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ATTORNEY-GENERAL

THE
ENGLISH REPORTS

VOLUME XXV

CHANCERY

V

CONTAINING

GILBERT, SELECT CASES TEMP. KING, MOSELY, W. KELYNGE,
CASES TEMP. TALBOT, AND WEST TEMP. HARDWICKE

WILLIAM GREEN & SONS, EDINBURGH
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*Printed by MORRISON & GIBB LIMITED, Edinburgh
February 1908*

PREFATORY NOTE

THE following editions have been used in this reprint: Gilbert, 1742; Select Cases Temp. King, second edition, by MacNaughten, 1850; Mosely, 1793; W. Kelynge, 1764; Cases Temp. Talbot, third edition, 1793; West Temp. Hardwicke, 1827.

The gap in the paging in W. Kelynge between pages 43 and 57, is occupied in the original by an index of the first 43 pages and a Table of Cases of the remainder of the volume. The latter is incorporated in the new Table of Cases. Page 208, which immediately precedes the additional cases, is blank in the original.

In Cases Temp. Talbot, pages 287 to the end consist of Addenda and Corrigena. Wherever practicable these have been incorporated in the text. Where this has not been possible, references have been inserted in the body of the work to the Addenda. The paging of the 1793 edition, being somewhat erratic, has been checked and corrected with the two earlier editions of 1741 and 1753.

Mr. Max. A. Robertson and Mr. Geoffrey Ellis, Barristers-at-Law, are responsible for the work on this volume.

LIST OF LORD CHANCELLORS, LORD KEEPERS, LORDS COMMISSIONERS OF THE GREAT SEAL, AND MASTERS OF THE ROLLS DURING THE PERIOD COVERED BY THE PRESENT VOLUME.

LORD CHANCELLORS, LORD KEEPERS, AND LORDS COMMIS- SIONERS OF THE GREAT SEAL.

- 1700. Sir NATHAN WRIGHT, Lord Keeper.
- 1705. LORD COWPER, Lord Chancellor.
- 1708. Sir THOMAS TREVOR, }
ROBERT TRACY, Esq., } Lords Commissioners.
JOHN SCROPE, Esq., }
- 1708. Sir SIMON HARCOURT, Lord Keeper, afterwards LORD HARCOURT, Lord
Chancellor.
- 1714. EARL COWPER, Lord Chancellor.
- 1718. Sir ROBERT TRACY, }
Sir JOHN PRATT, } Lords Commissioners.
Sir JAMES MONTAGUE, }
- 1718. LORD PARKER, afterwards EARL OF MACCLESFIELD, Lord Chancellor.
- 1725. Sir JOSEPH JEKYLL, M. R., }
Sir ROBERT RAYMOND, } Lords Commissioners.
Sir JEFFREY GILBERT, }
- 1725. LORD KING, Lord Chancellor.
- 1733. LORD TALBOT, Lord Chancellor.
- 1737. LORD HARDWICKE, afterwards EARL OF HARDWICKE, Lord Chancellor.

MASTERS OF THE ROLLS.

- 1693. Sir JOHN TREVOR.
- 1717. Sir JOSEPH JEKYLL.
- 1727. The Hon. JOHN VARNY.

Reports of CASES IN EQUITY, ARGUED
AND DECREED in the COURTS OF
CHANCERY AND EXCHEQUER,
Chiefly in the Reign of KING GEORGE
I., By a Late Learned Judge; to which
are added Some SELECT CASES IN
EQUITY, HEARD AND DETERMINED
in the COURT OF EXCHEQUER in
IRELAND, By the same Hand. Second
Edition, 1742. [1705-1727.]

[1] EASTER-TERM, 1706, 4 ANNÆ, IN CHANCERY.

Lady OXENDEN *against* Sir JAMES OXENDEN. [1705.]

S. C. 2 Vern. 493 ; [Prec. Chan. 239 ; 1 Eq. Cas. Abr. 67, pl. 6].

Alimony and separate Maintenance decreed out of a Trust Estate. See 1 Chanc. R. 4, 164 ; 1 Chanc. C. 250 ; 1 Vern. 53, 326 ; 2 Vern. 386, 671, 752 ; and post, 152. See 2 Peer Will. (639).

The Lady *Oxenden* sued her Husband by Bill here for Alimony (after a Divorce *propter Sævitiā*), and had a Decree for £300 *per Ann.* out of a Trust Estate, which the Court laid hold of, as being under a Trust, and in their Possession. But the *Lord Keeper* doubted what to have done, had there been no such Trust Estate to have laid hold on, and said, he would give no Opinion, it not being the Case in Question ; he said, the constant Practice in this Court was, to take Care of a Woman that had a Fortune, which her Husband could not come at, without the Assistance of this Court (as in Case of a Legacy or a Trust, where she marry'd without having a suitable Settlement), This Court would, before the Husband should have the Fortune compel him to make a Provision for her. It was objected, that this Court had no Jurisdiction in the Case of Alimony ; but Mr. *Pooley* said (to which the *Keeper* agreed), That this was as proper, if not a properer Place than the Spiritual Court : For the Spiritual Court has only a consequential Jurisdiction for Alimony, always subsequent to a Separation, unless *pro misis & expensis*, and a present Subsistence ; but this Court has an *original Jurisdiction*, or at least a concurrent Jurisdiction with the Spiritual Court, as in the Cases of Legacies, Probates, &c. But the *Lord Keeper* said, this Court could neither separate *a Mensa & Thoro*, nor *a Vinculo* ; these being Matters meerly spiritual. See 1 Chanc. Rep. 250, 251, The Case of *Whorewood* ver. *Whorewood*.

'Twas held in Chancery, That if a Deed is made of an Estate with a Power of Revocation, and after 'tis revok'd, he to whom the Inheritance belongs, may by Bill here compel such Deed to be delivered up to him to whom the Estate belongs, to be cancell'd, because the Deed of Revocation may be lost, and then 'tis unreasonable the other Deed should be standing out. (Of revoking Wills, &c., See [1] Abr. Eq. Cases, 407, 409.)

G. v.—1

[2] Earl of BATH *versus* SHERWIN. [1707.]

(See Lucas's Rep. pag. 1 to 4.)

A bill of Peace, and to stay Suits at Law, &c. See 1 Vern. 22, 266, 308 ; Parliament Cases, 17 ; Note 1 Chanc. C. 2, 121, 123 ; See post. 183.

The Case was no more than this. A Bill was brought for a perpetual Injunction, to stay the Defendant from bringing any more Ejectments, to try his Title at Law, suggesting, that the Plaintiff had had five Verdicts, and that 'twas an unreasonable Vexation, &c. Therefore to put this Title in *perpetual Peace*, was the Prayer of the Bill. The *Lord Keeper*, after this Case had been fully debated, took Time to consider of it, and now this Term he delivered his Opinion, *viz.* That to give this Court an original Jurisdiction, there ought to be a *Fraud* or a *Trust*, or some *Accident* to fall out in the Case, or to prevent some general Inconvenience, as between the Lord of a Manor and the Tenants, to settle their several Rights ; if in Case the Right between the Lord and the several Tenants was to be settled by separate Actions, the Difficulty upon the Lord would be insuperable, by Reason of the Multiplicity of Suits at Law. The like in settling Buttings and Boundaries, &c. Therefore this Court will interpose, and direct an Issue to be try'd, which when try'd, and the Conscience of the Court thereby informed and satisfy'd, this Court will then put the whole in Peace by a perpetual Injunction : But this Case the *Keeper* thought was in its Nature new, and did not fall under the general Notion of a Bill of Peace, this being only betwixt A. and B., and one Man is able to contend against another ; 'twas true (he said) he thought it but a Notion of the Courts at Law, in Cases of Ejectments, to allow a former Verdict to be given in Evidence in a Trial of another Man's Property, which is the Notion they go upon to grant a new Trial, because there being a fresh Demise, they say, this is a new Lease which has never been tried before ; but then why should they suffer another Verdict to be given in Evidence in another Cause ? Why don't they allow it to be pleaded in Bar ? He said, he was very well satisfy'd of the Vexatiousness of the Defendant in this Case ; but then he said, the Law was clear in this Point, and Costs would attend the Event of such Trials : And if this Case was a Grievance in the Law, 'twas proper for another Jurisdiction, *viz.* in Parliament, especially since Parliaments are so frequent ; so that it would be a Piece of Arrogance in him, to take upon him the Reformation of the Law, tho' it needed it.

NOYES & Ux' *versus* MORDANT, &c. [Feb. 4, 1706.]

[See 1 Wh. & T. L. C. (7th ed.), 414 ; *Thellusson v. Woodford*, 1806, 13 Ves. 222 ; *Schroder v. Schroder*, 1854, Kay, 586 (note) ; *Cooper v. Cooper*, 1874, L. R. 7 H. L. 63 ; *In re Vardon's Trusts*, 1884, 28 Ch. D. 129.]

2 Vernon, 581 [1 Eq. Cas. Abr. 273, pl. 3 ; Prec. Chan. 265], S. C.

A Mortgage in Fee, decreed to the Heir of the Wife, and not to the Husband, or Administrator, &c. See 1 Vern. 271, 298, 471 ; 2 Vern. 67, 20, 21, 227. Note 2 Vern. 520 ; 1 Salk. 154.

The Case was thus : A. being in long Possession of an Estate that was a Mortgage in Fee, by his Will devises it to his Daughters B. and C. and their Heirs, and dies. B. marries and dies. The Question was, whether the Share of B. should be deemed a Real or Personal [3] Estate, and consequently, whether it should descend to her Heir, or be decreed to her Husband as her Administrator. But 'twas decreed against the Husband, to the Heir of the Wife, and the *Lord Keeper* put this Case : A Man seised of Lands in Fee, which were only mortgaged to him, he by his Will devises all those Lands to his Son and his Heirs, and expresses himself in his Will thus ; That they shall go as an Inheritance ; surely the Heir, if this *Mortgage* be paid off, shall receive the Money, and not the Executor : For the Father who had the governing Power over the Estate, may dispose of it as an Inheritance, so long as it can continue so ; and the Money, when paid off, shall go as he intended the Land ; but Note, this is when the Disposition is in his own Family, and when his Intent appears plain by the express Words of the Will : For though the Will cannot absolutely pass a Fee, yet

as much as can pass shall pass, and so it is in all Cases where a Man has Children, *viz.* Daughters, and has a full Power to dispose of his Estate amongst his Children, and he by his Will disposes of it to them : But suppose it happens that what he gives to one Daughter he was only Tenant in Tail of, and the rest which he gives to his other Daughters, he was Tenant in Fee of : Now inasmuch as the Fee-Tail Land cannot pass by the Will, the rest of the Daughters shall lose a proportionable Part of their Land, to supply the Defect of the Will *quoad* that Daughter. For this is in the Nature of a necessary imply'd Condition, *viz.* That all of them should enjoy what their Father intended them ; for over the Fee-Simple Land he had an absolute Power, and it can't be intended, but that if the Father had thought that that Daughter could have taken nothing by his Will, he would have made his Will otherwise.

A. devises Land whereof he was Tenant in Tail, to B. his eldest Daughter, and he devises other Land whereof he was Tenant in Fee to C. his second Daughter, on Condition that C. release her Right in the intail'd Lands to B., and afterwards by a Codicil says, That if a third Daughter should be born, then all the Fee Simple Lands shall be equally divided betwixt C. and such third Daughter : Now altho' all the three Daughters shall at Law take their Proportion of the intail'd Lands, as Coheirs in Tail, yet the eldest Daughter in Equity shall have an Equivalent out of the Fee-Simple Lands.

Lord GUERNSEY *versus* RODBRIDGES. [1708.]

[See *Massey v. Johnson*, 1847, 1 Exch. Rep. 250.]

Where a Decree shall bind an Infant. See 1 Vern. 132 ; 2 Vern. 224, 225 ; 1 Chanc. C. 256 ; Abr. Eq. C. 283, &c. ; Post, 18, 36, 103.

In the Lord Keeper *Wright's* Time, there was a Decree for a perpetual Injunction to quiet the Possession of a Water-Course to the Plaintiff's House, through the Defendant's Ground, unless the Defendant, who was then an Infant, should shew Cause to the contrary, within six Months after his full Age. But he shewing no Cause, the Plaintiff apply'd to the Court to confirm the Decree, and make it absolute. The Case appeared to be this : The Duke of *Norfolk*, from whom the Plaintiff purchas'd, was Owner of *Alberry*, and had a Water-Course to his House, through the Defendant's Ground, which ran under Ground in Pots. The Defendant's Father being an Infant, the [4] Duke obtained a Lease of this Ground from the Guardian, till the Defendant's Father came of Age, and made a Cut through the Ground in a new Place, which he quietly enjoyed after the Defendant's Father came of Age, for 21 Years before he died. The Plaintiff in his Bill suggested, and endeavoured to prove an Agreement, but that did not expressly appear.

However, 'twas urged, that it should be presumed ; for, if an Owner of Ground stands by, and sees another build upon it, and says nothing, he shall be barred from ever recovering it. Q.

'Twas said on the other Side, that the Water-Course not being the same, there could be no Prescription, nor was there any Grant ; and if there was a Parol Agreement, it should not bind the Inheritance.

Lord Chancellor. Wherever a Parol Agreement is begun to be put in Execution, and intended to be continued, there though there be no Writing, yet this Court shall enforce the Execution thereof, notwithstanding the Statute of Frauds and Perjuries. In the Case of *Foxcroft* and ———, there was no Writing, but only a Parol Lease of *Wildhouse* for a great Number of Years : But the Lessee having begun to build, he had his Bargain compleated, and for that very Reason, because at Common Law it might be within the Statute of Frauds ; 'tis proper for the Jurisdiction of the Court, rather than the Common Law. Mutual Benefit is an Evidence of an Agreement, as suppose two Men front a River, each has not his own Ground only, but the other's between him and the Water, so they cut through each other's Ground for Water, and this continues 20 Years, I will presume an Agreement. And in this Case, it appears by the Evidence, that there was a mutual Benefit ; so he confirmed the Decree.

Note : in this Case, the *Chancellor* took no Notice of the Infancy of the Defendant's Father, when this Water-Course began ; seeing after his full Age, he acquiesced under it 21 Years. But an Objection was made, that the Defendant's Answer by his Guardian when he was an Infant, should not be read in the Cause, and it was allowed regularly

to be so held in all Courts ; but in this Case, the Cause was brought to a Hearing at the Defendant's Request.—The Infant at his full Age might (as the right Way is) have apply'd to the Court, and set forth how he is grieved by the Decree, and might have had Leave to amend or alter his Answer, or any Part of it, or put in a new one, but he not having done so, it shall be presumed, that he abides by that Answer ; and so 'twas read against him.

There was in that Case of *Foxcroft* and ——— [Lester v. Foxcroft, Colles, P. C. 108] this Circumstance, that there were Leases drawn and intended to be executed, before the Lessor's Death, who then lay a dying ; but the Execution of them was, by a Fraud in the Heir at Law, prevented. (Q. 1 Vern. 262 ; 2 Vern. 305, 306.)

[5] Information by the ATTORNEY GENERAL, on the Behalf of the Master and Fellows of Sidney-College in Cambridge *against* BARNES and his Wife. [1708.]

S. C. 2 Vern. 597 ; 3 Ch. R. 150.

Where a Will is void, it can't operate as an Appointment. See Stat. 29 Car. 2, c. 4. See 2 Chan. Cas. 109 ; 2 Chan. R. 150 ; 2 Vern. 493 ; 3 Mod. 263 ; 2 Vern. 498.

Dr. *Johnson* gave certain Freehold and Copyhold Lands to the Master and Fellows of *Sidney-College*, by his Will, which was found in a Drawer in his Closet after his Death, signed and sealed, and all wrote with his own Hand, but no Witnesses to it ; but he made a Codicil, which was called a Codicil to be annexed to his Last Will, and was attested by three or four Witnesses, as he lay on his Death-Bed, his Will not being then produced, but was in his Closet, as aforesaid ; and this Will was proved as to his Personal Estate.

The Question was, That tho' this might not operate as a Will, yet it might operate as an Appointment by the Stat. of 43 *Eliz.* c. 4, of charitable Uses : And 'twas urged, that as to Copyhold Lands, where they are surrendered to the Use of a Will, there the Will is but an Appointment ; and if it have no Witnesses, 'tis well enough : So as to Freehold, devised by Will to a Charity, take the Will not as a Will, but as a Paper, signifying only that he designed a Charity, and 'tis a sufficient Conveyance for that Purpose, tho' it would not be so in another Case. And Hob. 136, and the Case of *Thwaites* and *Dye*, first in this Court, and then in the House of Lords, were cited. 'Twas likewise said, that the Statute of Frauds does not make a Will not attested wholly void, but that it shall not operate as a Devise ; it may operate otherwise, notwithstanding, as in the Case of a Surrender ; and tho' a Codicil be not annex'd in Fact, yet the Law annexes it, as in the Case of a certain Nobleman (not named) but quoted by *Dobbins*, who made Codicils, and gave several of them to Servants, as Bequests, for them to produce at his Death, which they did, and they were all good.

'Twas urged on the other side, that this would be to disappoint the Statute of Frauds : That though this be called an Appointment, yet it so far remains a Will, as that it may be revoked ; and if it be a Will, then the Statute lays hold on it.

There were two or three of these Writings or Wills, besides this, in the same Closet. So that if this is an Appointment, then the first is good ; if a Will, then the last published is good, and the first dated may be last published. It differs from a Settlement to such Uses, as by his Will he shall appoint ; for there the Will don't pass the Estate, but is only a bare Nomination, as in Case of Surrenders.

Lord Chancellor. As to the Cases cited, the Charity of Judges have carry'd them too far, perhaps, in Cases of this Nature. But by the Statute, *Wills not so and so circumstanced, shall be void to all Intents and Purposes.* Now if this be good as an Appointment, then 'tis not void to all Intents, &c.

I shall be very loth to break in upon the Statute of Frauds, and there is no Instance where Men are so easily imposed upon, as at the [6] Time of their dying, under the Pretence of Charity ; and there's no Precedent of this kind since the Statute (tho' the *Attorney General* said he could produce one, which he was desired to do, and to give a Copy on't to the other Side). The *Chancellor* said, He'd take Time to give his Judgment ; but he seem'd to incline very strongly against the Distinction of operating by Will or Appointment, which he said the Makers of the Statute never thought of.

Note : 'Twas said by the *Chancellor*, for the Information, that the Statute 43 *Eliz.* cap. 4, does by these Words *Limitation* and *Appointment*, repeal the Statute *de*

Donis, as to this Case ; which the Counsel of the other Side agreed to, tho' there were no Fine or Recovery.

VANE *versus* His Father Lord BARNARD. [1708.]

Q. 2 Vern. 738, but not the same Point. See 1 Salk. 161, Marriage Articles, a Covenant to covenant, &c. Q. 2 P. Will. (620).

Lord *Barnard*, for the Advancement of the Plaintiff, a younger Son, in Marriage with Sir ——— *Jolliff's* Daughter, enters into Articles with Sir ——— *Jolliff*, to this Effect : Sir ——— *Jolliff* covenants and agrees *inter al'* to settle Lands free from Incumbrances, according to the usual Limitations in Marriage-Settlements ; and in Consideration thereof, the Lord *B.* covenants and agrees to settle Lands by Name, of the Value of £2000 *per Ann.* (but with a Life or two upon them) upon Trustees to like Uses ; but with these Words : *That in such Settlement there shall be Covenants, that he is seised in Fee, has good Right to convey, and that the Trustees shall enjoy free from Incumbrances.* It happened, that these Lands were charged by my Lord *B.'s* own Marriage-Settlement with £6500 to be paid to such Daughter or Daughters as should be living at my Lord's Death, and not provided for. The bill was to have a specifick Performance of the Articles by my Lord's paying off, or otherwise giving collateral Security against this contingent Portion of £6500, he having then one Daughter, about 16 Years old. It was urged for the Plaintiff, That 'twas usual for this Court to decree a specifick Performance of Articles and Covenants, and not to depend only upon the uncertain Reparation by Damages, which the Personal Estate may perhaps not be able to satisfy ; and this was not controverted, where 'twas possible to be done. But the Lord Chancellor held, That here was not any Covenant that the Lands were free from Incumbrances, but only a Covenant, that he would in the Settlement (which was after to be executed) covenant for that Purpose ; so that the Parties seemed to be satisfy'd with a bare Covenant only ; and the Marriage-Articles were only a *Covenant to covenant* : So that inserting that Covenant in the future Settlement, was a specifick Performance of those Articles, and was all that my Lord agreed to do, or that the Plaintiff by his Bill desired to have.

My Lord Chancellor said, Notice or no Notice of this Incumbrance was very material in this Case : For where a Covenant is in this Manner, if any Incumbrance is discover'd between the executing the Articles, and the Sealing the Deed of Settlement, whereof the [7] Party had no Notice, that Incumbrance shall be discharged, even before sealing the Deed of Settlement, both upon Account of the Fraud in concealing such Incumbrance, and because it would be needless to enter into a Covenant, which before entering into, is already known to be broke ; but against all other Incumbrances discovered afterwards, there is the Party's Covenant only. Now where you have a Notice of an Incumbrance before executing the Articles, 'tis a stronger Case than the last ; for you consent with your Eyes open, to accept the Party's Covenant against an Incumbrance you were aware of ; and when you have chosen your Method of Security yourself, this Court will give no other, nor make the Party do a further Act, than by the Articles he has agreed to do ; and the rather in this Case, for that the Portion is not a certain Incumbrance, but a contingent one ; and therefore 'tis reasonable to suppose, that my Lord *Barnard* would not be compelled to charge his remaining Estate, at all Hazards, to secure against an Incumbrance, that was but contingent, to the Prejudice of his eldest Son, especially when he had provided for the younger Son so plentifully ; and decreed, that my Lord *Barnard* should execute a Deed of Settlement, with Covenants exactly pursuant to the Articles only ; but because the Estate was subject to a present Charge, *viz.* to the payment of a yearly Sum for the Daughter's Maintenance from her Birth, therefore that the Lord *Barnard* should pay and discharge all Arrears of that, and the growing Annuity, as it shall arise, taking Acquittances from his Daughter, and leaving them with the Plaintiff for his Security.

'Twas strongly urged by Mr. *Vernon*, That supposing these Articles were but a *Covenant to covenant* ; yet as soon as the Articles were performed, by sealing the Deed of Settlement, then they might come the next Day and exhibit their Bill, to enforce an Execution specifically of the Covenant in such Deed of Settlement : And why may not the Court decree that to be done now, as well as that, which after Performance of this Decree, they will immediately decree upon a new Bill. Lord Chancellor said, In this Case they could not, for the Incumbrance was not necessary, but contingent :

And if you brought an Action at Law upon such a Covenant, you should not recover two Pence Damages, till a Breach, which possibly may never happen. Besides, the Covenant in the Deed of Settlement is not to be, that the Estate is free from Incumbrances, but that the Trustees shall enjoy free from Incumbrances; which so long as they do, the Covenant is not broke. And it seems, the Portion being contingent, and not certain, was the Reason of this Part of the Decree; because, 'tis plain, by the latter Part of the Decree, where the Incumbrance was certain (*viz.* the Payment of a yearly Sum), the Lord *Barnard* was decreed immediately to discharge it; tho' by the Articles he did but *covenant* to *covenant*, as is aforesaid, and there's no other Difference between these two Matters.

In controverting the Point of Notice in this Case, it appeared, that Sir *Edward Northey* was employ'd as Counsel by the Plaintiff and *Jolliff*, and had Notice, as he owned; but afterwards, he not being [8] able to dispatch it fast enough, the Matter was taken out of his Hands, and one Sir ——— was employed, who drew the Writing, and finish'd the Matter, and no Proof was made that he had any Notice of this Incumbrance. Whereupon the Question was, Whether Notice to a Counsel, or Agent, that is once employ'd, and goes not thro' with the Business, shall be Notice to the Party himself; for 'twas allow'd of all Hands, that if he goes through, Notice to Counsel, Attorney, Scrivener, or any other Agent, is sufficient Notice to the Party himself. The *Chancellor* was in doubt, but another Proof of Notice accidentally being discovered, this Matter was not determined: for it appear'd, that in these Articles Notice was taken of my Lady *Barnard's* Jointure in these very Lands, which necessarily leads to the Deed whereby that Jointure is made; and in that Deed there was this Portion charged upon the Lands; and whatever is contain'd in a Deed, to which any other necessarily leads you, you are presumed to know; which was allowed without a Word more, *quod Mirum*.

Note the Difference between a present Covenant, that Lands are free from Incumbrance, and that a Man shall execute a Deed with Covenant, that the Lands are free: And between a Covenant, that Lands are free, and that the Trustees shall enjoy the Lands free.

MAPLETOFT *versus* MAPLETOFT and CLERK. [1708.]

A surrender of Copyhold Lands, on Condition, &c. Where Equity will not supply a defective Surrender in favour of a Wife, &c., against the Heir. See 1 Salk. 187; 1 Vern. 132; 2 Vern. 585, 680; and *N.B.* The Cases in the Chancery Abridgement, 124; See Lucas's R. 471, & 2 P. Will. 490.

Richard Mapletoft, the Plaintiff's Brother, surrenders Copyhold Lands worth £200 a Year (but subject to a Rent-Charge of £52 a Year) to the Use of himself and his Wife, for their Lives, and the Life of the longer Liver of them, Remainder to his own right Heirs. The bill was to set aside this Surrender. It appear'd upon the Proofs, that *Richard*, at the Time of the Surrender was so very ill, that he was not expected to live many Days; and upon surrendering into the Hands of the two Customary Tenants, he declared, That he made that Surrender, *upon Condition, that if he recovered*, then the Surrender should be returned to him again, and his Wife should only have £100 a Year out of it. Soon afterwards he grew better (tho' he never recovered) and demanded the Surrender back again, but 'twas refused; whereupon he left his Wife in great Concern, and made a second Surrender of £100 a Year only to his Wife for Life, and soon after died. The Defendants gave Evidence of his great Love to his Wife, and several Declarations, that he had rather his Wife should have his Estate than any of his Relations; and insisted, that by the *Condition, if he recovered*, was intended, if he lived to be quite well again. But the *Lord Chancellor* declared his Opinion to be, That by the Words, *if he recovered*, were only meant, if he grew so well as to be able to settle his Estate better than his Weakness at that Time would give him Leave; and that the Surrender of the whole was but a provisional Security for the Wife, and he intended to give her all, only in Case he could not live to settle his Affairs better; and as for his Intention to give her all mentioned in the Proofs, 'twas plain, such Intention [9] did not continue till the Surrender, if any such there ever was. For 'twas agreed on all Hands, the Surrender was conditional, and decreed accordingly; but looking upon the Surrender as a Security to the Wife for the £100

a Year, he decreed Costs to be paid out of the Estate, as where a Person comes to redeem, &c.

Note: *Richard Maplet* in this Case had but an Estate Tail by his Grandfather's Will, with a Power to make a Wife a Jointure, which Power was not well executed: but because the Plaintiff in his Bill had offered to settle £100 a Year, the Court decreed accordingly.

WOODMAN *versus* SKUSE. [1708.]

A Bond, &c., made under Terror and Duress; but confirmed when at Liberty, decreed. See 1 Ch. R. 157; 2 Vern. 187, 252; 1 Vern. 98; 1 Ch. Cas. 202.

The Defendant coming home from *Blechingly* Fair, finds the Plaintiff naked and just going to Bed to his Wife; he thereupon gets a Note from him for £500, which was in *June*; afterwards in *August* the Plaintiff gives him a Judgment, and in *October* following surrenders Copyhold Lands to him by way of farther Security. The Plaintiff brought his Bill to have the several Securities deliver'd up, alledging a Contrivance to catch him in that Manner, that he was drunk, and did not know what he did; and that the Defendant with an Ax threatened to cut him in Pieces, so that he was under Terror; and that the Defendant himself had said in Company, that the Securities were for Money lent. The *Lord Chancellor* observed, there was no Proof at all of a Plot to catch the Plaintiff in this Manner, nor that he appeared to be so disordered or frightened; for he continued in the same Mind when he was in cool Blood, at the several Times of giving the three different Securities; and 'twas proved, that he join'd with the Defendant in giving out that the Note was given for a Bargain of Grass, so that he knew what he was about, and had a Mind to conceal it; (and further said) the Defendant's saying in Company that 'twas for a Bargain of Grass, made the Plaintiff's Equity the worse, for 'twas a Sign the Defendant was so just as to keep it a Secret, which was certainly the Intention of the Bargain it should be. If a Jury in this Case had given Damages, this Court could not relieve: And why should it when the Plaintiff himself has three Times given and ascertain'd Damages against himself? It shews he thought the Damages but reasonable; so dismiss'd the Bill, but without Costs; because the Defendant had bragged of his Bargain, which was a Sign he thought himself rather over-paid; and therefore the *Chancellor* said he would relieve against the Penalties. (See 1 Chan. Cases, 283; Nels. Ch. R. 437.)

[10] TERRY *versus* TERRY and RAGGET. [1708.]

A Trustee lending of his own Head an Infant's Money to one that broke, must bear the Loss. See 1 Vern. 295; 2 Vern. 224, 236; Abr. of Equity Cases, 280, &c.; Ante, 3, 4.

Where a Trustee may lay out the Infant's Money, in purchasing Lands, &c. See Lucas's R. 20.

The Bill was brought against the Defendant's Executors and Trustees, for the Plaintiff's Wife, during her Minority, to have an Account. It appeared upon the Proofs, that the Defendant *Terry* had, without the Consent of the other Trustee *Ragget*, lent £100 of the Infant's Money to one *Fletcher* (who was then looked upon as a solvent Person), upon his single Bond; and *Fletcher* afterwards broke. It was also urged for the Plaintiff, that they had with the Infant's Money purchased a Copyhold Estate for the Infant, at a much higher Rate than it is worth: But it appeared by the Proofs, that the Estate lay contiguous to another of the Infant's, and was more valuable to her than any Body else: That it had before cost more than they gave for it; and that it was purchased at the Importunity of the Infant's Mother and Aunt, who both contributed one £3 the other £8 toward the paying for it. It was likewise insisted on for the Plaintiff, that the Defendants had referred a Matter to Arbitration, where the Infant's Right to Land was concerned; but that appeared only to be a Dispute that arose, touching a Hedge which was supposed to be made crooked, and too much into a Neighbour's Land, which being referred, it was by Award set straight, and about three Shillings spent upon the Arbitrators.

As to the first, the *Lord Chancellor* said, That for Example's sake, the Trustee lending an Infant's Money in such Manner of his own Head, and upon a single Bond

only, should be answerable to the Infant for the Money, and so the Decree was ; but he seemed to make those Circumstances, and especially the latter, the Ground of his Decree ; so that had Land Security been taken, or a Joint Bond of two or three more solvent Persons, the Loss must have been to the Infant, which I particularly observed.

As to the second, the *Lord Chancellor* confirmed the Purchase. And though Mr. *How* insisted, that Guardians or Trustees, without a Power given them for that Purpose, could in no Case change Money of an Infant's into Land, because they descended in a different Manner, one to the Heir, the other to the Executor ; and that in this Case 'twas a Prejudice to the Husband, who, had it been Money, had been immediately upon the Marriage intitled to it ; whereas now, if she died before she came of Age, he would lose it : Yet my *Lord Chancellor* said, 'twas true generally, Executors or Trustees without a Power can't purchase Lands with an Infant's Money ; yet where 'tis an honest Purchase, as this seems to be, and to the Infant's Advantage, by reason of the Contiguity, he would allow of such chopping and changing, especially when attended with the Circumstance of the Mother and Aunt's Desire. Besides, he observed that the Plaintiff's Wife was still under Age, and which way could he tell whether she approved or disapproved ? She had submitted her Will to her Husband, so could not make Choice if she were at Age ; and he would not decree the Purchase naught, and let in the Husband to have the Money, when he had made no Settlement upon the Wife, as was owned. Mr. *How* urged, that during [11] the Infancy, it might then be decreed to be Personal Estate, that so, if she died under Age, the Husband might have it. But the *Chancellor* said, Let him take his Chance : 'Tis certain this Court may decree, that an Executor or Trustee shall purchase for an Infant ; and whatever this Court can command to be done, without Doubt it can approve when done.

HARRIS *versus* HORWELL. [1708.]

Lands purchased after a Will decreed to go pursuant to the Will, though no Trust declared. See Luc. R. 98.

The Case was : A Testator, after the making his Will, purchased an Estate, and having by his Will given all his Lands from his Heir at Law to his Nephew, and when he was a dying, he told his Heir at Law that he would have him by no Means hinder his Nephew from enjoying it, though he had not by any Writing declared the Trust for his Nephew, and dies ; and the Heir at Law suffers him to enjoy it eleven Years, and then pretends he thought the Lands had passed by the Will, as being purchased before the Will : But *Lord Chancellor* decreed, that this Case was out of the Statute of Frauds, and that the Heir letting him enjoy it so long, was an Execution of the Trust, and so out of the Statute. He cited the Case of *Leister and Foxcroft* (Ante, p. 4 [Colles, P. C. 108]) in the House of Lords, that where a Parol Building Lease was made of Ground, and when the Lessor was dying, he declared he thought he ought to have made a Lease in Writing : But the Heir told him, he should not discompose himself, for that he would supply it ; whereby, and by other fraudulent Means, the Lessee was hindered from seeing the Lessor, and having it done accordingly. The Lords held this to be out of the Statute, and made it good to the Lessor ; and tho' in this Case no express Fraud was proved, yet here was that Possession for eleven Years, which is a strong Presumption that the Heir at Law suffered it as an Execution of the Testator's Declaration.

If a Mortgagee afterwards get an absolute Deed, but suffers Possession to go sometime contrary to it, it will again make it but a Mortgage : So if a Man has made his Will, and his Son Executor, and when he is dying says he has a Mind to have his Wife Executrix, and the Son says, don't trouble yourself to alter it, for I will let her have the Surplus, and act as Executor ; this Court will decree it accordingly.

CARTER Administrator of MARY BLETSOE his Wife, *Plaintiff, versus* BLETSOE & al',
Defendants. [1708.]

[S. C. Prec. Chan. 267; 2 Vern. 617. See *Parker v. Hodgson*, 1861, 1 D. & S. 574; *Henty v. Wrey*, 1882, 19 Ch. D. 503,—21 Ch. D. 356.]

Note S. C. 2 Vern. 617.

Devise of a Legacy to be paid at 21; the Legatee dying before 21, it never vested.
See 2 Vent. 342; 2 Salk. 415; 2 Chanc. 155; 2 Vern. 617, 673. Q. 1 Vern. 462.

Matthew Bletsoe by his Will devises his Lands to his eldest Son *Satterthwaite Bletsoe* and his Heirs; but it was his Will and Mind nevertheless, that he the said *Satterthwaite* and his Heirs should pay out of the said Lands so devised to him the Sum of £600, viz. to his Daughter *Mary Bletsoe* £200 at her Age of 21 Years; and to his Son *John Bletsoe* the Sum of £200 at his Age of 21 Years; and to [12] *Matthew Bletsoe* the sum of £200 at his Age of 21 Years; and if it should please God to take away out of this Life his Son *Satterthwaite*, before he attained to the Age of 21 Years, then his Will was, that his Son *John Bletsoe* should not have his £200 set him, but it should be paid to his Daughter *Mary Bletsoe* and *Matthew Bletsoe*, to be added to their Portions; and he, the said *John*, to have all the Estate given to the said *Satterthwaite*; for his Will was, that he should have it to him and his Heirs, and for him to pay the £600 as was express'd in such his Will; and also to be allowed and paid out of his Lands to his Children, for their Maintenance and Education, £4 *per Ann.* for every £100 yearly, till they came to their several Ages of 21 Years, and until their several Portions were paid. *Satterthwaite* died before his Age of 21 Years, and the Plaintiff married *Mary*, and had two Children by her, and *Mary* died two Months before her Age of 21; and the Question was, Whether this was not a subsisting Charge upon the Land, and an Interest so vested in *Mary*, as to intitle the Plaintiff as her Administrator to the Legacies, though she died under 21? 'Twas urged for the Plaintiff, that the Intent of the Will was for their Portions, by the express Word *Portions* in the Will; and by the Civil Law, Portion is always construed to be for their Preferment in Marriage, and that may happen long before the Age of 21, as this Case was. And as for the £100, which fell to her upon *Satterthwaite's* Death, no Time was limited for Payment of that, therefore the Plaintiff ought to have a Decree at least *quoad* that £100. It was likewise farther urged, that 4 *per Cent.* being allotted till they attained their Age of 21 Years, was in the Nature of Interest, and therefore the Testator must intend this Devise as a *Debitum in presenti*, though *Solvendum in futuro*, because Interest imports a Debt: But the *Chancellor* dismiss'd the Bill *quoad* both Demands with Costs, because here were no words in his Will which vested any Interest in these Legacies before the Age of 21 Years; and as to the £100 to *Matthew*, he said 'twas to be governed by the other Legacies.

HEDGES *versus* HEDGES. [1708.]

See 2 P. Will. from 435 to 449.

A Construction of Wills, and of the Custom of *London*. See this Case imperfectly reported, 2 Vern. 615.

Sir *William Hedges* being a Freeman of the City of *London*, and having Children by two Venters, and being desirous to make a Difference between them in Point of Fortune, he had by his Will given to two of them a Specifick Legacy of a Bond for £3000, but being dubious whether it were more agreeable to his Intent and Meaning to give it by his Will, or by Act in his Life-time, he thereupon sent for his Lawyer to consult with, and his Lawyer, through Unskilfulness, advised him to do it by Act executed in his Life-time; whereupon a Line was by the Lawyer drawn over those Words in the Will, which gave the £3000 Legacy. And the Bond was altered, and a new Security given in the Name of Sir *James Bateman*, in Trust for those Children, and the Will newly published, and soon afterwards Sir *William Hedges* died. And if these Children should have an equal Share of one Third of the [13] Estate with the other Children, and also retain to themselves the £3000, was the Question? 'Twas

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urged to be the plainest Intent of Sir *William* imaginable that they should, and that it would be contrary to Equity that the Mistake of the Lawyer should frustrate so manifest an Intent, and the rather, because the Obliteration was done by the Lawyer, without Sir *William's* Directions; 'twas further urged, that rather than this should be construed as an Advancement of them in Sir *William's* Life-Time, so as to make them bring it into Hotchpot if they would come in for a Distribution of the third Part with the other Children, Equity ought to construe it as a Devise of so much out of the Freeman's Part, of which he had a Power, *viz.* the dead Man's Part, or else to construe it, as a Legacy *causa Mortis*.

But *per Cur'*. This can't be construed as a Legacy *causa Mortis*. That is, where a Man lies in *Extremis*, or being surprized with Sickness, and not having an Opportunity of making his Will, but lest he should die before he could make it, he gives with his own Hands his Goods to his Friends about him; this, if he dies, shall operate as a Legacy, but if he recovers, then does the Property thereof revert to him; but in this Case, the Testator, Sir *William* acted deliberately, and made his Election, that they should take by a Gift in his Life-time, and for that Purpose altered the Securities, and re-published his Will, and so determined that they should not take it by his Will. My Lord said, he believed the Intent of Sir *William* was, as has been suggested. But if Men will deliberately lay down Premises, and from them draw false Conclusions, this Court has no Jurisdiction to set right such Mistakes. In this Case Sir *William*, by the Advancement of them in his Life-Time, thought they would, notwithstanding that, have shared equally with their other Brothers and Sisters; but it seems he and his Lawyer thereupon drew Conclusions contrary to the Law and Custom of *London*. But he said, that he would not compel them to throw their £3000 into Hotchpot, but leave them to their Election, according as they found the Value of the third Part. But if the third Part was of greater Value than to bring in £1500 a-piece, that before they should come into any of that, they should bring their £3000 into Hotchpot. (*Q. post.* 137, 153, &c.; 2 P. Will. 440, &c., and 560.)

OXWITH *versus* PLUMMER. Upon an appeal from the Master of the Rolls's Decree.

[Feb. 5, 1708.]

[See *Holmes v. Powell*, 1856, 8 De G. M. & G. 582.]

See this case imperfectly reported, 2 Vern. 636. Where a defective Surrender, &c., shall be made good, &c. See 2 Chanc. R. 218; 2 Vern. 565, 609, 680, &c.; Vide ante, 8; Post, 95, 96.

A. upon the marriage of his Son makes a Feoffment of certain Freehold Lands, by the Name of such and such Farms, in Trust for the Son for Life, then for his intended Wife for Life, then to his first Son, &c., and for want of such Issue, in Trust for the right Heirs of the Son. It happened that eight Acres, Part of one of these Farms, was Copyhold, and there was a Covenant in the Deed, that A. should surrender those eight Acres to the Uses as the Freehold Lands were therein limited. The Son's Wife dies without Issue, whereby the Trust of the Fee-simple was in the Son, who mortgages the Farm, whereof the eight Acres were Parcel, by the Name of such a Farm, [14] with the general Words, all and singular the Lands and Tenements Parcel thereof, or usually occupied therewith, &c., but does not mention the eight Acres of Copyhold by Name, nor is there any Covenant in the Mortgage-Deed to surrender them (see also post, 121. and note 2 P. Will. 490). The Son dies, and the Equity of Redemption descends to his Sister and Heir, who is foreclosed by Decree of this Court, and afterwards conveys the Equity of Redemption to the Mortgagee. A. the Father who made the Settlement being indebted to *Plummer* by Judgment, at the Request of his Daughter, the Sister and Heir of his Son, surrenders the eight Acres of Copyhold to *Plummer*, as a further Security; *Plummer* brings his Ejectment and has Judgment for the eight Acres. The Mortgagee, Defendant in Ejectment, brings his Bill to be relieved. 'Twas urged for the Plaintiff, that if *Cestui que Trust* mortgages Lands, and there is a Defect in the legal Conveyance (as in this Case the Defect of a Surrender), yet that shall be supply'd in Equity; for, if afterwards the Trustee could, by any Conveyance by him made of his legal Interest, defeat the former Conveyance of the *Cestui que Trust*, no Purchaser could be safe. And Mr. *Paunceford* cited two Cases, *viz.* One, where a Man makes a Feoffment in Fee, upon a valuable

Consideration without Livery, then gives a Judgment to *J. S.* who gets Possession, yet the want of Livery was supply'd. The other was the Case of *Taylor and Wheeler* (2 Vern. 565, vide ib. 609, 680, 163 ; Abr. Eq. C. 122, &c.). A Man seised of Copyhold Lands in Fee makes a Mortgage of them and Covenants to surrender, but four or five Years past, and no Surrender is made, then the Mortgagor becomes a Bankrupt. The Creditors get Possession, by Virtue of a Statute, upon a Bill brought by the Mortgagee. This *Chancellor* decreed the Mortgagee to hold the Lands against the Assignees of the Commissioners of Bankrupt.

Lord Chancellor. In this Case the Copyhold Lands were never by the Mortgage put under any specifical Lien, and if not, then this differs from the Cases quoted by Mr. *Paunceford*. It appears that the Settlement lay before the Counsel of the Mortgagee, because the Mortgage Deed recites it so, that he was not ignorant that Part of the Lands were Copyhold. Now, why should the Mortgagee not take a Covenant to surrender, unless 'twas thought the Freehold Lands were sufficient, and so never intended to pass the Copyhold ? And I will not by such general Words pass Lands against the Intention of the Parties. Suppose a Man grants a Farm by Name, and all his Lands, &c., usually held and occupied therewith ; and it happens that some of these Lands are Copyhold, Will this be a Forfeiture ? surely not. Where a Mortgagee recites a Settlement, in which the Copyhold Lands appear, and yet he takes no Care to get a Conveyance of them, nor so much as names them ; I should hold, that if the Freehold Lands were sufficient, the Copyhold should not pass by the Deed, though there were no Creditor or Purchaser in the Case : And if so, then the Defendant hath both Law of his Side, and the better Equity. And he rely'd upon that substantial difference, where there is a specifick Lien, and where not ; which distinguishes this Case from that of *Taylor and Wheeler* (2 Vern. 565). For there the Copyhold Lands were specifically bound by the Mortgage, and the Creditors of the Bankrupt had no specifical Lien at all upon them ; they [15] did not lend their Money upon the Credit of those Lands ; but the Bankrupt being indebted to his Creditors, they were scrambling for what they could get. So the Creditors upon Judgment had a general Lien only : They did not lend upon the Security of those very Lands, but were repaying themselves as well as they could ; and therefore those Cases are good Equity ; for the Equity that went along with the legal Interest, there being no specifical Lien, was not so good as the bare Equity only of the other Side.

'Tis generally true, that Law and Equity together shall prevail against Equity only ; but then 'tis with this Distinction, that the Equity that goes along with the Law is of the same Nature, and as strong as the other Equity. He took a Difference, where a Man originally lends Money upon a Security, and where a Man having Money due to him upon Bond, comes to the Debtor, and tells him he will trust him no longer upon Personal Security only, or that if he won't give him real Security, he will immediately arrest him ; and thereupon he assigns or mortgages Lands, which is the same Thing ; and where a Man, who is already trusted with Money, seems to grow insolvent, whereupon his Creditors endeavouring to bolster up their Security as well as they can, find out Copyhold Lands, and get a Surrender of them. For, in the first he trusts his Money upon the real Security, in the latter he does not. So the Bill was dismissed, and the Decree of the *Master of the Rolls* affirmed.

In this Case 'twas said by *Vernon*, that by the Rule of Law and Equity both, being too hard for Equity only, it must be intended where there's no Notice. *Lord Chancellor.* That is no Exception. For he that has Notice has no Equity at all.

ANONYMUS. [1708.]

[See *Welby v. Welby*, 1813, 2 V. & B. 190; *Schroder v. Schroder*, 1854, Kay, 585; 23 L. J. Chan. 917. See also 3 & 4 Will. 4, c. 106. s. 3.]

Cowper, Chancellor.

Vide ante, p. 3.

Intailed Lands devised. Vide ante [Gilb. Rep. 11], *Harris versus Horwell*.

The Case was this. A. was seised of two Acres, one in Fee, t'other in Tail ; and having two Sons, he by his Will devises the Fee-Simple Acre to his eldest Son, who was Issue in Tail ; and he devised the Tail Acre to the youngest Son and died : The eldest Son entered upon the Tail Acre ; whereupon the youngest Son brought his Bill in this

Court against his Brother, that he might enjoy the Tail Acre devised to him, or else have an Equivalent out of the Fee Acre ; because his Father plainly designed him something. *Lord Chancellor.* This Devise being design'd as a Provision for the younger Son, the Devise of the Fee Acre to the eldest Son must be understood to be with a *tacit* Condition, that he shall suffer the younger Son to enjoy quietly, or else, that the younger Son shall have an Equivalent out of the Fee Acre, and decreed the same accordingly.

[16] Lord ALTHAM *versus* The Earl of ANGLESEY. [1709.]

What will make a good Tenant to the *Præcipe*, for suffering a Recovery. See 2 Salk. 568 ; 1 Show. 347 ; Cumb. 425. See Lucas's R. 40, &c.—Depositions of Witnesses. —Construction of the Statute 29 Car. 2, c. 3, as to Declarations or Trusts, &c.

On an Issue directed out of Chancery, to be tried in B. R. The Case appeared to be thus :

Tenant in Tail, Remainder in Tail, with Remainders over. Tenant in Tail, having a Mind to dock the Intail, and bar the Remainders, levies a Fine with Proclamation *sur Conusance de droit come ceo*, &c., to J. S. and his Heirs, in order to make him Tenant to the *Præcipe* ; but no Use of this Fine was declared. Seven Years afterwards a *Præcipe* was brought against J. S. who came in and vouched the *Conusor* of the Fine, who vouched over the common Vouchee ; and the Question here was, if J. S. were a good Tenant to the *Præcipe*, and the common Recovery well suffered.

Another Point was, if Depositions of Witnesses, taken by Virtue of a Commission, out of the Court of Chancery in *England*, for the Examination of Witnesses in *Ireland*, in a Cause between the same Parties, and their proving Copies of the said Fine and Recovery in *Ireland*, were good Evidence, and should be allowed to be read as such here, seeing the Witnesses only swore that they were true Copies at the Time of their Examination. But this Objection was answered, in as much as it appeared, that those Copies were kept in the Hands of a certain Person, without any Alteration.

As to the first Question, it was resolved by *Holt, Powel, Powis, and Gould*, that the said J. S. was a good Tenant to the *Præcipe*, and that the Recovery was well suffered, and all the Remainders barred.

This Question doth arise principally upon the Statute of Frauds and Perjuries, 29 Car. 2, c. 3, Whereby 'tis enacted, that all Declarations or Creations of Trusts, or Confidences of any Lands, Tenements, or Hereditaments, shall be manifested, and proved by some Writing signed by the Party, who is by Law enabled to declare such Trust, or else by his last Will in Writing, or else they shall be utterly void, provided always, that where any Conveyance shall be made of any Lands or Tenements, by which a Trust or Confidence shall or may arise, or result by Implication or Construction of Law, or be transferred or extinguished, by an Act or Operation of Law, then, and in every such Case, such Trust or Confidence shall be of the like Force and Effect, as the same would have been if this Statute had not been made.

It was unanimously agreed, that this Statute did not extend to this Case, *viz.* where there is only Cognizor and Cognizee, and that it extended only to third Persons ; though it was objected, that in this Case, when, by the Fine, the legal Estate was convey'd to J. S. and his Heirs, and no Use declared of it, that the Use did result to *Conusor* and his Heirs, and then before the *Præcipe* was brought, the legal Estate was out of the *Conusee*, by Virtue of the Statute, for transferring Uses into Possession. But *Holt, G. J.*, and *Powel* held in this Case, that [17] when a Fine is levied, or a Feoffment made to a Man and his Heirs, the Estate is in the *Conusee* and Feoffee, not as an Use, but by the Common Law, and may be averred to be so ; and for the Form of pleading the Averment, you may see Co. Ent. 219, 220, where a Fine was levied, and the *Conusee* in pleading averred, *Cujus quidem finis prætextu prædict' J. S. fuit seisitus de, &c., cum pertinent' in Dominico suo ut de feodo* ; and in Plowd. 477, 478, a Feoffment was pleaded *Habendum to A. and his Heirs for ever, virtute cujus Feoffment' idem A. fuit seisitus de, &c., cum pertinent' in Dominico suo ut de feodo* : And in this Case it plainly appears, that the Intent of the Fine was to make the said J. S. a Tenant to the *Præcipe*, for the common Recovery ; and when the common Recovery is effected, a Use shall arise by Operation of Law from the *Conusor* and his Heirs, * from whom the Estate first moved.

Holt, C. J., held, That *Uses* were not within this Statute, but that the Statute did restrain only the Operation of Trusts and Confidences in Chancery ; but all the other Justices held the contrary, and that *Uses* were within it ; for the Common Law makes no distinction between Trusts and Confidences, and Uses ; and there was no Founda-

tion to make a Difference between Trusts and Uses, since the Statute 27 H. 8, though they have done it in Chancery. And now, since the Statute of Frauds, 29 Car. 2, c. 3, no Stranger can take a Use by any Parol Averment.

If a Fine be levied to a Man and his Heirs, to the Use of him and his Heirs, in this Case he shall take by the Common Law, and not by way of Use (Dyer, 155, 133, 134); and in this Case there may be a Parol Averment, to prevent a resulting Use to the Conusor in Fee; for when the Fine is levied, an Use doth immediately arise, either to the Conusor and his Heirs, or to the Conusee and his Heirs; and when there is a subsequent Deed, it only shews what the Intent of the Parties was at the Time of the Fine levied, 9 Co. *Douman's Case*: So that when a Fine is levied, an Use doth arise by Implication of Law to the Conusee and his Heirs, and consequently this Case is excepted out of the Statute. The Fine and Recovery here make but one Conveyance; and if the Use should result to the Conusor and his Heirs, it would destroy the middle Part of the Conveyance, and defeat the plain Intention of the Parties, which was to put the Use in the Conusee; and this is evident, because the Conusor, by suffering himself to be vouched, has own'd it. And how could Tenant in Tail make himself Tenant in Fee, if so be this must be construed a resulting Use?

As to an Objection that was made, that there might be a long Time between the Fine and Recovery; admitting that there had been a long Time between the Fine and Recovery, yet there it may be made good by a Parol Averment, before the Statute of Frauds, and by Writing [18] since, upon the reason of *Douman's Case*, if nothing were done intermediate to the contrary. Dyer, 136.

Gould said, That if a Fine *Sur Conusans de droit come ceo, &c.*, were levied, a Use did result to the Conusor; but if the Conusee did grant and render the Lands to the Conusor in Tail, the Conusee was seised of the Reversion to his own Use. Moor, 156; Dyer, 311. So if a Feoffment be made to A. and his Heirs, upon Condition to infeoff B. and his Heirs, without limiting or declaring any Use; in this Case, when A. has infeoffed B. and his Heirs, an Use shall arise to B. and his Heirs; and in all Cases of Common Recoveries a Tenant to the *Præcipe* shall be presumed, and that as well in a new Recovery as in an old one.

As to the second Point, it was likewise unanimously resolved, That these Depositions might be read as Evidence, and that the Copies proved upon the Commission were good Evidences of the Records of the Fine and Recovery in *Ireland*. 'Tis true, Evidence *viva voce* is always best; and though the Law indeed requires the best Proof that can be had, yet when better can't be had, it is satisfied with that which can be had. Now, in this Case, there is no Way to fetch the Person out of *Ireland*, who examined these Copies; no *Subpœna* runs thither; neither can any Person be obliged to go into *Ireland* to fetch Copies from thence: So that the Rule, that the best Witnesses Evidence must be had, must be understood where the Party is to swear a Thing of his own Knowledge; this is like the common Case, where the Depositions of a Person that is sick or dead, or beyond Sea, are admitted as Evidence. *Holt* said, That Witnesses *viva voce*, and Depositions, might be made Use of to the same Point, and so have the best Evidence, without taking away the other Evidence, or hindering the Reading of Depositions; and so is the common Course about foreign Affairs.

* See the Case of *Long and Buckridge, Trin. 4 Georgii* [1718], adjudged, That the Averment of *Cujus quidem finis prætextu, &c.*, is only *Expressio eorum quæ tacite insunt, & nihil operatur*, and that *prima facie* the Fine shall pass the Estate to the Conusee; and to bring the Use back to the Conusor, the Conusor must shew, that the Intent was not to give it to the Conusee, for else the Conusee shall be deemed to take the Estate by the Common Law. And this Case of Lord *Anglesey* and *Altham* was there held to be good Law.

SHOTBOLT versus BISCOW, &c.

Friday, May 30, 1712. J. G. in Court.

Bill of Interpleader to redeem, notwithstanding a Judgment had, and Fine levied.

What Charges and Incumbrances on Lands shall be barred by Fine, or not. 1 Chan. Cas. 49, 720. See 2 Chan. C. 257; 1 Vern. 152, 132; 2 Vern. 56, 189, 662.

The Case, as it appeared upon the Pleadings, was thus: *William Shotbolt*, on his Marriage with *Alice*, Daughter of one Mr. *Biscow*, gave a Bond of £500 to the said

Mr. *Biscow*, with a Warrant of Attorney, to confess Judgment thereon ; and this Judgment was defeasanced on Payment of £300 to *Alice*, in Case she survived her Husband : Afterwards, about the Year 1706, the Plaintiff agreed with *William Shotbolt* for the Purchase of his whole Estate for £900 whereof £700 was to be paid down ; and in Regard the said Estate was subject to an Annuity of £20 *per annum*, during the Life of a certain Person, 'twas agreed that the Plaintiff should retain the other £200 in his Hands, to indemnify himself against the said Annuity ; and that after the said Purchase completed, he should convey back the Estate for a Term of Years, redeemable on his Payment of the said £200 and Interest, after the falling in of the said Annuity. Accordingly, *William Shotbolt* and *Alice* his Wife, by Indenture of Lease and Release, and Fine, convey the Estate to the Plaintiff and his Heirs, and the Wife at the same Time [19] delivered up the Bond to be cancelled soon after the executing of these Deeds and Fine ; in regard, *William Shotbolt* was indebted to his Brother *Battallion Shotbolt*, in the Sum of £200 and upwards, 'twas agreed for securing that Sum, the Plaintiff should mortgage the said Estate to the said *Battallion*, redeemable on his Payment of the said £200 and Interest ; and accordingly the Plaintiff executed a Lease of the Premises, wherein reciting the Annuity of £20 *per Annum*, and the Judgment to *Biscow*, and that for indemnifying against these two Sums it was agreed upon his Purchase he should retain £200 in his own Hands, and so by Direction of *William Shotbolt*, the Plaintiff mortgages the Premises to *Battallion*, redeemable on Payment of the said £200 and Interest : *William* dies, and *Alice* survives him ; and *Biscow*, the Conusee in the Judgment, being likewise dead, she takes out Administration to him, and now would extend the Judgment on the Plaintiff's Estate ; *Battallion Shotbolt*, the Mortgagee, pretending that he only had a title to the £200 secured by the Mortgage ; and the Plaintiff brought an Ejectment, and recovered at Law, the Annuitant being dead ; and he now likewise brought this Bill, that on Payment of the £200 to such of the Defendants as had a Right to receive the same, he might redeem, and be let into the Possession of the Estate. The Defendant *Alice*, by her Answer, insisted that the £200 belonged to her, by Virtue of her Judgment, which was prior to *Battallion*, the other Defendant's Mortgage, and that this £200 was all she would be able to get for the £300 which the Judgment was given to secure : The Defendant *Battallion* insisted, that the £200 belonged to him as a Creditor, by Virtue of the Mortgage, and that *Alice*'s Title was extinguished by the Fine ; and it was agreed on all Hands, that the Plaintiff ought to redeem on Payment of the £200 only ; but whether *Alice* or *Battallion* had a Right to receive it, was the Question ; and for that this Bill was in nature of an interpleading Bill, he pray'd they might settle the Right between themselves, that so he might not pay his Money to a wrong Hand.

For the Defendant *Alice* 'twas insisted, that this £300 was all the Provision she had ; that it was expressly taken Notice of in the Mortgage, and the Retaining the £200 was a Security, as well against that, in case she should survive, as against the Annuity ; that she surviving her Husband, and having taken Administration to her Father the Conusee, and the Judgment being prior to the Mortgage, she had now a legal Title to lay on her Judgment, and that a Court of Equity ought not to take it from her.

But for the Defendant *Battallion* 'twas insisted, that she joining in the Fine with her Husband, that had extinguished all her Right, by Virtue of the Judgment ; that if she herself had been Conusee, there had been no Question of it ; for though a Release by the Conusee of all his Right to the Land of the Conusor will not prevent, or be a Bar to his taking out Execution after, yet such Right may certainly be extinguished, that as such Fine would have barr'd the Conusee himself, so her joining will in Equity defeat the Interest of her Trustee ; that upon the Fine she was examined, and consented to part with all Right in [20] the Land ; and if she should be allowed by this Judgment to take back again any Right to the Land, that would be to derogate from her own Grant. They agreed, indeed, that her joining in the Lease and Release, would not extinguish her Interest in the Judgment ; but the Fine wherein she join'd, carry'd away all her Right and Interest in the Land. That at the levying of the Fine she had delivered up the Bond ; and though that neither would be sufficient to bar her without the Fine, yet 'twas an Argument that she relinquished her Security, and that the Reason of taking Notice of the Judgment in the Mortgage was, because that was still standing out as a legal Lien upon the Land : That her Father being then dead, and she having taken out Administration to him, 'twas proper for the Purchaser to secure himself as far as he could against it : That if it had been intended the Security for the

£300 should be continued, the Purchaser would have retained the £300 in his Hands for that Purpose ; and that £200 only being retained, was an Argument they never intended the Purchaser should be charged with that, which was not an adequate Security for the £300.

And the *Lord Keeper* was clearly of that Opinion, and decreed the Plaintiff should be admitted to redeem, and should have his Costs ; and that the Defendant *Battallion* had the Right to the £300 as an honest Creditor ; and decreed accordingly, That the Plaintiff should have his Costs, and the Defendant *Alice* to procure Satisfaction, to be acknowledged on the Judgment, at the Defendant's Cost.

CURE versus HOWARD. [1710.]

Of Contingent Remainders, and resulting Uses. See 1 Ch. Cas. 27, 296 ; 2 Chan. Cas. 26, 231 ; 1 Salk. 228 ; 1 Vern. 108, 276, 366, 467 ; 2 Vern. 28, 294, 436 ; 2 Vent. 312, 361.

This Cause came on to be heard by Consent, upon Bill and Answer only, for the Opinion of the Court ; and upon reading several Deeds, it appeared to be thus : *Robert Howard* seised of an Estate of Inheritance by Indenture in 1677, covenants to levy a Fine thereof to one *Cure* and *Broadstreet*, and their Heirs, to the Use of himself for Life ; and after, to such Uses, Intents and Purposes, as he should by any Deed or Writing under his Hand and Seal, executed in the Presence of two or more credible Witnesses, during his natural Life, direct and appoint, and for want of such Direction and Appointment, in Trust for him and his Heirs ; and a Fine was levied accordingly ; and the said *Robert Howard*, afterwards intermarrying with one *Winefrid*, by whom he had Issue *Robert*, and the said *Robert* his Father being seised in Right of his said Wife of other Lands of Inheritance, they, by Indenture of Lease and Release, and Fine duly levied thereon, grant and convey these Lands to Trustees and their Heirs, to the Use of *Robert* the Father for Life, and after to *Winefrid* for Life, Remainder to the Wife of *Robert* the Son, and the Heirs Male of his Body issuing, Remainder to the right Heirs of the Survivor of them, the said *Robert* the Father and *Winefrid* the Wife, for ever ; afterwards, upon the Marriage of *Robert* his Son with *Mary Anne* his Wife, one of the Defendants, by Indenture of Lease and Release, 9th and 10th July 1698, be[21]-tween *Robert Howard* the Father, and *Winefrid* his Wife, and *Robert Thirson* of the first Part, *Anne Broadstreet*, Daughter and Heir of *Broadstreet*, the surviving Trustee in the Deed of 1677, of the second Part, *Mary-Anne Woolf* of the third Part, and others of the fourth and fifth Parts, in Consideration of a Marriage between *Robert* the Son, and *Mary-Anne Woolf*, and of £4000 Portion, and other Considerations, *Robert* the Father, and *Winefrid* the Wife, and *Robert* the Son grant, release, and convey several Lands, Tenements, and Hereditaments, therein particularly mentioned, being as well those whereof *Robert* the Father was at first seised, in Right of the said *Winefrid* his Wife, as others whereof he was sole seised in Fee, to Trustees and their Heirs, to the Uses following, viz. as to Part, to the Use of *Robert* the Father, for 99 Years, if he should so long live ; Remainder to Trustees and their Heirs, during his Life, to support contingent Remainders ; Remainder to the Use of *Winefrid* for Life ; Remainder to *Robert* the Son for 99 Years, if he should so long live ; Remainder to Trustees during his Life, to support contingent Remainders ; and as to the other Part to the Use of *Robert* the Father, and *Winefrid* his Wife, for their Lives, and the Life of the longer Liver of them ; Remainder to *Robert* the Son for 99 Years, if he should so long live ; Remainder to Trustees and their Heirs, during his Life, to support contingent Remainders ; Remainder as to the other Part, to *Robert* the Son, in Possession for 99 Years, if he should so long live, Remainder to Trustees and their Heirs, during his Life, to support contingent Remainders ; Remainder to *Mary-Anne* for Life, for her Jointure ; Remainder of the whole, as the several estates before limited should respectively determine, to the first Son of the Body of *Mary-Anne* to be begotten, and of the Heirs Male of the Body of such first Son lawfully issuing, and so to the second and other Sons in like Manner ; Remainder to the Heirs Male of *Robert* the Son ; Remainder to the right Heirs of *Robert* the Father for ever ; and *Robert* the Father covenants, that he and *Winefrid* his Wife, would levy a Fine of all the said Lands, to the Uses before mentioned, and by the same Indentures, *Anne Broadstreet*, by the Direction of *Robert* the Father, grants, releases, and conveys, and he ratifies and confirms all the Lands, by the Deed of 1677, limited to her and *Broadstreet*,

and their Heirs, to the Use of *Robert* the Father, for 99 Years, if he should so long live ; Remainder to Trustees during his Life, to support contingent Remainders with other Remainders over to the right Heirs of the Father for ever. A Fine was accordingly levied, and the Marriage took Effect, and they had Issue *William* a Son, and *Winefrid* a Daughter ; then *Winefrid* the Mother dies, and then *Robert* the Son dies, then *Robert* the Father, 15 *January* 1706, makes his Will, and thereby devises all his Lands, Manors, Tenements and Hereditaments in Possession, Reversion, Remainder or Expectancy whatsoever, to *Charles Baggot*, *Richard Baggot* and others, and their Heirs in Trust, by the Sale or Mortgage, to raise so much as would be sufficient to pay his Debt, and the Legacies thereby given, and gives several Legacies to the Amount of £3000 and upwards, and makes *Mary* his then Wife Executrix, and dies considerably indebted ; [22] and some Time after his Death, *William* the Grandson dies, without Issue, and now the Bill was brought by the Creditors and Legatees of *Robert* the said Father, against *Mary* his Executrix, and *Mary-Anne Howard* and *Winefrid* her Daughter, *Charles* and *Richard Baggot*, and others, to have a Satisfaction of their Debts and Legacies, pursuant to the Will of old *Robert* : The Defendant *Mary-Anne Howard* sets out the Indentures of 9 and 10 *July* 1698, and insists in Behalf of *Winefrid* her Daughter, that the Remainder of all that was thereby limited to *Robert* the Father, for 99 Years, with Remainder to his right Heirs, vested in *Winefrid* her Daughter, as Heir to *William* her Brother, as a contingent Remainder by Purchase, and so not subject to *Robert* the Father's Disposal by Will, and whether they were, and how many, and which of them was so subject, was the only Question ; and first, as to the Lands limited to *Robert* the Father for Life, with the last Remainder thereof to his own right Heirs, there was little or no Question made of it ; but that it was the old Reversion in Fee in him, and consequently liable to be disposed of as he thought fit ; but as to the other Lands limited to him for 99 Years, with such Remainder to his own right Heirs, there were very solemn Arguments, how far he had a Power over it, and that was divided into three Points.

First, Whether if these lands not comprized in the Deeds of 1677, and whereof he was seised in Possession at the Time of the Marriage Settlement upon his Son, the Remainder to his right Heirs, should be looked upon to be the old Reversion, and so under his Power of devising ?

Secondly, Whether if the Lands comprized in the deed of 1677, the Remainder to his own right Heirs, should be looked upon to be void, and the old Reversion vested in himself, and so pass by his Will ?

Thirdly, Whether the Remainder to the right Heirs of the Survivor of the said *Robert* the father, and *Winefrid* his Wife, was capable of being settled to the uses therein limited, and if so, whether the Remainder to the right Heirs of *Robert* the Father was so vested in him, as to be subject to his Will ?

As to the first Point (see 2 Vern. 43, 195, 359, 668) 'twas argued, that this Remainder to the right Heirs of *Robert* the Father was a contingent Remainder, and vested in his right Heir by Purchase, and was no Part of the old Use resulting to himself, and consequently not liable to his Disposition by Will, and so this Case differed intirely from the Cases of *Fenwick* and *Milford*, and *Pibus* and *Milford* ; for in these Cases there was no Disposition at all made of the old Use during his Life, so consequently his right Heirs could not be Purchasers ; and the Reason they construed the old Use to continue in him during his Life was, because it might happen that all the Estates might be determined during his Life, and then there would be no Person to take the Freehold whilst he lived, because he could have no Heirs 'till after his Death ; and it might happen, that all the Estates might determine in his Life-time ; and as he had made no Disposition of the Use during his Life, so the Use during his Life continued in him, and that upon Determination of the intermediate Estates being united, and conjoined with the Remainder to his right Heirs, made it [23] one consolidated Fee in himself, and consequently his Heirs must take by Descent, and not by Purchase ; but where the intire Use was expressly limited out of him during his Life, so that by no Possibility the intermediate Estates can determine during his Life ; there the Remainder to his right Heir is a good Remainder, and they shall take by Purchase and not by Descent ; and he said, that Difference was taken and agreed to in the Case of *Tippen* and *Colen*, in 4th Mod. 300, in which Case the Cases of *Fenwick* and *Milford*, and *Pibus* and *Milford* were all cited, and here in the principal Case he has limited the Use during his Life to Trustees, to support contingent Remainders, and so has

disposed of the old Use during his Life, and consequently there can be no old Use remaining in him, to unite with the Remainders, limited to his right Heirs ; and then they shall take the Remainder as Heirs by Purchase : And *Letchmere* said, he having limited such an Estate to Trustees, during his Life, to support contingent Remainders, the Law shall never, against its own express Limitations, bring back the Use to him again during his Life ; for then it must take it out of the Trustees, to whom he has by express Limitation given it, during his Life, he has no Estate of Freehold to unite and consolidate with the Remainder to his own right Heirs, and consequently they can't take by Descent from him, but must take as Purchasers, and then he had no Power to subject this Remainder to Debts or Legacies by his Will.

As to the second Point, whether the Remainder to his own right Heirs of the Lands, comprised in the Deed of 1677, was a void Remainder, and vested in himself as Part of the old Use ; this, they said, was a much stronger Point ; for besides that the Limitation to himself is only for 99 Years, as the former Limitations were, the legal Estate of this Part of the Lands was standing out in the Trustee, and then there can be no Pretence of any resulting Use to him for his Life, for nothing moved from him, but the whole Estate was in the Trustee, and passed from him to the several Uses, and so he being a Stranger, might by Will limit the Remainder to the right Heirs of old *Robert*, so as to make 'em capable of taking by Purchase, since there could be no Use remaining to him, after the Settlement, when it had none before ; and it was urged strongly, that for another Reason the right Heirs might be Purchasers of this Part of the Estate, for by the Deed of 1677 the Use was limited to him but for Life only, and after his Death to such Uses, Intents and Purposes, as he shall direct and appoint, and for want of such Direction and Appointment, to his own right Heirs ; so that he had Time, during his whole Life, to make such Appointment, and consequently the Estate in the mean Time must be lodged in the Trustees to supply such Appointment when it comes, and then he only having an Estate for Life in these Lands, could not make good any of the Limitations in the Settlement of 1698 beyond his own Life ; for suppose he should afterwards have made an Appointment pursuant to his Power, this must have taken Place of the Settlement, and defeated all these Uses as to this Part of the Land ; because he had Power during his whole Life to make that Appointment, and consequently during his Life the Estate must continue in the Trustees, to answer and supply that Power ; and so is Co. 10, 85, expressly [24] in Point. But they urged further, that this very Settlement of 1698 was an absolute Appointment in Pursuance of his Power ; for the Heir of the surviving Trustee was a Party to it, and joins in the conveying of those very Lands, and 'tis said to be by Direction and Appointment of *Robert Howard* the Father, who had such Power of appointing, so it can't be taken to be other than an Appointment in Pursuance of his Power, and then the Estate lodging in the Trustees to supply and answer such Appointment, when he limits the last Remainder to his own right Heirs, they must take by Virtue of the Appointment, and consequently must take as Purchasers, because the Estate was lodged in the Trustees to answer such Appointment ; and the Father had only the bare Power of appointing the Uses, and so can never derive an Estate by Descent to his Heirs, when he had no Fee nor legal Estate in himself, but a bare Power of appointing the Uses, which must after draw out the Possession from the Trustees according to these Uses.

As to the third Point (2 P. Will. 379), 'twas argued, that the Remainder of *Winefrid's* Inheritance, limited to the right Heirs of the Survivor of her and *Robert* her Husband, was a contingent Remainder ; and *Robert* the Father being the Survivor, the same vested in his right Heirs by Purchase, and consequently not subject to his Disposition by Will, and they insisted that the Fine levied by *Robert* the Father, and *Winefrid* the Wife in 1698, had not barred or destroyed that contingent Remainder, because of the intermediate Estate Tail to *Robert* the Son, which was sufficient to preserve it ; and then the Fine enured only as a Grant of what they might lawfully grant, and did not any ways touch or affect this Remainder.

On the other Side 'twas argued by *Prat* and others, as to the first Point, that this was within the Reason of the Cases of *Fenwick* and *Mitford*, and *Pibus* and *Mitford*, and that here was a resulting Use to him during his Life, because it might happen that all the intermediate Estates might determine before his Death ; for suppose the Trustees during his Life, to support the contingent Estate, should forfeit their Estates and all Estates determine, what then would become of the Freehold during his Life ? For his Heirs could not have it, and so he himself must have it as Part of the old Use

undisposed of ; which being conjoined with the last Limitation to his right Heirs, will make an intire Fee in himself, and consequently his right Heirs can't be Purchasors, any more than if he had no Limitation at *all of the Fee in him*.

As to the second Point 'twas argued,

First, That the last Limitation in the Deed of 1677, being to the Trustees and their Heirs, in Trust for *Robert* and his Heirs, was executed to him in Possession as absolutely, as if it had been said to the Use of him and his Heirs ; for the Statute makes no Difference between an Use and a Trust, but mentions them promiscuously ; and this, upon reading the Deeds, seemed to be given up as a clear Point.

Secondly, Admitting it should not be so, but that the legal Estate continued in the Trustees, yet, in a Court of Equity, it must be look'd upon as if he himself had been in actual Possession, and made such Settlement ; for that a Trust in this Court was considered by the same Rules, [25] and capable of the same Limitation as the Possession was at Law, and no Manner of Difference betwixt them.

Thirdly, That till an Appointment made, 'twas the Use of him and his Heirs, and an Appointment was always wanting till it was made ; and that he had good Power to dispose and settle the Remainder of these Lands to the Uses in the Marriage-Settlement, because there was no Appointment thereof before, and consequently nothing to hinder him from disposing thereof as he thought proper.

But *Fourthly*, Admitting the Settlement in 1698 should be construed to be an Appointment, pursuant to his Power, yet 'twas only a partial one, and made no Disposition of the Use during his Life ; for if the Trustees to support contingent Remainders should forfeit their Estate, or have joined with these in Remainder, in conveying their Estate, and then all the intermediate Estates had determined, yet here would remain an undisposed Use during his Life ; for of that he had made no Appointment, and then that being united with the last Limitation to his own right Heirs, makes an intire Fee in himself, and consequently his Heirs must have taken it by Descent, and not by Purchase ; and then he had good Power over it, and the Disposition of his Will must stand.

As to the third Point, 'twas urged, that this Fine by the Husband and Wife in 1698, destroyed or gave away the Remainder to the right Heirs of the Survivor of them, because they both joined in it ; and in *Albany's Case* it is said, that a common Fine destroys all Rights, all Titles, all Possibilities, both present and future ; and if so, the Fine in this Case, which is of so much a higher Nature, must do it *a fortiori*.

Secondly, This Fine estops the Heir to claim the Estate against the Fines of his Ancestor ; he can't say that *partes finis nihil habuerunt*, but is thereby totally barr'd and estopped from claiming it.

Thirdly, That this was no contingent Remainder ; or if it was, yet *Robert* the Husband surviving, the Contingency was then at an End, and then his Heirs must take it ; but then he having an Estate in Fee therein, they could not take it but only by Descent, for then the whole Fee was vested in him, and consequently he had good Power to subject it by his Will to the Payment of his Debts and Legacies.

Lord Keeper after all ordered a Case to be stated on these several Points out of the Deeds, and then he would consider of them and give his Opinion, and if it were necessary, would desire the Assistance of some of the Judges in it ; but inclined pretty strongly, that old *Robert* had Power to subject all these Lands by Will as his old Reversion undisposed of, and said they might argue to the contrary from Sun-rising to Sun-setting, but he thought they would not alter his Opinion.

[26] KING *versus* WITHERS. [1711.]

(See S. C. [1] Abr. Eq. 112.)

[S. C. Cas. temp. Talb. 117; Prec. Chan. 348; 2 Eq. Cas. Abr. 656, pl. 10; 3 Bro. P. C. 135 (Tomlin's ed. sub nom. *Wither v. King*). Followed, *Remnant v. Hood*, 1860, 2 De G. F. & J. 413; *Davies v. Huquenin*, 1863, 1 H. & M. 743; *Hently v. Wrey*, 1882, 19 Ch. D. 503 (but see S. C. on appeal, 21 Ch. D. 332); *In re Cresswell*, 1883, 24 Ch. D. 107; *Haverty v. Curtis*, [1895] 1 Ir. R. 37.]

Where a Devise, on Condition not to marry without Consent, &c., shall be an absolute Devise. See 1 Chan. Cas. 22, 58, 138; 2 Chan. Rep. 23, 95; 1 Vern. 20; 2 Vern. 293, 357, 452, 572, 720. See 2 P. Will. p. (626) and (628).

This Cause came on to be heard by Consent, and was thus: The Defendant's Father by his Will in Writing duly attested, devised to the Defendant, who was his Heir at Law, and to his Heirs, all his Lands, Tenements and Hereditaments, in the County of B. except such and such Part thereof, charged and chargeable with the Sum of £2500 to his Daughter (since married to the Plaintiff) at her Age of 21, or Marriage, which shall first happen, and devised the excepted Lands in Trust to be sold for the Payment of his Debts, provided that if his said Daughter should marry in the Life of her Mother, without her Consent first had in Writing, £500 of the said £2500 should cease, and should be applied towards Payment of his Debts, charged upon the said excepted Lands, and appoints his Wife to be Guardian of his said Daughter, and makes her Executrix and dies; the Daughter attains the Age of 21, and afterwards, without the Consent or Privy of the Mother, intermarries with the Plaintiff, who is a Gentleman of some Estate, and called to the Bar, but had made no Settlement or Provision for his Wife; and so the Defendant, the Heir at Law, refused to raise or pay any Part of his Sister's Portion; and insisted likewise, that by her Marriage without her Mother's Consent, £500 Part of her Fortune, was become forfeited: Whereupon the Plaintiff brought the Bill, to have the whole Portion raised and paid by a Sale of the Lands charged therewith.

For the Plaintiff 'twas insisted, That upon the Daughter's attaining the Age of 21, the whole Portion became vested in her, and that she might then have demanded it; and though she afterwards married without her Mother's Consent, yet that could not divert or bring back the Portion which was before vested and settled as an interest in her, for that Consent in all Reason could be carried no farther than during her Minority, or until she attain the Age of 21; during which Time she was appointed to be under the Care and Tuition of her Mother; and so long it might be reasonable to restrain her Marriage, without her Mother's Consent, but not after: And though the Words are, If she marries without her Mother's Consent during her Life, yet that must be taken only if her Mother be living during the Time such Consent was necessary, that is, during her Minority, for which Time she was to be under the Mother's Guardianship; but upon her attaining her Age of 21, the Power of her Mother as Guardian ceased, and consequently it was never intended to confine her beyond that Time, to her Mother's Consent in Marriage: That here was no Devise of the £500 over, and so it must be only taken to be *in Terrorem*, according to the Resolution in *Fry and Porter's Case* (see Abr. Eq. G. 111); and consequently the Plaintiff ought to have the whole Portion raised by Sale of the Lands charged therewith, unless the Defendant would otherwise provide for the Payment thereof.

[27] On the other Side, 'twas insisted for the Defendant, that *Cujus est dare ejus est disponere*, that a Man may impose what Terms and Conditions he thinks fit, in the Disposal of his Estate; that here he has expressly made the Mother's Consent requisite, during her Life; and to say the whole Portion vested in the Daughter upon her attaining the Age of 21, is nothing to the Purpose; for tho' it did, yet without Question the Condition may bring it back again; as if a Feoffment in Fee be made upon Condition. here the Estate is vested, yet the Breach of the Condition will tetch it back again out of the Feoffee; and when the Devisor has in expres Words restrained her from marrying without her Mother's Consent, during her Life, you won't reject surely this Condition, and give her the whole Portion, without any Regard to her observing the Terms of it: Besides, here is a devise over; for upon her Marriage without her Mother's

Consent, the £500 is to go towards Payment of the Debts, in Ease of the other Part of the Testator's Estate, made liable thereto ; and though there were no such Devise over, yet the £500 is forfeited by her Violation of the Condition annexed to it ; and so it was held in the Case of *Bennet* and *Lord Salisbury* (see Abr. Eq. C. 110 ; 2 Vent. 365 ; 2 Vern. 223 ; Skinner, 285).

Lord Keeper. This Portion did not vest in the Daughter presently ; for 'tis not given to her generally to be paid, or payable at such a Time, but 'tis given to her at the Age of 21, or Marriage, so that before that Time no Interest or Right to it is vested in her ; but here she attained the Age of 21, and I take it clearly, this is not a particular or present Legacy, but is to be raised out of the Lands, and so must have the same Construction as a Devise of the Lands themselves would ; and I think the Distinction, that where there is no Devise over, that the Condition shall be taken to be only *in Terrorem*, is a great deal too wide, for here in Effect is no Devise over ; for though it be to go towards Payment of Debts, yet here appear no Creditors to be concerned, none that are in Danger of losing their Debts, and so I shall consider it as it stands upon the Condition itself : And I think in this Case the Plaintiff must have her whole Portion, for the Testator has appointed two Times, Marriage or 21, to intitle her to it, and which soever of them first happened, gave her a Right to it ; and here she has attained her Age of 21, and that singly gives her a Right to it : Indeed, if she had married before that Age, she must have had her Mother's Consent, otherwise she was to lose £500, but when she attains her Age, and marries after, her Title to the whole is accrued, which was compleat by her attaining that Age ; it is not to be impeached after by her Marriage, without her Mother's Consent ; for as her Marriage by her Mother's Consent was one Title, so her attaining the Age of 21 was another Title, and which ever of them first happens, intitles her to her own Portion ; and she having attained the Age of 21 first, her Title to the Portion now vests wholly upon that ; and so there must be a Decree for Sale of so much of the Lands as will be necessary for that Purpose, unless the Defendant will otherwise secure the Payment of it : But the Money, when raised, must be brought before the Master, till the Plaintiff makes a Settlement on his Wife for such Purpose ; [28] he is likewise to bring his Title-Deeds before the Master, to see what Provision he can make for her.

KITTSOŶ *versus* KITTSOŶ & al'. [1711.]

Eodem die.

The Custom of *London*, as to Freemens Estates, where the Wife shall be barr'd of her customary Part or not. See 1 Vern. 132 ; 2 Vern. 110 ; and Abr. Eq. 157 ; and post, Loeffes, vide ante, 12, 13.

Mr. *Francis Kittson*, Coach-Maker, being a Citizen and Freeman of *London*, and seised of a good real Estate, and also possessed of and intitled to a considerable Personal Estate, makes his Will the 20th of *September* 1711, and thereby devises to his Wife *Anne Kittson* the Plaintiff, for Life, all his Lands, Tenements and Hereditaments whatsoever, at *Inguille-Green*, in the Parish of *Eglin*, and County of *Surrey* ; and after her Death he devises the same to his Nephew *Edward Kittson* of *Henley*, and his Heirs for ever ; and after several Legacies and Bequests, he goes on, *Item* as to the House wherein I now dwell, together with all my Stock of Timber and other Stock, Goods, Chattels, Debts, and Personal Estate whatsoever and wheresoever. I give and devise unto my said Wife *Anne Kittson* for her Life, with Power to her to dispose of £500 Part thereof, at her Death ; and after her Death, I give and devise all my said Stock, Goods, Chattels, and Personal Estate, except the said £500, to and amongst my Sisters, *Elizabeth Kittson*, *Elizabeth Thorpe*, and several others of the Defendants : He likewise gives to his Wife for Life all his five Houses in *Hedge-Lane*, and after her Death he gives the same to his said Nephew *Edward Kittson*, his Executor and Administrator, and makes his said Wife and Mr. *Robins* Executors, and dies ; Mr. *Robins* alone proves the Will, and the Widow brought this Bill against him, and also against the said *Edward Kittson* and *Elizabeth*, and the rest of the Residuary Legatees, and also against one *Edward Kittson*, who was Heir at Law to the Testator, to establish the Will, and to have the Lands and Estate at *Inguille-Green* quieted to her for Life, and likewise the five Houses in *Hedge-Lane* ; and also to have one

Moiety of the Personal Estate, and her Widow's Chamber as her own for ever, by Virtue of the Custom of *London*, as a Freeman's Widow, there being no Children ; and to have the other Moiety of the Personal Estate for Life, by Virtue of the Will, and disposing £500 thereout at her Death. The Defendant *Robins* answered, and submitted to do as the Court should direct ; the other Defendants likewise answered and insisted, that the Plaintiff ought to make her Election, to take either by the Custom of *London*, or by the Will, and not by both, and brought a Cross Bill to that Purpose, and to have an Account ; and as to *Edward Kittson*, the Bill was, that in case the Widow should elect to take by the Custom of *London*, that he might be let into the immediate Possession of the Estate at *Inguille-Green*, and the five Houses in *Hedge-Lane* ; and as to the rest, that in case of such Election, they might have a Moiety of the Personal Estate forthwith.

For the Widow 'twas insisted, That as to the Estate of Inheritance at *Inguille-Green*, she had brought the Heir at Law before the Court, to establish the Will against him, and also against the Devisee in Remainder, and that there could be no Colour to take away the Estate for Life, [29] that Part of the Estate being expressly and specifically devised to her for her Life, and the Devise thereof collateral and independent of the Devise of the Personal Estate ; and as to the Personal 'twas insisted, that the Testator must be supposed to know that he was a Freeman, and that as such he had not Power at all over a Moiety thereof, but that by his Death the same vested in his Widow as her own for ever, and consequently when he devised all his Personal Estate, that could be intended no more than he had a Power over, which was his own Moiety : as to the other Moiety, 'twas none of his to dispose of, nor could he by his Will make better or worse his Wife's Title thereto, so his Devise of all his Personal Estate must be meant, all he had a Power over, all he could give, not what this Custom of *London* had already given her, and consequently she must take her own Moiety by the Custom, and the other by his Will.

On the other Side 'twas argued, that the Plaintiff was very unreasonable in her Demand, that in this Court, wherever a Person had a Debt owing to him, and the Debtor by his Will gave any Thing which was Equivalent to or more than the Debt, it had always been allowed to go in Discharge and Satisfaction of the Debt, much more in this Case of a Customary Part, which was in the Nature of a Debt or Demand out of the Testator's Personal Estate, and so when he gives her all his Personal Estate for Life, it must be supposed he intended it in Satisfaction of her Moiety thereof, due by the Custom of *London* ; that 'tis plain in this Case he intended her the Power of disposing of £500 only of his Personal Estate, and no more, for he not only gives her no more to dispose of at her Death, but when he comes to dispose of the Residue he takes it up, and says all the rest of my Personal Estate, except the £500, I give and devise to the Defendants ; so that 'tis plain he intended she should have Power to diminish or lessen his Personal Estate no more than the £500 only ; and though this Devise could not debar or exclude her of her Customary Part, if she thinks fit to elect it, yet she ought not to take both ; and of this there can be no Doubt, since the Case of *Heron and Heron* (Q. 2 Vern. 555, and Abr. Eq. C. 203), where Sir *John Heron* had canton'd out his Real and Personal Estate among his Children and Wife, and after his Death, my Lady *Heron* would have had not only what was so given her by her Husband, but also the customary Part of a Freeman's Widow ; but was decreed by Lord *Cowper* to make her Election, and that she ought not to claim both, and the Case of *Lawrence and Lawrence* (see Abr. Eq. C. 217, 218) was cited to the same Effect. And

Lord *Keeper* was clearly of this Opinion, and pronounced the Decree accordingly (see 2 Vern. 365. But Note, That the Decree in that Case was afterwards revers'd in the House of Lords) ; but held, as to the Estate at *Inguille-Green*, it had no Dependence upon, or Relation to the Devise of the Personal Estate ; but that though she made her Election (as she did in Court to take by the Custom), yet that the Devise of that Estate continued good to her for Life ; though it was urged, and Mr. *Vernon* and *How* said privately between themselves, that upon her electing to take by the Custom, she ought to have no Benefit at all of the Will, but that *Edward Kittson*, the Devisee in Remainder, ought to be let into Possession of that Estate immediately ; but his Lordship held otherwise, and as to the five [30] Houses in *Hedge-Lane*, they being Leasehold, were decreed to come in with the rest of the Personal Estate to be sold, and the Money divided accordingly.

But as to them the Court seemed not to have apprehended the Case rightly ; for they

being expressly given to the Widow for Life, and after her Death to *Edward Kittson*, together with the Estate at *Inguille-Green*, they ought, as it seems, to have gone accordingly ; for by the Decree for the Sale of 'em, the Remainder to *Edward Kittson* is destroyed, which surely the Court never intended, whatsoever they thought fit to do as to the Widow's Estate for Life therein ; for if the Estate for Life to the Widow of the Lands of Inheritance were good, it seems, so must the Devise of all these Houses, being expressly devised to her, before he came to the Devise of the *Residuum*, otherwise there is an Injury done to *Edward Kittson's* Remainder therein, but this was not taken Notice of, or explained by the Court.

There was another Point in the Case, which was this ; *Francis Kittson* about three Years ago purchased the Remainder of a Mortgage Term of 1000 Years, in an Estate at *Egham*, of one *Booth*, which *Booth* had a Decree of Foreclosure against one *Jane Reading*, the Heir at Law of the Mortgagor ; that upon Payment of £20 to be put out by the Senior Master of the Court of Chancery, the said *Jane Reading* should within six Months after she came of Age, release and convey the Inheritance, and Equity of Redemption to *Booth*, his Heirs and Assigns, unless Cause shewn within six Months after she came of Age. That Term was assigned to the Defendant *Robins*, in Trust for Mr. *Kittson*, to attend the Inheritance when it should be conveyed ; but the £20 was never paid, and no Conveyance yet made of the Inheritance, and whether this should be looked upon as Real or Personal Estate was submitted to the Court, and held, that by Reason of the Decree and Covenant of *Booth* for that Purpose, it must be deemed to be an Estate of Inheritance, and the Widow must have it for Life, and she to pay one third Part of the £20, and *Edward Kittson* the Devisee in Remainder the other two Thirds, with Interest proportionably, from the Time it ought to have been paid, *Booth* being become insolvent.

MARHANT *versus* TWISDEN. [1711.]

A Devise of a *Residuum* where it shall relate to the Personal Estate only, and be void as to the real Estate, by Reason of the Incertainty. See *Skinner*, 130 ; 2 Vent. 285 ; 1 Lev. 212 ; 3 Mod. 228 ; 2 Vern. 351, 461, 621, 623 ; 1 Vern. 3.

One *Sympton*, having settled all his Estate of Inheritance upon his Wife for Life, for her Jointure, makes his Will, and thereby devises several pecuniary Legacies to several Persons, and then says, all the Rest and Residue of my Estate and Chattels, Real and Personal, I give and devise to my Wife, whom I make to be Executrix ; and the only Question was, whether by this Devise the Reversion of the Jointure Lands passed to the Wife ?

And the *Lord Keeper* having taken Time to consider of it, now delivered his Opinion that it did not ; because the precedent and subsequent Words explain his Intent to carry only his Personal Estate ; for in the first Part of his Will having given only Legacies, and not Lands whatsoever, the Words, *all the rest and Residue of his Estate* are relative, and must be intended Estate of the same Nature with that he had before devised, which was only Personal ; for having before given no Real Estate, there could be no Rest or Residue of that, out of which he had given away none : Then the Words *Chattels, Real and Personal*, explain what Sort of Estate he meant ; and make the Devise, as if he had said all the rest of my Estate, whether Chattels Real or Personal, and so confine and restrain the extended Sense of the Word *Estate* ; and he said this Case differed from the Case of *Murray and Wise* (see Abr. Eq. C. 177 ; 2 Vern. 564), and that no Resolution was ever carried so far, as to construe these Words to pass a Fee.

GREENHILL *versus* WALDOE. [1711.]

Daughters Portions payable at 18, and no Maintenance in the mean Time : a Maintenance decreed. See hereafter *Beale's Case*, and 2 Vern. 236, and *Q. Lord Coventry's Case*. Abr. Eq. C. 301 ; 2 Peer Will. 449.

In this Case, upon a Marriage Settlement, after the common Limitation to the first and other Sons, a Term was limited to Trustees for 300 Years in Trust, upon Failure of Issue Male, to raise with all convenient Speed out of the Rents and Profits, or by Mortgage or Sale, £3000 for Daughters Portions, if more than one, to be equally divided between them ; and if one Daughter only, she to have the whole £3000, and to be paid to such

Daughter or Daughters, at their respective Ages of 18 or Marriage, which should first happen, after the Death of the Father and Mother; they have Issue two Daughters only, and no Son, and the Father by his Will, taking Notice of the Provision to his Daughters, devises to them £500 a-piece more, to be paid at the same Time as their original Portions were payable; but in Case either of them died before the Age of 18, then the additional Portion of £500 a-piece was to cease: The Father and Mother both died, the Daughters being about 15 or 16; the Plaintiff intermarries with one of them, and she being now about 20, this Bill was brought against the Defendant and Devisee of the Estate, charged with these Portions, and against the Trustees of the Term, to have the Portion raised, and Interest from the Death of the Father.

And 'twas insisted, that this was but reasonable, in regard the Father and Mother dying before the Portions became payable, there was no Maintenance provided for them in the mean Time, and it might have happened that the Daughters were but two or three Years of Age at the Death of the Father and Mother, and if this Court in such Case would not help them to a Maintenance 'till their Portions became payable, they must starve; yet they were Heirs at Law and disinherited; and so, if by any Construction they can be helped, this Court would do it: That here the Portions are directed to be raised with all convenient Speed, and if they had been raised presently after the Father and Mother's Death, the Brother and Devisee of the Estate could not complain, for his Estate was liable to the raising them presently; then when the Portions are raised, who is to have the Interest of them in the mean Time, 'till they became payable? Not the Trustees; for they have no-[32]-thing to do with it in their own Right; not the Brother and Devisee; for he has the Estate, and no Wrong is done to him; so surely in such Case the Daughters themselves would be intitled to it; so in this Case, though they are above 18, yet they ought to have Interest from the Time their Portions became raisable.

On the other Side 'twas insisted, that there was no Direction for Interest or Maintenance, 'till their Portions became payable; that this was the Agreement of the Parties at the Time of the Settlement, and could not be broke into; that if there had been no Portions at all provided for them they might have Reason to complain, but could not be relieved; that in this Case their Portions did not vest 'till 18 or Marriage, there being a Clause, that if either died before the Time the whole Portion was to sink, that it being contingent whether both or either of the Portions would become payable, neither could vest 'till the Contingency happened as to both, that those additional Portions of £500 a-piece by his Will, were in lieu of Maintenance, and that the Estate ought not to be charged farther.

But the *Chancellor* was of Opinion they ought to have either Interest or Maintenance from their Father's Death (he being the Survivor), and thought it much the same, whether 'twas called Interest or Maintenance; that the Father never intended they should starve 'till their Portions became payable, and so sent it to a Master to see what was reasonable for their Maintenance from the Time of their Father's Death, and decreed the original Portion to be raised by Sale, to be with Interest at 5 *per Cent.* being charged on Land, though 'twas pressed to be 6 *per Cent.*, and Mr. *Vernon* cited the Case of *Waring and Waring* (Q. Abr. Eq. C. 267), where Maintenance in a like Case was decreed 'till the Portions became payable, there being no Provision for it in the Settlement, and divers other Cases to the same Purpose. Vide ante.

LOEFFES versus LOWEN & al'. [1711.]

A Freeman of London dies, leaving a Widow and two Daughters; one of the Daughters dies, the other shall have the whole of the Orphanage Part. See 2 Vern. 110, 234, 340, 559, 754; 1 Vern. 88, 354; 1 Chanc. C. 181; 1 Lev. 32, 162, &c.; 1 Vent. 178; 1 Mod. 79; *Kittson's Case*, ante [Gilb. Rep. 28].

In this Case the Question was, whether the Plaintiffs, who were Creditors of one *Eyton*, should have the Benefit of a Bond for Payment of £1500 entered into by one *Bayly* to *Eyton*, or if the said Bond should be looked upon to be voluntary and fraudulent, as against the Creditors of *Bayly* who were Defendants, and they to be accordingly first satisfied out of *Bayly's* Assets, they being Creditors only by Simple Contract; and as to that the Case appeared to be thus: One *Mason* a Vintner, and Freeman of London, made his Will about 24 Years since, and thereby devised one third Part

of his Personal Estate to *Letitia* his Wife, and the other two Thirds to his Children, and died, having only two Daughters *Letitia* and another, who afterwards died intestate and unmarried; *Letitia* the Widow intermarried with *Bayly*, who was a Vintner likewise, and the Widow before Marriage, and she and her Husband after Marriage, continued to employ the whole Stock left by *Mason*, [33] in carrying on their Trade without making any Distribution or Division to the Children; some Time after, upon a Treaty of Marriage, to be had between *Letitia* the Daughter and *Eyton* (the other Daughter being then dead), a Computation was made of what Fortune would come to *Letitia* the Daughter; and the same appearing to be short of what *Eyton* expected, *Bayly* agreed to make up her Fortune £4000, but there was no Writing or Memorandum of it under Hand; but *Bayly* did afterwards pay all but £1500 of the Fortune agreed upon. About four Years after the Marriage *Bayly* makes his Will, and at the same Time proposes a Bond for *Eyton* of £3000, conditioned for the Payment of £1500 to him at such a Time, and then sends for *Eyton* and his Wife, shews them the Bond and Will, whereby he had likewise given them a Legacy, but never delivers the Bond to *Eyton* or his Wife, but kept it in his own Custody; and *Bayly* some time after dying suddenly, this Bond was found among his Writings, and by Agreement was delivered over to *Lowen*, who was a Defendant, to be kept by him as an indifferent Person, till it should appear how Things were like to go: *Bayly* dying in Debt considerably, his Executors renounced, and Administration with the Will annexed was granted to the Defendant *Lowen*, as principal Creditor, for about £2000, by Simple Contract, and *Bayly* was likewise indebted to several others by Simple Contract; and afterwards *Eyton* became a Bankrupt, and this Bond of £1500 was assign'd by the Commissioners to the Plaintiffs, who were his Creditors; so this Bill was brought to have the Bond delivered up to the Plaintiff, and to have an Account of *Bayly's* Personal Estate, and Satisfaction thereout, for the said £1500, several Proofs were read on the Plaintiff's Part, to prove the due Execution of the Bond, and that seemed to be out of all Doubt. *Eyton* and his Wife being likewise examined as Witnesses, by Order of Court, did both by their Depositions and Answers swear the Agreement by *Bayly* to pay or secure £4000 for the Wife's Portion.

On the other Side 'twas proved, That if this £1500 should be taken out of *Bayly's* Assets, there would not be enough to pay above 4s. 6d. in the Pound to his Creditors; so the only Question made, was, Whether the dead Daughter's Portion should survive wholly to the other Daughter, or be distributed between her and her Mother, according to the Statute? And as to this, a Difference was taken, and agreed to by the Court. That as to the Orphanage Part, which belongs to the two Daughters by the Custom of *London*, the Survivor should have the whole, even after a Division and Partition made between them; but as to the Testator's Part, devised to them, that was under the Direction of the Statute as a Legacy, and must be between the Mother and surviving Daughter accordingly.

And as to the other Point, the Court was of Opinion, that the Bond was to be looked upon as voluntary against the Creditors of *Bayly*; but my Lord said, that the Agreement to pay or secure £4000 in Consideration of the Marriage, tho' 'twere only by Parol, and by Consequence not binding within the Statute of Frauds and Perjuries, yet it was binding in Conscience, &c., and so far, as *Bayly* afterwards executed that Contract, by Payment of Part of the Money agreed upon, it was [34] an effectual Performance, and not to be set aside in a Court of Equity; and he would never call that fraudulent, which was just: But as to the £1500 Bond, you can't tack that to the Parol Agreement, so as to make it any Evidence in Writing of that Agreement, or as a Performance of it; for that appears to have been given four Years after, and without any Application of *Eyton* or his Wife: Besides, if it be intended to be in Execution of the former Agreement, 'tis natural to suppose it would have been immediately delivered only to the Obligee or his Wife, which here it was not; *Bayly* the Obligor kept it by him, it was made at the same Time with his Will, shewn to them, and after his Death found with his Will, and so he could not take it otherwise than in the Nature of a Legacy, and voluntary, and so delivered an Account to be taken of *Bayly's* Personal Estate, and that to be apply'd in the first Place towards Payment of his own Creditors; and if any Surplus remained, the Plaintiffs were to come in for a Satisfaction of their Bond, in the next Place, before the Legacies of *Bayly*; and Costs of all Sides to come out of *Bayly's* Personal Estate, he being the Occasion of this Suit. But the Plaintiffs thought there would be no Surplus at all, and so desired

till *Monday* to consider whether they would not chuse to have this Bill dismissed, rather than enter into the Account : And the *Chancellor* gave them Time accordingly.

TIPPING *versus* PIGGOT. [1711.]

What Act of a Trustee shall defeat a Trust, or destroy contingent Remainders. See 1 Ch. Cas. 49, 213 ; 2 Chan. Cas. 64, 78 ; 1 Chan. Rep. 68 ; 1 Vern. 13, 181, 440 ; 2 Vern. 133, 303, 583, 702, 754 ; 2 Salk. 680 ; 1 Lev. 237 ; 2 Vent. 350. Also the Case of *Trevor and Trevor*, ante.

In Consideration of a Marriage, and £3000 Fortune, and for settling the Lands in Question in the Name and Blood of the *Tippings*, a Settlement was made to the Use of the intended Husband for 99 Years, if he should so long live, Remainder to Trustees, during his Life, to support contingent Remainders ; Remainder to the first, and other Sons of that Marriage ; Remainders to the Heirs of the Body of the Husband, Remainder to the right Heirs of the Husband. The Marriage took Effect, and the Husband and Wife, and Trustees for Support, &c., by Fine and other Conveyances, settle these Lands to the Husband for 99 Years, if he should so long live ; Remainder to Trustees during his Life, to support contingent Remainders ; Remainder to the Wife for her Life, for her Jointure ; Remainder to the first and other Sons of that Marriage ; Remainder over to several others ; Remainder to the right Heirs of the Husband : Then the Husband and Wife die without Issue ; and this Bill was brought by the Plaintiff, Heir at Law to the Husband, to set aside that second Conveyance by the Trustees, as being made in Breach of their Trust ; and insisted, That they were Trustees, as well for the Support of the Remainder, as to the Remainder of the first and other Sons, all being contingent Remainders, and that such Conveyances ought to be set aside : And so has been the Practice of this Court, at least the Opinion of this Court, for these 20 Years ; tho' indeed Serjeant *Pemberton*, and several other eminent Conveyancers, have held, that by the Trustees concurring in any Act to prevent the Rising of the contingent Remainder, they were for ever destroyed and gone ; but that Opinion is now exploded in this Court.

[35] And the *Chancellor* held it to be so, as to the first and other Sons, who came in, and were to be considered as Purchasers under the Marriage-Settlement and Portion, and said it would be dangerous for any Trustees to make the Experiment ; for that it was most certainly a Breach of Trust, and if it should ever come in Question, he thought this Court would set aside such a Conveyance : Not but that he said the Case might possibly be so circumstanced, as that this Court would not relieve against it : But where Relief is to be given, in such Cases it is only to those who come and claim as Purchasers, as the first and other Sons ; all the Remainders after to the Heirs of the Body of the Husband, and the Remainder to his right Heirs, are merely voluntary, and not to be aided in the Court ; and so dismissed the Bill. Vide 1 Leon. 237, *Jenkins and Keymis* ; *Semble que le Portion sur Marriage extends a les Remainders coment que coient per second Venter.*

LIMONDSON *versus* SWEED. [1711.]

[S. C. sub nom. *Symondson v. Tweed*, Prec. Chan. 374.]

A specifick Performance of a *Parol Agreement* decreed, notwithstanding the Statute of *Frauds*, &c. See 1 Vern. 151, 159 ; 2 Vern. 373 ; Abr. Eq. 16, 17, 19, 20.

In this Case the Court declared, and the Counsel agreed likewise, that if a Man bring a Bill for a specifick Performance of a *Parol Agreement*, setting forth the Substance of it in his Bill, and the Defendant by his Answer confesses the Agreement, that the Court may in such Case decree an Execution thereof, notwithstanding the Statute of *Frauds* and *Perjuries*, because the Defendant confessing the Agreement, there can be no Danger of Perjury from the Contrariety of Evidence, which was the only Mischief that Statute intended to obviate ; but in the principal Cause the Defendant had not by his Answer confessed the Agreement charged in the Bill, which was only by *Parol* to settle some Lands and Houses on the Plaintiff, in Consideration of his marrying the Defendant's Daughter : And so the Bill was dismissed ; and

'twas said, in all Cases, wherever the Court had decreed a specifick Execution of a Parol Agreement, yet the same had been supported, and made out by Letters in Writing, and the particular Terms stipulated therein, as the Foundation for the Decree, otherwise the Court would never carry such an Agreement into Execution.

BRANDER *versus* ROBS. [1711.]

An *Agreement, &c.*, for a Mortgage by one before his Bankruptcy, made void, *Q.* See 1 Ch. Ca. 71; 2 Vern. 96, 97, 194, 432, and the Case of *Jacobson, &c.*, *postea*.

The Plaintiff was Assignee of Commissioners of Bankruptcy, issued out against one *Botville*, who was a Gunpowder-Maker, and had contracted with the Defendant for as much Salt-Petre as came to £224, but not having ready Money to pay for the same, proposed to make a Mortgage of an Estate he had in his own Possession, by way of Security for the Money; and in order thereunto, left with the Defendant the Title-Deeds, to get the Assignment drawn; the Defendant carried the Deeds to an Attorney, to look into the Title, and draw the Assignment, and the Attorney kept them by him for [36] some Time, and then died without having drawn the Mortgage; after which the Defendant carried the Deeds to a Scrivener, for the same Purpose; but before the Assignment was perfected, the said *Botville* became a Bankrupt: And now the Plaintiff Assignee of the Commissioners brought his Bill, to have the Deed delivered up, that so the Estate might be sold for the Satisfaction of Creditors. The Defendant by his Answer insisted upon the Matters aforesaid: His Counsel argued, that this was more than a Pledge of the Writings; that an Assignment was intended to be made, and if it had been made, this Court would not have taken it from him, without paying the Money; that its not being made, was only an accident occasioned by the Death of the Attorney, and this Court often relieves against Accidents, and so the Plaintiff ought not to have the Deeds without Payment of the Money. But the Court decreed the Deeds to be brought before the Master, and to be delivered by *Schedule* to the Plaintiff, with Costs; though no Reason was given for this Decree; *sed hoc Dur' a multis habebatur*.

ANDREWS *versus* CRADDOCK.

28 Nov. 1713. *J. G. in Court.*

Bill by *Prochein Amy*, without the Infant's Consent. See Abr. Eq. 72; 2 Vern. 711.

In this Case 'twas held by the Counsel, and agreed to by the Court, that any one may bring a Bill as *Prochein Amy* to an Infant, without his Consent, because it is at his Peril he brings it, and he is to be answerable for the Event; but none can bring a Bill in the Name of a Feme Covert, as her *Prochein Amy*, without her Consent; and if such Bill be brought, upon her Affidavit of the Matter the Bill will be dismissed.

MANFIELD *versus* DUGARD.

5 Feb. 1713. *J. G. in Court.*

See [1] Abr. Eq. 195, S. C. 1

Devises to his Wife till his Son be 21; the Son's Death at 13 determines the Wife's Interest. See 2 P. Will. 336.

In this Case a Man had by his Will in Writing devised to his Wife certain Lands, till his Son and Heir apparent should attain to the Age of 21; and when his Son should attain to the said Age, then to his Son and his Heirs, and dies: The Son lives to his Age of 13, and then dies; and the Wife supposing she had a Title to hold the Lands till such Time as he might have attained his Age of 21, continues in the Perception of the Rents and Profits of the said Lands for several Years. And this Bill was brought against her by the Heir at Law of the Son, to have an Account of the Rents and Profits from the Death of the Son; and the Wife was the Executrix likewise of her Husband; yet it not being devised during the Time for Payment of Debts, nor any Creditors, nor want of Assets appearing, it was held by the *Chancellor*, that the

Wife's Estate determined by the Death of her Son ; and that the Remainder vested presently in the Son upon the Testator's Death, and was not to expect till the Contingency of his attaining his Age of 21 should happen, for then in this Case 'twould never have vested at all, he dying before that Age, and so decreed the Wife to account for the Profits from the Time of her Son's Death : And upon a Rehearing his Lordship continued of the same Opinion, according to [37] the Distinctions taken in 3 Co. 19, *Boraston's Case* ; and 6 Co. 35, *Bishop of Bath's Case* ; but said it being a Point of Law, if they were not satisfied, they might appeal elsewhere, for the Decree being sign'd and inroll'd, 'twas now too late for him to consider of it again ; and the Rehearing was only for Matter of Costs taxed after the Decree.

EAST-INDIA COMPANY *versus* CLAVELL & al'.

[S. C. Prec. Chan. 377. Discussed, *George v. Milbanke*, 1803, 9 Ves. 193 ; *Payne v. Mortimer*, 1859, 28 L. J. Chan. 716,—4 De G. & J. 453, 455,—5 Jur. N. S. 750.]

5 May 1714. J. G. in Court.

A voluntary Settlement on a Daughter (after a Bond, &c.) made good by Matter *ex post facto*. See 2 Ch. Rep. 265 ; 1 Vern. 464 ; 1 Chan. Cas. 59, 103, 170, & 216, which seem *contra*.

On opening the Pleadings, the Cause appeared to be this : Sir *Edward Littleton* being appointed by the *East-India Company* to go as President to the Bay of *Bengal*, and to transact and manage all the Affairs of the Company there, does by Articles dated Jan. 9, 1698, for himself, his Executors and Administrators, covenant and agree with the Company and their Successors, to depart with the first Ship [which] should set Sail for that Place : and that after his Arrival there, he would faithfully, and to the utmost of his Skill and Power, transact and manage all Things in relation to the Company for their Benefit and Advantage, and would not imbezel, misapply or convert any of the Goods or Effects of the said Company to his own Use, with several other Covenants relating to his Fidelity and good Behaviour in the said Employment ; and at the same Time Sir *Edward Littleton*, together with Sir *Trencham Masters* and Mr. *Shepherd*, as his Sureties, became jointly and severally bound in a Bond of £2000 Penalty, conditioned for Performance of the said Articles ; and this Bond, like all other Bonds, bound themselves, their Heirs, Executors, and Administrators. Afterwards, Sir *Edward Littleton* being to proceed on his Voyage, by Indenture of Lease and Release 20 & 21 Jan. 1698, settled all his Estate to Trustees and their Heirs, for several Uses, and amongst the rest carves out a Term for 100 Years ; and this was declared to be upon Trust, that the Trustees should raise the Sum of £5000 as a Portion for his Daughter *Jane*, to be paid within three Months after Marriage ; and likewise makes a Provision for the Payment of his Debts, and soon after set out for *Bengal*. During the Time of his Abode there, he managed the Affairs of the Company, and had generally 2 or £300,000 of their Money in his Hands. Mr. *Clavell*, the Defendant, to whom Sir *Edward* had recommended the Care of his Daughter, some Time after Sir *Edward's* Departure, makes his Application to her in the Way of Marriage ; and she having the Copy of her Father's Settlement in her Hand, delivers it to Mr. *Clavell*, who went to Counsel to advise upon it ; and being advised that the Portion of £5000 was sufficiently secured by that Settlement, Mr. *Clavell* and the young Lady soon after married ; but no Settlement was made upon the Marriage, tho' 'twas proved that Mr. *Clavell* had an Estate of Inheritance of about £700 *per Ann.*, and a Personal Estate of a considerable Value. Some Time after the Marriage Mrs. *Clavell* died without Issue, and it being by her desired, she was buried among her Ancestors at a great Distance, which cost Mr. *Clavell* near £400. After her Death Mr. *Clavell* the Husband took out Administration to her, and brought his Bill in this Court against the Trustees, and had a Decree for Sale of [38] the 100 Years Term, and for raising and paying the £5000 Portion. Several Purchasors bid for the Estate before the Master. The *East-India Company*, from Time to Time, upon Application to the Court, obtained interlocutory Orders to put off the Sale, upon Pretence of bringing in better Purchasors ; the Reason of which was this ; Sir *Edward Littleton* had imbeziled or misapplied Goods or Effects of the Company to the Amount of £26,000, and so had forfeited his Articles and Bonds, and made himself unable to satisfy to the Company that Demand : And

the Company had before that Time, by their Agents and Factors in *Bengal*, seized all the Books and Papers of Sir *Edward*, and taken himself into Custody, where he died ; and so the Company conceiving themselves interested in the Estate, obtain'd the Orders before-mentioned for putting off the Sale, and now at last brought their Bill against Mr. *Clavell*, the Trustees, and several others, to have an Account of the Real and Personal Estate of Sir *Edward*, and that the same might in the first Place be subjected to the making good their Demands. And for the Company 'twas insisted, that the Settlement for raising £5000 for the Daughter was merely voluntary and fraudulent ; and tho' all voluntary Settlements were not fraudulent, yet this was apparently so, being made so immediately after the Articles and Bond given to the Company ; that it must be intended that Settlement was made and approved of at the same Time, tho' made to bear Date five or six Days after ; that it was to take away that which was to be the Fund for making good any Imbezilment or Misapplication of the Company's Money or Effects ; that the Company were real Creditors for a very great Sum of Money, and prior in Time to the Settlement of the Daughter ; that the Settlement was purely voluntary ; and besides, the Daughter was since dead without Issue, and no Settlement has been made upon her, and so 'twas hoped this voluntary subsequent Settlement, which was in Fraud of the prior Agreement and Articles with the Company, would not prevail.

On the other Side 'twas urged the Articles only bound the Executors or Administrators ; and tho' the Heirs are bound in the Bond, yet that should bring a Lien upon the Real Estate no farther than the Penalty of the Bond went, which was but for £2000. That there was no Pretence in the World to call that Settlement fraudulent, for tho' 'twas voluntary, yet 'twas made for very good and just Reasons ; that Sir *Edward* was going a very long and dangerous Voyage, and in all Probability might never return again ; that having only one Daughter, 'twas fit he should set his House in Order, and make some Provision for her before he went ; that it appear'd not to be fraudulent, in regard he expressly provided for the Payment of his Debts ; that this to the *East-India* Company was at that Time no Debt at all, nor is any Presumption to be allowed that he would become so indebted in order to defeat his Settlement ; that admitting the Settlement was voluntary at first, yet by an Act *ex post facto* such voluntary Settlement may become good ; and so 'twas in this Case ; that Mr. *Clavell* was drawn in and invited by this Settlement to marry the young Lady ; that he advised with Counsel beforehand, and was told 'twas effectual for the £5000 Portion ; that in Dr. *Hart's* Case in this Court, and affirmed [39] by the Lords, a Letter from the Father, promising to give his Daughter £1500 Portion, was held to be sufficient, not only to exempt it out of the Act of *Frauds and Perjuries*, but was likewise held obligatory on the Father to perform it, because the Person was thereby drawn in and invited to marry the Daughter : That in our Case Mr. *Clavell*, tho' he made no Settlement, yet he had a very good Estate, of which she would have been dowable if she had lived ; that he had expended £400 on her Funeral, to comply with her Request ; that if this Settlement was voluntary in its Creation, yet being the Motive and Inducement to Mr. *Clavell* to marry her, this had now made it valuable : And so 'tis prayed they might have the benefit of their Decree, and the Sale go on to the last and best Bidder.

Chancellor. I think the Settlement was a very reasonable, just and honest Provision, and no Colour of Fraud in it ; the Articles do not bind the Real Estate at all, and the Bond only so far as the Penalty goes, which is but £2000. So let an Account be taken of the Real Estate of Sir *Edward*, and what of his Goods and Effects came to the Hands of the Company upon the Seizure, and if that falls short of the £2000, the Deficiency must be made good in the first Place out of the Sale of these Lands, prior to the Defendant *Clavell's* Demands ; and till that Account be taken, let £2000 of the Purchase-Money be brought before the Master, and placed out at Interest to abide the Event of that Account, and the Residue to be applied to Mr. *Clavell's* Demand of £5000, and all Parties must join in the Sale ; and reserved the Consideration of Costs till the Account taken.

BONTELL *versus* MOHUN, TILDEN & al'. [1713.]

Of Devises by Implication. See 1 Vern. 22 ; 2 Vern. 451, 572, 723 ; 2 Vent. 223 ; Cro. Jac. 75 ; Moor, 635 ; Vaugh. 259, 365 ; post, 67.

The Plaintiff's Bill was to have an Account of the Personal Estate of *Anne Mohun*, the Defendant's Testatrix, and Satisfaction thereof of the Sum of £400, and likewise

to have an Account of the Rents and Profits of the Estate in Question, from the Death of the said *Anne Mohun*; and upon the Defendant's Answers and Proofs read in the Cause, the Case was this: *Anne Birch*, the Plaintiff's Grandmother, and Mother of the said *Anne Mohun*, being seised in Fee of the Estate in Question, and possessed likewise of a Personal Estate to the Value of about £2000, died intestate several Years since, after whose Death the Real Estate descended to the Plaintiff, and the said *Anne Mohun*, her Aunt, as Coheirs, and the Personal Estate came likewise between them equally, as next of Kin: The Plaintiff some Time after being sick and infirm, and intending to go to *Montpelier* in *France* for the Recovery of her Health, releases and conveys her Moiety of the Estate in Question to her Aunt and her Heirs, in Consideration of £400 secured to her by her Aunt's Bond; but having a great Confidence in her Aunt, she leaves this Bond with her, and then goes to *France*: Afterwards *Anne Mohun*, by Indenture of Lease and Release, 25 & 26 of *March* 1700, conveys the Estate in Question to one *Pepper* and his Heirs, to the Use of himself, his Executors and Administrators, for 99 Years, if the said *Anne Mohun*, and the Plaintiff *Bontell* her Niece, or either [40] of them, should so long live, Remainder to the Use of herself and her Heirs, and declares the Trust of the Term to be, that the said *Anne Mohun* should receive the Rents and Profits thereof for so many Years of the Term as she should live: Then comes a Proviso, That if the said *Anne Mohun*, her Executors or Administrators, should pay the Plaintiff the Sum of £400, secured to her by way of Bond, and likewise by Indenture of Release, even bearing Date herewith, &c., as the Will expressly describes it to be: then after, by another Clause in the Will, she devises the Estate in Question to the Defendant *Henry Mohun* (who was her eldest Son and Heir) and the Heirs of his Body after the Death of the Plaintiff (the said *Elizabeth Bontell*) with Remainder over, and dies. The Defendant *Henry Mohun* enters, and suffers a Common Recovery of the Estate, and limits the Uses to himself and his Heirs: And now the Plaintiff brought this Bill to have Satisfaction of the £400 and Interest, and also an Account of the Rents and Profits of his said Real Estate from the Death of his Aunt: And *Henry Mohun* brought likewise a Cross Bill to be let into the Redemption of the Term upon Payment of the £400 and Interest; and the single Question was, Whether the Plaintiff was to have the Estate for Life by Virtue of the Devise to her for Life by Implication, or whether that Clause meant no more than only to continue it a Security to her for the £400 and Interest? The Plaintiff had one Witness to prove that her Aunt had declared she should have the Estate for Life.

And 'twas argued for her, that this Devise gave her an Estate for Life by Implication, and the Implication to her was necessary, being devised to the Defendant, who was her Son and Heir, but not to take Place till after the Plaintiff's Death, and consequently the Plaintiff must have it during her Life, because no one else could; that the 99 Years Term was a Security for the £400, for if that was determinable upon the Death of her Aunt, she had had no manner of Benefit of that Term; that tho' the Proviso had made it in the Nature of a Mortgage, redeemable upon the Payment of the £400 and Interest, yet that was not an absolute compleat Security for the Money; that this Devise to her for Life could not be taken to be of the same Nature with the Term, or as a farther Security for the Money, because she had in the first part of her Will expressly devised the £400 to the Plaintiff, and so had in a Manner paid or exonerated her Real Estate of that; and tho' she took Notice that it was the same £400 secured to her by Bond, and likewise by the 99 Years Term, yet that was only to prevent her claiming two several sums of £400, and so the Devise after of her Real Estate was absolute and independent, and must give her an Estate for Life by necessary Implication.

On the other Side 'twas argued, that this Devise to her by Implication could be intended only to be of the same Nature with the Term, or as a kind of a farther Security to her for the Money secured thereby; that as the Term was redeemable by the Payment of £400 and Interest, so the Estate by Implication must be of the same Nature too; that as she had the Term for her Life, 'twas but natural, when she came to dispose of the Inheritance to her Son, to give it him after the Plaintiff's Death, and proves only that she carried the same throughout the [41] Will, and that the Plaintiff should be secure of her £400, and the Estate not to be taken from her till that was paid; that the Will was made on the same Day with the Deed, and expressly referred to the £400 Security by that Deed, and so her giving that Estate to her Son after the Plaintiff's Death could not be intended in Pursuance and Confirmation of the Estate the Plaintiff had before, which would have continued during her Life, and shews only that she

would not seem to do any thing in Derogation or Prejudice of that Estate ; and Mr. *Gilbert* argued that even at Law the Books are, that the *Implication* in a Devise to disinherit the Heir must be a necessary Implication ; that if the Devise had been to the Plaintiff at the Death of a Stranger, this would not have carried it to the Plaintiff for Life, because no necessary Implication, but that it might descend to the Heir at Law in the mean Time ; that upon the Circumstances of this Case it might be reasonably intended no other Estate than what she had before the Term ; that as that was for her Life, it was natural and reasonable not to give away the Estate till after her Death ; that as the Term was redeemable, so must this Estate too, because it might be intended to be no other, and so no such necessary Implication of an absolute Estate in the Land, as is allowed in the Books of Law, to the Disinheritance of the Heir.

And the *Chancellor* was of the same Opinion, and especially for that Last Reason, that there was no necessary Implication, &c., and so decreed the Plaintiff her £400 and Interest, and dismissed her Bill as to the Account of the Rents and Profits, but without Costs, for the Colour she had to make such Demand.

ANDREWS *versus* BROWN & Ux'. [1713.]

[S. C. Prec. Chan. 385. Disapproved, *Jones v. Scott*, 1831, 1 Russ. & M. 270.]

What will bring a Debt out of the Statute of Limitations.

In this Case 'twas held clearly, that if a Man has a Debt due by Note to him, or a Book-Debt, and has made no Demand of it, so that he is barred by the Statute of Limitations ; yet, if the Debtor after the six Years put out an Advertisement, that all Persons who have any Debts owing to them from him, will repair to such a Place, they shall be paid ; this, tho' it were only general, and so may be intended of legal subsisting Debts only, yet amounts to such an Acknowledgment of that Debt which was barred, as will revive the Right, and bring it out of the Statute again ; so if in that Case the Debtor has made his Will, and directed that all his Debts shall be paid, or made any Provision for the Payment of his Debts in general (see 2 P. Will. 373), this likewise would revive such a Debt, and bring it out of the Statute, so that his Executors would be liable to the Payment of that Debt among the rest ; and 'twas said it had been ruled so oftentimes, and that a little Matter would bring it out of the Statute, being to revive and restore a Right : *A fortiori*, if after six Years, the Debtor, upon Application of that particular Debt, acknowledges it, and promises Payment ; this revives the Debt, and brings it out of the Statute, because as the Note itself was at first but an Evidence of the Debt, so that being barred, this Acknowledgment and Promise is a new Evidence of the Debt, and being [42] proved, will maintain an *Assumpsit* for Recovery of it, and in the principal Case the Plaintiff recovered upon a Note of £300 of *Valentine Duncombe*, Brother of the late Sir *Charles Duncombe*, to whom the Defendant's Wife was Executrix, given in 1688, payable to one or Bearer, and the Note had been handed from one to another, till at last *Valentine* became a Bankrupt, went to *France*, and long after the six Years, and Death of *Valentine*, Sir *Charles* his Executor recovering a Debt of five or six thousand Pounds, which was due to his Brother, put out an Advertisement, for all Persons who had Debts owing from his Brother, to come to him and make them out, they would be paid ; and the Plaintiff having this Note, prosecuted for the Recovery of the Money soon after the Advertisement, but could not bring it to a Hearing till now ; he had a Decree for the £300 and Interest from the Time of the Bill brought, though my Lord said, this Bill was in the Nature of an *Indeb. Assumpsit* at Law.

Another Point in this Case was, that after the Bill and Answer came in, and a Replication filed, several Witnesses were examined, and their Depositions taken ; then the Plaintiff moved to withdraw his Replication, and took Exceptions to the Answer, and they replied and examined other Witnesses ; and now on the Hearing would read the first Depositions ; but the other Side insisting they could not be read, by Reason the Replication must be withdrawn, and so as taken without any Replication, they were irregular, and ought to be suppress'd ; and accordingly my Lord said they ought to be suppress'd, for that, as he said, they should have examined them anew after the second Answer came in, and Replication filed, or have moved the Court to have Liberty to make Use of them at the Hearing. (See 1 Vern. 253 ; 2 Vern. 472 ;

1 Chanc. C. 25, 228 ; 2 Chanc. C. 75, 79 ; and *Spencer versus Allen, Trin.* 1718. See above.)

A third Point in this Case was, wherein the Court and Bar agreed, that where Interrogatories are exhibited in the Examiner's Office, and Witnesses examined thereon, that either Part may, without Application to the Court, or Order for that Purpose, exhibit one or more Interrogatories, or a new Set of Interrogatories, for farther Examination of the same or other Witnesses ; but where the Commission is taken out for Examination, there no new Interrogatory or Set of Interrogatories can be exhibited without Motion or Order of the Court. And the Reason of the Difference was said to be, because the Examiner is an Officer of Credit and sworn, and so presumed to be impartial, and that he will not disclose the Depositions to either Party ; but the Commissioners are private Persons and not sworn, and are called the Plaintiff's Commissioners or Defendant's Commissioners, and so without Leave of the Court no new Interrogatories can be added before them.

[43] HUNT *versus* HUNT & Ux' & al'. [1713.]

On Breach of a Condition or Proviso in a Settlement, a Re-conveyance decreed. See 1 Vern. 402, 430 ; 2 Mod. 36 ; 1 Vent. 199 ; 2 Vern. 359, 478 ; Abr. Eq. 106, &c.

The Defendant was Son and Heir apparent to the Plaintiff, who had an Estate of about £200 *per Ann.*, and the Son Defendant, being about to marry *Elizabeth Wright*, who was not above 16 Years of Age, the Plaintiff by Lease and Release, 14 and 15 of October 1708, settles and conveys his Estate to Trustees and their Heirs, as to Part to the Use of himself for Life ; Remainder both as to that Part after his Death, and as to the other Part in Possession, to the Use of the Defendant for Life ; Remainder to the intended Wife for Life, for her Jointure, Remainder to the first and other Sons, &c., in the usual Form ; and in the Release was a Proviso, that if the Marriage did not take Effect, and *Elizabeth* should not, when she came of Age, by Fine or otherwise, join in charging an Estate she was then intitled to, of about £250 *per Ann.*, with the Sum of £2000 to be paid to the Plaintiff ; then the Indentures of Lease and Release and Settlement were to be void absolutely, and to all Intents and Purposes : The Marriage took Effect, and about Half a Year ago the Wife attained her Age of 21, but finding her own Estate of more Value than that settled upon her in Jointure, she and her Husband refused to join in charging it with the £2000, whereupon this Bill was brought against them, and the Trustees to have a Re-conveyance.

'Twas insisted for the Defendants that there needed none, because by the Proviso on the Defendant's refusal, the Estate thereby limited to them was to cease and be void ; but the Court thought that not sufficient without a Re-conveyance, it being in the Case of a Freehold.

Then 'twas insisted for the Plaintiff, and the Bill was for that Purpose likewise, that he might have an Account and Satisfaction for the Mesne Profits received by Defendants from the Time of the Settlement, and 'twas said, that by the Proviso of the Release the Estate being to cease, and be void on the Defendant's Refusal, the Plaintiff ought to be restored to all Benefits and Advantages, which thereof had been made, and consequently to the Rents and Profits received by Defendants.

But the *Lord Chancellor* decreed a Re-conveyance, and an Account of the Rents and Profits only from the Defendant's Refusal after his Wife came of Age, and no Costs on either side, and said that it was no Condition precedent, but subsequent to the vesting the Estate in the Defendants.

[44] JENNOR *versus* HARPER. [1713.]

See 1 P. Will. 247, S. C.

A charitable Devise by a Parol Codicil. *Quære* if good, where Equity will supply a Defect, in the Appointment of a Charity. See Abr. Eq. 97, 98 ; 2 Vern. 453, 597 ; 1 Chanc. C. 134 ; 1 Chanc. R. 91 ; 1 Salk. 163.

One *Jennor* made his Will in Writing some time in the Year 1651, and afterwards, the 5th of December in the same Year, makes a Codicil in Writing, and the same Day makes another Nuncupative one (on which the present Question arose), and thereby devises out of his Lands and Estate, in such a Place, £20 *per Ann.* for the Erection of a School, and Maintenance of the School-Master for ever. This Nuncupative Schedule

was after his Death, put into Writing, and proved as such by three Witnesses. The School was built and a School-Master put in, and continued for several Years by the Executors of *Jennor*; but after the Heir at Law refusing to continue the Payment, no School had been there kept for about 30 Years past: But some Time since a Commission for charitable Uses was taken out, and the Commissioners decreed the Devise good, and the Heir at Law to pay the £20 *per Ann.* according to the Nuncupative Schedule; and now upon Exceptions to that Decree, the Question was, whether this were a good Devise.

'Twas urged for the Charity, that this, though 'twere only a Parol Devise, yet 'twas a good Appointment within the Statute of 43 *Eliz.*, and that that Act made no Difference between an Appointment by Parol and an Appointment by Writing; and that this being made before the Statute of Frauds and Perjuries, tho' 'twere only by Parol, and so not good within the 22 *Henry VIII.*, was yet a good Appointment within the 43 *Eliz.*, which being subsequent in Time had repealed the former Statute as to this, and that a Devise by Tenant Tail to a Charity, though not good against the Issue upon the Statute *de Donis*, yet has been several Times held good against him as an Appointment by the 43 *Eliz.*, which has abrogated that Act too as to charitable Devises. But on the other Side 'twas urged, that these Devises to Charities, as well as others, must be governed by some Rules; that by the Civil Law, if a Man devises a Charity out of his Personal Estate, and Legacies thereout likewise to others, and the Personal Estate fell short to answer all, the Charity should be preferred: but in this Court that Rule will not hold, but the Charity must abate in Proportion with the rest: that since the Statute of Frauds, if a Man by his Will gave Lands to a Charity, yet if that Will was carried but imperfectly into Execution, and so was not good as a Will, it has been held not to be good as an Appointment. (See 2 Vern. 597; 1 Salk. 163, S. P.) So was *Dr. Johnson's* Case; where there were but two Witnesses to a Will. Indeed, if a Man should make a Writing on Purpose to Found a Charity, it might have another Construction; but when he makes a Will, and intends it to other Purposes, though he thereby appoints a Charity, yet if the Will be defective as a Will, it shall not operate as an Appointment to support the Charity; that it was a long Time doubted, whether a Will in Writing, though good in all Circumstances, should operate as an Appointment against the Issue in Tail; and if that was so much doubted to support a Nuncu-[45]-pative Devise of Lands to a Charity would be carrying it still much farther; and Mr. *Williams* mention'd a Case in Comb. 28, where a Man sent for a Scrivener to make his Will, and directed him to give his Lands to such an one and his Heirs, upon Condition; the Scrivener wrote the Will, but before he had wrote the Condition the Testator died; and this was adjudged a void Will, for an absolute Devise it could not be, because the Condition was mention'd before the Man's Death: That the Reason a Devise by a Tenant in Tail to charitable Uses shall be good against the Issue, is, because the Testator had it in his Power by Fine and Recovery to bar the Issue and Remainder-Men; and tho' he did not live to perform that Ceremony, yet as a Will, being perfect and compleat by the 43 *Eliz.*, it might work as an Appointment; for at Common Law there were no Fines or Recoveries, or Estates Tail, and therefore that Statute was therein a Restoring of the Common Law; so a Deed of Bargain and Sale for charitable Uses, tho' not good by 27 *H. 8* for want of Inrolment, yet by the other Act 'twill be good as an Appointment, for that restores the Common Law; but no Resolution has ever gone so far as to support a Parol Devise to a Charity out of Lands, because being Defective as a Will, which was the Manner of Conveyance he intended to pass it by, it can have no Effect as an Appointment, which he did not intend: And my *Lord Chancellor* seemed to be of the same Opinion, but said he would take Time to consider of it till the first Day of Causes after the Term, and in the mean Time recommended it to the Plaintiffs to make good the Charity; and afterwards decreed it not good as an Appointment.

Sir CHARLES ORBY & al' *versus* Lord MOHUN. [April 15, 1706.]

2 Vern. 531, 542 [S. C.]; 3 Chan. Rep. p. 102, &c., of reserving ancient and accustomed Rents. See 6 Mod. 59.—Note: Several Errors of this Case in 3 Chan. Rep. may be corrected by this Report.

In this Case the *Lord Keeper* desired the Assistance of the two Chief Justices; and the Lord Chief Justice *Trevor* began to dissect the Question thus: This Case does arise

upon the Settlement of *Charles Earl of Macclesfield*, who by Lease and Release, 23d and 24th of April 1683, settled all his Lands in *Cheshire* on *Sir Henry Hobart* and *Robert Mason, Esq.* and their Heirs; To the End that a common Recovery should be suffered to the Use of himself for 99 Years, if he so long lived; Remainder as to Part of the Premises to the Use of *William Harbord* and *Francis Charleton, Esq.* for 300 Years, in Trust, to raise £12,000 to be disposed of as the said *Earl Charles* shall direct; Remainder of the whole to *Charles Lord Brandon* his Eldest Son, for 99 Years, if he so long lived; Remainder to the first, second, third, &c. Sons of that Marriage, viz. *Lord Brandon* with *Mrs. Mason*, in Tail-Male; Remainder to first, second, third, &c. Sons of the *Lord Brandon*, by any other Wife in Tail-Male; Remainder to *Filton Gerard*, second Son of *Earl Charles*, for 99 Years, if he so long lived; Remainder to his first, second, third, &c., Sons in Tail; Remainder to *Earl Charles's* Heirs and Assigns: Then follows a Power to *Earl Charles*, *Lord Charles*, and *Filton*, severally, as they shall come into Possession, to make Leases for three Lives for 21 Years, or any other Number of Years determinable on three Lives, in this [46] Manner, viz. 1st, Of all or any of the Lands, anciently and accustomably demised, whereof Fines have been usually taken, reserving the ancient, usual and accustomed Rents, or more. 2dly, Of all the other Lands, reserving the most improved Rents that can be got, and that the Tenants should seal and execute Counter-Parts of their Leases; and at the latter End of the Deed is a Declaration, that till suffering and perfecting the Recoveries, *Sir Henry Hobart*, and *Richard Mason*, and their Heirs should stand, and be seised of the Premises in Trust for such Person and Persons, and for such Estate and Estates as were therein before limited and declared. No Recovery was ever suffered, and the Estate in Law is vested in *Sir John Hobart*, the Heir of *Sir Henry Hobart*, who survived *Richard Mason*. *Charles Lord Brandon* was attainted of High Treason, *Michaelmas* 1685, against *K. Charles II.* *Earl Charles*, in *November* 1685, reciting his Power to dispose of £12,000 by Indenture, limits £8000 Part thereof, to his Daughter the *Lady Gerard*, and £4000 to his Son *Filton*, immediately after his Death. In 1687 the *Lord Brandon* obtained a Pardon, and a Writ of Error from *King James* the Second; but both being defective (being for Treason against *King James*, and not against *King Charles*, as his Attainder was), yet Judgment for Reversal of his Attainders was pronounced, but not enter'd. In 1693 *Earl Charles* died, and the *Lord Charles Brandon* entered, and took the Profits himself (not permitting the Trustees *Hobart* and *Charleton* to raise the £12,000), and in *July* 1701 made his Will, *inter al'* (in these Words): *My Will is, That if I should happen to die without Issue Male, I give, grant, devise, and bequeath all and every my Manors, Messuages, &c. in Possession, Reversion or Remainder, to Charles Lord Mohun, his Heirs and Assigns for ever*; and died the 5th of *November* following, without Issue: After his Death *Earl Filton* entered, and being desirous to make Leases for the Benefit of his Family, being seised with a sudden Sickness when he had no Rent-Rolls or old Leases to guide himself, as to the Reservation of the old Rents (all or most of them being in my *Lord Mohun's* Hands, who refused to deliver them), made two Leases 21 *December* 1702, one Lease of one third Part of the Estate not anciently and accustomably letten, reserving thereon the best improved Rent, and the other of the other Parts, and in both takes Notice of this Power generally; and that pursuant thereto, and to execute the said Power, he demises all the Lands in the said Settlement to *Sir Charles Orby* and *Mr. Orby*, severally and not jointly, reserving the several ancient and accustom'd Rents, but does not specify what those Rents are; and soon after *Earl Filton* died.

Lord Chief Justice Trevor. I am to give my Opinion on this Case, and to that End must take Notice, that there are two Points insisted on by the Counsel for the Plaintiffs. First, as to the £8000 the Principal cannot be disputed; for my *Lady Gerard* made *Lord Charles* her Executor, and he made the *Lord Mohun* his Executor; and the only Question as to this is, whether it ought to carry Interest? And I think, upon the Power *Earl Charles* had of raising the £12,000 it ought to carry Interest; for the Land was charged with it, and the Term vested in Trustees for the raising it, which they might have [47] done by mortgaging or selling the Term; and it was to be paid at the Time appointed, which in this Case was immediately after his Death. The Term is in Nature of a Mortgage, and tho' not mortgaged, or any Sale made thereof, yet that is not material; for it was payable at the Time of his Death, and so must carry Interest from that Time being then due, and must remain as a Mortgage in their or any other Hands: But I conceive a Deduction of Interest must be made from the Time *Filton*

had the Estate in his own Hands, as to the £4000, for he must not have Interest, because he received the Profits himself of the Estate, out of which it was to be paid.

The second and main Question is touching the Leases, Whether they are well made, in Pursuance of the Power in the Settlement ? As to the first of these Leases I shall not speak much, because it seems to be given up by the Counsel for the Plaintiff ; and that a Reservation of the most improved Rents is so uncertain, that they will not at the Bar contend for it.

As to the other Lease, in Case a Recovery had been suffered, and thereby a Power had come to him according to the Settlement, would the Lease be good at Law ? That is the Question before us : And Sir *Charles Orby's* Counsel laid down as a Foundation, that altho' it be a Lease by one Deed of all the Lands that were anciently and accustomedly demised, and also of all the other Lands that were not, that is to say, a Demise of all the Lands within the Power ; if that should be construed as one Lease, and one intire Reservation, it must be void as to the Remainder-Man ; yet the Rents issuing out of all must be apportioned, and so 'twould be in Nature of several Leases, in Construction of Law ; because if *reddendo singula singulis*, the ancient usual and accustomed Rents shall be construed to be reserved for the Lands not anciently demised, 'tis void only as to them. But I am of Opinion 'tis void as to the Remainder-Man, for all the Lands ; and it is to be considered in what Manner the Rents are reserved ; the Words of the Lease are, *reserving therefore the several ancient, respective and accustomed Rents*, and the Word (*therefore*) goes to all the Lands ; as to the Case of *Fanfield and Rogers*, Cro. El. 340, and *Winter's* Case, Dyer, 308, which is the same in Effect ; there the Devise was of all the Demesne Lands, and Site of the Manor, *ac etiam totum illud Manerium de Chansfield, ac omnia Terras & Tenement' eidem Manerio Spectan', habend'* the said Site and Demesnes, and also the said Manor and Premises ; reserving or yielding for the said Site or Demesnes one Sum, and for the Residue another. These don't come up to our Case, nor doth our Case come up to them, for *reserving therefore* is for the whole ; but say they, it afterwards comes and says, *the several ancient respective and accustomed Rents payable, &c.* That might do, if it might be construed payable out of any Part, when reserved out of the whole ; but in *Knight's* Case, 5 Coke, 'tis resolved, that what comes after the Reservation shall not sever it ; and it was in that Case ruled, that what comes after the *Videlicet*, was but a Description of the Value. I mention this only because I am doubtful whether it can make it several, as this Case is : But I deliver no Opinion as to that, because I go upon another [48] Reason ; and that taking it to be even a several Reservation, I am of Opinion it is a void Lease. In the first Place, I consider the Reservation of Rent is in general Terms, without ascertaining any Rent ; and it has been argued at the Bar that it is a good Reservation, because it is certain by Reference or Relation to a Certainty, & *id certum est quod certum reddi potest*. Now I agree the Argument will hold to some Purposes, and such a Lease may be good when made by a Tenant in Fee-Simple, because, by making out what the ancient Rent was, he may recover the same, and may distrain and avow for the ancient Rent ; and as such Lease may be good, when it is made by a Tenant in Fee-Simple, so in like manner it may be not good, and the Reservation thereon void ; for if such Tenant in Fee can't set forth the ancient Rent, or if he can set it forth, yet it will be void, if he can't prove what the ancient Rent is, for he must make out that 'tis the ancient Rent : Now here this Lease was not made by him that was Master of the whole Estate, and therefore it will differ very much from what may be made by a Tenant in Fee ; for in Case of the Tenant in Fee the Lease will be good, and the Reservation good or void, according to the Proofs he can make of the ancient Rent : But in this Case there must be such a Reservation as is effectual to all Intents and Purposes, and must not by any Means be uncertain ; and by this Lease the Remainder-Man possibly may or may not be able to ascertain and prove what the ancient Rent was, or aver that such a Sum as he avows for is the ancient Rent reserved ; so that he is under a Necessity of doing all these Things ; and if he fails in any one of them, he can't recover his Rent, and it may not be in his Power to do it, for it depends upon Evidence, which is uncertain, and upon a Matter of Fact, which is also uncertain ; and it may be the Rents anciently reserved were not the same Rents at all Times, but that sometimes greater, and sometimes lesser Rents were reserved ; and this Power is over Lands where Fines have been taken, and consequently the Rent must be more or less according to the Greatness or Smallness of the Fines ; and no doubt on the Trial the Tenant may shew, that another Rent than what the Remainder-Man avows for was

anciently reserved, and so nonsuit him upon the Evidence as often as he shall think fit to contest it, whereby he may come to lose his Rent. And this is the first Reason I go upon, That because of the Generality and Uncertainty of the Reservation, this Lease cannot be good against a Remainder-Man.

My Lord Mohun's Counsel cited for their first Authority the Case of *Owen and Ap-Rice*, Cro. Car. 94, which is very imperfectly reported there : For which Reason Mr. Attorney General got a Copy of the Record, which I have seen, and find, that the Reason given in the Record seems to be a Mistake ; for 'tis said to be a Lease of three Manors, usually let at £32 *per Annum*, wherein the Bishop reserved the usual and accustomed yearly Rents, and the other Rents and Services, at the Days and Times usually accustomed ; and because he does not shew any Rent in certain, the Lease was held void. Now that was not the only Reason ; for my Lord Chief Justice Vaughan, in *Threadneedle* and [49] *Linham's Case*, 1 Mod. 203, mentions another Reason, that is, that whereas there were three Manors usually let, the Lease was but of two, for there is an Exception of one of them by the Record itself ; it should seem to me that they went on both these Reasons (see 2 Mod. 57 ; 3 Keb. 380 ; Stat. 1 Eliz. c. 19, Sect. 26). The Case in Truth was a Lease of two Manors, excepting the third under the antient and accustom'd Rent, not specifying any ; now the three Manors had been usually lett at £32 *per Ann.*, therefore taking both these Reasons together, the Lease was certainly void, because there never was any antient Rent, for two, but for three Manors ; for if there had been £32 reserved for the two Manors, that had been undoubtedly good : And because I conceive that they did not go in that Case upon either of these Reasons singly, I think that Case can be of no Authority, nor is it of any Weight with me for my Opinion herein,

The Counsel on the other Side cited the Case of *Lawson and Piggot*, which was on a Power reserved by a Settlement, by Mr. Venables of Cheshire, to make Leases of Lands antiently demised, reserving at least 12s. for every Cheshire Acre, and thereupon a Lease was made by him of the Lands antiently demised, reserving all the Rent intended to be reserved ; the Case came to be tried at the King's Bench, where the tenant who was Plaintiff recovered, notwithstanding the Reservation was in such general Terms, and both the Chief Justices Holt and Treby agreed it was a good Lease, and gave their Opinion accordingly ; but that does not come up to this Case ; for the Reservation by the Power intended may be ascertained, at least by every Cheshire Acre ; 'tis known what a Cheshire Acre is, and by Admeasurements may at all Times be ascertained, and depends not upon uncertain Evidence. There is another Thing, in my Opinion in this Case, which carries a great deal of Weight with me, and that is, though this be but one Deed, it must be construed as the Plaintiff's Counsel would have it, to be several distinct Leases, under such distinct Rents, as formerly all the antiently demised Lands were usually let at severally, under several distinct Rents : And it must be considered that 'tis a great Estate, *et non constat*, how many Manors are contained therein ; so that the Remainder-Man (for I must have Recourse to my former Argument) must in his Avowry aver what Lands were particularly demised upon that Lease, or otherwise his Avowry will not serve him ; for if he should declare for more or less, either of these two Mistakes will destroy it ; because that it is a several Lease, so that it seems to be at a mighty great Uncertainty, and to be a Lease and Reservation, directly contrary to what the Power meant, and not any ways made for the Advantage of the Remainder-Man, as the Power, by providing that Counter-Parts should be sealed by the Tenants seems to intend ; for by that, it must be inferred, that it was so provided, to the End the Remainder-Man should know what certain Rents were reserved, and that too upon what certain Lands in each Demise. Now the Demise may amount to 20 several Leases, and there is but one Counter-Part for all, so that he can't by any manner of Probability, say it may be impossible for him to make out the several Rents and Lands : For first he must have all the antient Leases, which can't be presumed ; for when the Leases are expired, [50] the Counter-Parts are usually given up, and not regarded, and so may be lost ; and therefore the Remainder-Man would be put to infinite Uncertainty and Inconveniency ; and it can't be presumed, that by this Settlement 'twas intended he should be liable to any such Obstacles, but on the contrary that he should not meet with any of them, and therefore it prudently foresaw the Inconvenience, and provided a Remedy against it, that there should be a Certainty by Counter-Parts of every several Lease, and in such Case he would be enabled to come at his Rent ; but here is no more than one Counter-Part for all, whereas there may be 20 several Leases, and not one Rent for any of them ascertained, so that he had as good

as none, since it can be of no Account at all to him. One Thing more I must take Notice of which has been offered, and that is, the Plaintiff's Counsel say, that if in this Lease there had been a particular Rent reserved, it would not avoid any of the Inconveniencies I have mentioned, nor serve the Remainder-Man to any Purpose; for tho' there be an antient Rent reserved in certain, he must aver that it is an antient Rent. But I think the Remainder-Man need only aver that it is the antient Rent or more, and that is enough for him in that Case; but I must also shew, that there is a vast Difference where a particular Rent in certain is reserved, and where not; for in this Case he must not only aver it to be the antient Rent, but also prove it to be so; and if the Tenant should prove another antient Rent, that will not make the Lease void, but bar the Plaintiff in the Avowry; but in the Case of a particular Reservation, he must truly aver the same to be the antient Rent; yet where he shews the particular Rent under the Tenant's own Hand, it is incumbent on the Tenant to prove that it was not the antient Rent, and if he should not so prove it, it will be presumed for the Plaintiff; and if he should, then the Consequence would be that he will thereby avoid the Lease; which is absurd to think that any Tenant will endeavour, when it is made for his Benefit, and if not the Rent, yet the Land in that Case would be recovered, but in this Case neither. So that there is a great Difference between those two Cases; in the one he must not only aver that it is the antient Rent, but prove it to be so; and in the other he need only aver it to be antient Rent or more, and shew the Counter-Part, and the Tenant, if he will, must make the Proof (for it lies on him) to the contrary, which, if he should, would avoid his own Lease; and so 'tis every Way better for the Remainder-Man to have a particular Demise, and a particular Reservation. Upon the whole, I think this Lease not agreeable to the Intention of the Settlement, and so it can't be good at Law.

Holt, Chief Justice. The Case has been truly stated and open'd at large by my Brother *Trevor*, and I agree in the Point of the Interest of the £8000 to be paid from the Time of the Death of the Testator, for then the Money is due; 'tis a Charge commencing then, and he that takes the Profits must pay the Interest; and there ought to be a Deduction for Interest all that Time that *Filton* enjoyed the Lands, because he had the Profits that should have paid himself the Interest, and therefore he must take it by way of Retainer; but as to the Lease, I'm of Opinion that 'tis a good Lease for all the Lands antiently and accustomably let-[51]-ten; for the rest the Plaintiff's Counsel do not contend; The Case is upon a Settlement made, wherein there is a *Power for the Tenant for Life to make Leases of Lands antiently letten upon Fines taken, reserving the antient and accustomable Rents*; and a Lease of those Lands is made in the very Words of the Settlement. And first, I will consider whether a Lease made by such a Power be good, reserving and rendering Rent in this Manner; and in order thereto, I will secondly (though it does not go directly to the Matter in Dispute, but for the Good of Posterity, and which may give more Light hereafter) explain what is meant by these Words in a Settlement or Lease, &c., *antient and accustomable Rent*. Thirdly, I will consider where Lands antiently demised severally, and Lands not antiently demised severally, or altogether compiled in one Deed, whether that be not as well as if they had been demised by several Deeds, and first, considering the Power, 'tis thereby said *yielding the antient and accustomable Rent*, and 'tis not denied, but that the Power is certain: Nor will any Body say that a Reservation, pursuing the very Words of the Power, is not as certain as the Power? If not, I am sure the Power itself must be void; and if it be not uncertain in the Power, I am sure it can't be so in the Reservation; for the same Words must have the same Sense in both; and general Words, tho' they don't refer to any certain Particular, are sufficient; and so is the Case of *Ameridith*, cited 9 Co. 29, in the *Abbot of Strata Marcella's* Case, and indeed is the very Case in Point. King *Henry VIII.* being seised in Fee of the Manor of *Stepenham* and Hundred of *Coleridge* in the County of *Devon*, late Parcel of the Possessions of *Margaret*, Countess of *Sarum* (*inter alia*) grants the same to his Queen *Catherine* for Life, and by another Patent granted to her for Life, to have in the said Manor and Hundred *bona & catalla felonum, &c. Fines, &c. Royal Fishes, &c. Annum Diem & Vast'*, with many other Royal Privileges and Exemptions, and afterwards the same came by Descent to Queen *Mary*, who in the first Year of her Reign granted the same Manor and Hundred to the Earl of *Huntingdon* and his Wife, and that they within the said Manor and Hundred should have *Tot talia, tanta ead' & hujusmodi Libertates, Privilegia, Franchisas, Jurisdictiones, &c. quot qualia quanta, &c. quæ pred' Comitissa Sarum aut aliquis vel aliqui Premissa aut aliq' inde Parcellam ante habentes possidentes aut Seisiti inde existunt unq' habuer' tenuer' aut gavisi fuer' &c.*

infra Premissa, &c. ratione vel preteritu alicujus Chartæ Doni seu Concessionis seu aliquarum Literarum Paten', &c. in Tail Male, the Remainders over in Fee. The Question was, if the Patentee should have all the Franchises which were granted as aforesaid to Queen Catherine; and there was the same Objection, that the Reference was general and too uncertain; but the whole Court of *Exchequer* resolved it was certain by the Reference to the Charter of Queen Catherine; tho' it did not refer to the Charter, but by general Words (*prout aliquis seu aliqui, &c.*) and that such general Reference was as much in Law, as if the Letters Patent had been all recited therein; Now if such a Grant was good in the Queen's Case, much more shall it be good between Subject and Subject; and it would be a great deal harder to construe it void in this Case than in the other.

[52] Secondly, It is a good Lease for this Reason, that by this Reservation the Rents are as certain as they can be; and 'tis not the reserving a Sum certain that is requisite to make it certain; for even upon a certain Sum, or a particular Rent reserved, it must be mentioned to be the antient and accustomable Rent or more; it is not what is reserved, as to the Sum that is requisite; but that it be the antient Rent or more: So that the bare Reservation of a Sum only does not make it good. In *Whillock's Case*, 8 Co. 69 b, there is the Pleading: And though he may take his Remedy by Debt or Avowal, yet 'tis plain in Avowry the Tenant must aver that it is the antient Rent, unless the Defendant will take upon him to aver the same; so that there will be no such Hazard as 'tis pretended; and therefore I am of Opinion that a Reservation by such general Words is good. My Lord Chief Justice *Trevor* agrees with me, that if it had been made by Tenant in Fee-Simple, such a Lease, with such a Reservation might be good; if in one Case, I don't see why it should not in the other; but I take it, that he must aver the Sum he declares for to be the antient Rent in both Cases. Sir *John Mollins's Case*, 6 Co. 6 a, is a Case in Point, for there *Tenendum de nobis, &c. per Servitia inde debiti & de Jure Consueti*, must be made good by Averment, as in this Case. There is an Objection made that it will be troublesome and inconvenient to him in Remainder; I don't see how; and if it were, he ought to take the Estate as it was intended him. But 'tis said he will or may be at a great Loss to find out and prove what was the antient Rent: I would know who can do it better than he, to whom all the Counter-Parts, Rent-Rolls, and Evidence of the whole Estate must come, together with the Land, and all the Writings are all of Course in his Hands, so that the Trouble, if any there be, can't signify any thing; no Body can know so well as himself; and if he will distrain, he must avow and aver, and may easily give Evidence what was the antient and accustomable Rents. I take the Reason of *Owen and Ap-Rees Case*, Cro. Car. 94, to be clearly with me; 'tis said not to be intelligibly reported by Mr. Justice *Cro.* But that was not his Fault; for 'tis mistaken in the transcribing only, because he wrote a very ill Hand: Mr. *Attorney* has got a Copy of the Record, and the Case was this: There were four Manors usually let at £32 yearly, and the Bishop Leases three of them rendering the antient Rent; now that was nothing, and so not good, for no such antient Rent had been reserved for the three Manors at £32, and it could not be helped by Apportionment, but it had been good by reserving it in this Manner, *viz.* rendering the antient and accustomable Rent for the said three Manors, and also for the fourth; and that is the very Case before us. It is argued that such a Lease can't be made, as to take Effect, by any but by the Tenant in Fee: Now pray see the Difference. This is the same in Effect, it being made by a Power derived from him that has the Fee, and the Lessee is in mediately though not immediately (which will make no Difference here) from him that has the Fee; that is the express Resolution of *Whillock's Case*, 8 Co. 71 a, for the Power is reserved to the Tenant for Life, and none other, who, in Case the Settlement had not been made, would have been Tenant in Fee, and the Power reserved in him savors strongly [53] of that which he would have had with the Fee; 'tis as if *Charles Earl of Macclesfield* had made it before the Settlement (or if he had made it after the Settlement, when he was in the same Plight in all Respects as *Fitton* was, when he made it, that would have been the same Thing); for being made by the Tenant for Life, who was invested with the Fee, 'tis the very same Thing to all Intents and Purposes, and as good as if it had been made by him who was immediately Tenant in Fee-Simple in Possession.

Now there remains only to shew, that the ancient Rent may be ascertained, and what was meant by these Words *ancient and accustomable Rent* in the Settlement: And I take it, that is the Rent, and shall be at all Times so understood, that was reserved

at the Time of the Creation of the Power, where a Lease was then in Being, or that was last before the Time reserved, where there was no Lease then in Being; for he that creates the Power intends no more than that the Lessor and Lessee shall not be able to put the Estate in a worse Condition, but keep it in the same Plight and Condition, at least, that it was in when so settled. Now suppose anciently there have been Variety of Rents reserved, as for Instance, £19 for many Years anciently, and £20 for some few Years before the Settlement, and at the Time thereof the Lands were not in Lease; in that Case the £20 and not the £19 though a much ancients Rent, shall be the ancient Rent, for the Length of Time in that Case is immaterial; and for this I depend upon a Case of undoubted Authority, and that is the Case of *Morris* and *Antrobus* in the Exchequer; 'tis in Hard. 325, and was quoted at large by my Brother *Cheshire* at the Bar, and was thus: The Canons of St. *Paul's* made a Lease 13 Car. II. for 21 Years, of the Rectory of St. *Gregory's*, to the Plaintiff and his Wife, rendering £38 per Ann. and a Couple of Capons; the Rent had been at first £25, then £37, then £38, and last of all £40 and the Capons; and then the Lord Chief Justice *Hale*, upon whose Authority I lean, held the Lease to be void, though it was a greater yearly Rent than any of the ancient Rents, except the last; and consequently, as he also declared in that Case, the usual and accustomed Rent was that upon the last Lease, and so must the Statute 1 Eliz. be expounded on the Word *accustomed*: So that the ancient Rent is not to be taken in this Case in respect of Time past, but of Time to come. I doubt whether I express myself so well as to be understood; but I would say, that the Lease that was then or last before in Being at the Time of such Settlement, the Rent reserved thereon is the ancient Rent, in respect of any Lease to be made pursuant thereunto; as if a Lease was made four Years ago at £4, and another be made now reserving the ancient and accustomed Rent, that Lease of £4 in respect of this Lease, which was then a future Act to be done, is ancient, and the Rent thereof is old Rent in respect of the new Lease. I will suppose a Variety of Rents reserved at several Times, as of £10 for 30 Years ago, and £20 20 Years ago, yet the last Reservation of £20 must be the ancient Rent; otherwise this Power can't be executed; and therefore *ex necessitate* you must bring it to some Certainty, as I have done, to know what must be intended by these Words *ancient, usual and accustomed Rent*; and [54] for that I depend upon the Case of *Morris* and *Antrobus*, as a Case in Point: And the Reason of the Law is with me; and it will be no Answer to say, that *ex necessitate* such a Construction was made there, because it was an Ecclesiastical Lease; and a Dean and Chapter once reserving a greater Rent than formerly, can never diminish it again; but Tenant in Fee-Simple may make Leases at £50, and afterwards at £10, and then, if he makes a Settlement, as in this Case, shall the £10 or the £50 be the ancient Rent? I hold that the £10 shall be; for *Majus* and *Minus* will not be any Alteration of the Case, nor varies it one Way or the other, as it may in the Case of a Dean and Chapter, who can increase but never diminish, which is not the Case of a Tenant in Fee; and what he might have done at the Time of the Settlement made, and what he thought a Rent then sufficient, should, upon a Power reserved to him of his ancient Estate, be the Measure of his Intention; and without a Certainty the Power can't be executed, by reserving even a Sum in particular. And so having dispatched this second Point, which though it is not a Thing that now comes directly in Question, yet I give this as my Opinion for a future Good, to be remembered, that upon any Settlement, where a Power is reserved to the Tenant for Life, to make Leases of the Lands in the Settlement, which were anciently and accustomedly demised, and whereof Fines have been taken at the ancient, usual and accustomed Rents for three Lives, or 21 Years, or any other Number of Years, determinable on three Lives, the Rent must be the same, and no other than what was then or last before reserved upon a Lease of the same Lands in Being, or which expired last before the Time of the Settlement made.

The third Point is, that all the Lands in the Settlement are demised by one Deed; whereas the Intent of the Settlement was, that several Leases should be made of the several Manors and Farms, and so several Deeds and Counter-Parts to be sealed by the several Tenants; but now, as they are hudled up altogether in one, they make but one Lease. To this I answer, That if the Reservation be several, notwithstanding their being compiled in one Deed, that can be in no sort a Diminution of the Power: For suppose there are four several Farms, let at four several (ancient) Rents, as for Example, one anciently at 40s., another at 20s., another at so much, and the other at another Rent, and all comprised in one Deed, reserving the several Rents anciently reserved; can any one

say it's but one Lease, or one Reservation ; or that it is not pursuant to the Power, and one Counter-Part is as good and effectual as twenty Counter-Parts ? The Intent of the Settlement was, that the Reservation should be so certain, that he to whom the Rent was to come might know how, and for what he was to declare. *Habendum* the four Farms at four Rents severally and respectively for 99 Years, if A. B. or C. should so long live, that was held a good Reservation within the Intent of the Settlement : So is the Authority of *Knight's Case*, 5 Co. 54. *Winter's Case*, Dyer, 308. And the Case of *Tanfield and Rogers*, Cro. El. 340, is express, that several Reservations may be in one and the same Deed ; and that the Reservation here is such a several Reservation, and consequently the Lease good ; for that which [55] was not anciently so demised will not hurt the other, but must fall to the Ground. Lands anciently demised, and Lands not so demised, are letten in one Lease, reserving the ancient Rent for those that were anciently demised, &c., is a good Lease, and the Reservation for the other Land is void ; and the contrary Opinion is contrary to all the Rules of Law ; the Putting them in one Lease will not be material to object, for by one Counter-Part he may see what are the several Rents reserved out of each Farm or Manor. But you'll say, 'tis the Reserving therefore, &c., in Joint-Words, that makes all but one Joint-Demise : The Words are, *Demise, lease, and to farm let, &c., reserving therefore, &c.* But with Submission, notwithstanding the Words are never so joint, yet they shall be taken severally, where they have a distinct Subject-Matter to work upon. The Power is for the several Sorts of Lands or Estates, some demisable anciently, others not, 5 Co. 7. In *Wincham's Case* there was a Demise to A. for 10 Years of Black Acre, and a Demise to B. for 20 Years of White Acre, and afterwards a Demise by Indenture to a third Person of both for 40 Years, to commence after the Determination of the said several Demises : Here the last Demise being of both Lands, and that to A. expiring 10 Years before the other, 'twas held, that the joint Words in the last Lease should have a several and respective Construction, & *reddendo singula singulis*, by the last Lease, the Term of 40 Years in Black Acre should commence immediately after the Lease to A. expired ; and in White Acre, after the Lease to B. expired, that is one 10 Years before the other ; and so it must of Consequence, to all Intents, be a several Demise by joint Words in one and the same Deed, of the several Lands in the like Manner : In this Case the Lands are several, and the Demise must be several by the Deed, because we must, to make a right Construction, look back to his several Powers ; and it will be very hard to construe this to be a void Deed of Demise, where it may be construed to be a good one ; and the Words are as express, as can be to make it several : He says *severally and distinctly*, and so he demises them severally, and meant to do it according to his Power, and not otherwise. These Words have been slighted at the Bar, but they ought not to be rejected, for they are very material. This Lease he makes in Pursuance of his Power ; and it would be a strange and hard Construction to say, that according to his Power he did demise these Lands *jointly*, when in express Terms he says, that *according to his Power he demised them severally* as he ought to have done, 5 Co. 18. *Slingsby's Case* is express, that Several Words are void, where they would work on a Joint Interest ; and Joint Words are void, where they would work on a Several Interest ; but Joint Words in a Covenant make it joint and several, and work severally : And plainer Words can't be spoken than in this Case ; for he says severally, and not jointly, *i.e.* several Terms of Years. It has been said, that a Power of this Nature ought not to be taken favourably, it being in Prejudice of the Remainder-Man : I confess I know not why ; for if he that would otherwise have been Tenant in Fee becomes Tenant for Life by such a Settlement, whereby a Power is reserved to him, that would have descended with the Fee, it ought to be taken beneficially [56] for him, and that Power has a Relish of the ancient Fee. So 6 Co. 17, *Sir Edward Clear's Case*, That very improper Words may serve to execute a Power. *Clement Harwood*, seised of three Acres of Land of equal Value *in Capite*, levied a Fine of two of them, to the Use of his Wife for Life for Jointure, and afterwards makes a Feoffment by Deed of the Third Acre to the Use of such Persons, &c., and of such Estates, &c., as he should appoint and limit by his Will in Writing, and accordingly devised it to a third Person in Fee ; here, though it could not be good as a Devise, but utterly void, inasmuch as he had conveyed two Parts before, by Act executed, yet it was held a good Execution of his Power, because it ought to have a favourable Construction ; and therefore *ex necessitate* the Judges there had Recourse to his Power, that it should pass by Way of Limitation of the Use, even though he took no Manner of Notice thereof by his Will, but devised the third Part generally in Fee : So here, if this Lease can't be good as a Joint-Demise of all the Lands

in the Settlement, yet it may be good as a several Demise of the several Sorts of Lands therein ; and it should be construed to be a several Demise, though it had been demised joint, as it is not, and so make it a good Execution of the Power, and consequently a good Lease, *ut res magis valeat quam pereat*. So in *Hob. 312, Kibbet and Lee's Case*, the Devise which was void as an absolute Disposition of the Estate, was construed a good Revocation in Execution of the Power, though no Notice taken of the Settlement therein, because such a Power must be always construed favourably, and with a beneficial Intent for the Party to whom it is reserved, in Consideration of the Estate he has parted withal. So in *Scroop's Case*, 10 Co. 140 b, A Covenant to stand seised to other Uses than were in the Settlement, adjudged a good Revocation of the Uses in the Settlement though not express'd ; and the true Reason is, because such Power must at all Times have a beneficial Construction for him who is to have it. Indeed he must pursue the Circumstances, and the Form prescribed, as such a Reservation, Counter-Part, &c., but he need not take any Notice even of his Power ; and if he should make a Lease without mentioning it seemingly as a Proprietor, that shall be construed as if it had been done by Virtue and in Pursuance of his Power, if it could by any Means be done by Virtue thereof ; and so are all the Authorities : So that I conceive that there is nothing omitted that is requisite to make this a good and effectual Lease, according to the Settlement ; and I think it to be such, and ought to be construed as *Several Demises*.

Lord Chancellor Cowper. The Case has been stated distinctly and clearly by my Lord Chief Justice *Trevor*, and my Lord Chief Justice *Holt* : And as to the first Point, I concur readily with both their Lordships, because the Creation of the Term from the Death of the old Earl *Charles* is in the Nature of a Mortgage, and so consequently there must be Interest for the Mortgage-Money from the Time it was payable and due, which was at the Death of the old Earl *Charles* ; for the younger *Charles* was in Nature of a Mortgagor ; and the Estate being charged when it came to him with the Money, he was bound only [57] as Tenant for Life to keep down the Interest, as in the common Rule of Equity ; if he redeems he is to pay but one Third of the Principal, and he in Remainder the other two Thirds, that's the Course of Equity ; Then when *E. Fitton* came into Possession he was not to pay Interest to himself, and so no Interest after that since, till the Time of his Death, at which Time the Interest will again revive.

But as to the second Point I hold, that the second Lease, reserving for the other Lands the most improved Rent, lies under an absolute uncontrovertible Uncertainty, and is of no Value to the Parties : The great Point arises upon this other Lease, which is made as well of the Lands antiently as not antiently demisable, and both which are demised in one Lease ; and I must own, with Submission to better Judgment, that in this Point I differ in Opinion with my Lord Chief Justice *Holt*, and am of the same Opinion with my Lord Chief Justice *Trevor* ; I took Time formerly to consider of it when I was Counsel and attended at the Bar, and because it was a Case *primæ Impressionis* I made a particular Observation of the Arguments at Bar on both Sides, and am now of the same Opinion I was then, and shall deliver it accordingly, making Use of my old Notes : But I must premise a few Things in order to come to the Point in Question. 1st, 'Tis agreed by both my Lord Chief Justices to be merely a Question at Common Law, and not to have a different Determination in this Court from what it would receive at the Courts below ; and it is here now in the same Manner as if there had been a Special Verdict here before me, where Equity can't aid, nor will it help this Lease, it not being compleatly executed in all Respects ; I speak this because the Counsel for the Plaintiff seem'd to direct something this Way, as if in Case any Thing were wanting it might be relieved here ; and I am clear of Opinion, that it being a voluntary Execution of a Power not done upon a valuable Consideration, 'tis not a Matter by any Means proper to go before a Master, but must stand or fall as it can ; for if it be good it must be decreed good, if bad it must be decreed bad, though never so inconvenient for the Remainder-Man or Lessee ; and so 'tis in the same Condition as if a Recovery had been suffered. 2dly, As to the Reservation, the Question is not if it would be void between the Lessor and Lessee ; as 'twas argued very fallaciously at the Bar, for want of making this Distinction or Difference ; *where made* between Party and Party, it may be good, but to bind the Interest of a third Person or not is the Question, and whether it be within the Execution of the Power ? Now by the Limitations set to the Power, it is plain they were made for the Benefit of the Remainder-Man ; I will easily grant that when he in Remainder for Life came into Possession, he might lease as he pleased ; and as to him the Reservation is not void, because it may happen to be re-

covered ; but to the Remainder-Man it is void, because it may not happen to be recovered ; so you see by this Distinction 'tis not absolutely void for Uncertainty, but it is not absolutely and perfectly Certain ; some Things are in their Nature uncertain, some Things accidentally so ; and to argue that if such a thing as this Rent is, be not uncertain, then this is certain, and if certain, then it is good to [58] bind the Remainder-Man, is not a fair way of arguing ; the first will not follow, for there is a wide medium between not absolutely uncertain and certain, for future Events may alter the Case here, so 'tis not absolutely uncertain or certain, as if he can be so able or so lucky as to pitch upon the Sum which was the antient Rent ; and if he can also prove it to be so, and if it shall happen that the other shall not be able to prove that any other Sum was the antient Rent, then these three *If's* being so luckily with him, it may be a good Lease, and he may recover his Rent ; but on the contrary, if in any of these *If's* he should happen to be at a Loss, he can't be certain but must fail, and the Lease is bad, so as to be absolutely void for Uncertainty, and the Remainder-Man, for whose Sake the Limitations are intended, is no Party : Now as this Case is, 'tis possible it may never be reduced to a Certainty, for the Remainder-Man may meet with Difficulties insuperable, and if any Uncertainty is in it, the Lease is void as to him ; but to prevent any such Uncertainty there may be reserved the antient Rent or more, and that's alternative, and then the Lease will be good according to the Settlement. 'Tis said the antient Rent is certain, by referring it to the last Rent at, or next before, the Time of Settlement, where no Lease was in Being : With Submission to greater Judgments I can't agree to that ; supposing it were twice at a greater and once at a lesser Rent ; I take the two former Leases to be the antient Rent, for the last might be made by him that had the Fee, who is not bound to reserve the antient Rent, but may let it for nothing if he pleases ; here are Lands antiently demised, whereof Fines have been taken, so that here is a flat Impossibility to make that Distinction, because the Rents have in all Probability been more or less, as the Fines have been higher or lower. A third Thing I premise is this, That the Reservation and Deed being to be made upon a Restraint of the Power must be taken strictly against the Tenant for Life, because of the limited Acts he is to pursue, and liberally for the Remainder-Man, because that Restraint was intended for his Benefit ; and there are Multitudes of Authorities in the Books, that such a limited Power is to be taken strictly against Tenant for Life, where the Restraints are put upon him for the Benefit of the Remainder-Man ; and if we should go on both Reasons together, it must still be taken for the Benefit of him in Remainder ; and for this I insist on the Reverse of the Reason in *Mountjoy's Case*, 5 Co. 3 b. That was an Estate Tail created by Parliament, &c., he had a narrower Power by the Act than the Law would have given him as Tenant in Tail, therefore that must have a reasonable Construction according to the Meaning of the Act : But *vice versa*, here the Power of Tenant for Life is by way of enlarging the Estate, and being in Augmentation of it must be taken strictly, and so it must be taken according to general and natural Reason ; now according to that this can't be a good Lease to bind the Freehold and Inheritance of the Remainder-Man, for in Construction of Deeds the true genuine Sense and Meaning of the Parties must be attended to, and so we must consider each Part of the Power in the Deed ; and that in Respect of the Rent reserved, the Remainder-Man [59] must be in as good a Condition as the antient Persons that held the Estate enjoyed the same ; it was not intended that general Words, especially those mentioned in the Settlement, should be *verbatim* turned into a Reservation in the Leases, but the Intent provided for a Certainty to be had in every Reservation of what Rents should be reserved, and that to be in particular ; so that he in Remainder might have a Remedy upon his Action for a Rent reserved certain, and in Terms as formerly had been used to be reserved for the Land, or at least so as it might be reduced to a certain Rent by referring to a Certainty ; and this is the plain and honest Meaning of the Parties, and not to involve the Remainder-Man in perpetual Controversy and Uncertainty, as in this Case he is otherwise obnoxious to. 'Tis said the antient and accustomed Rents being reserved, there will be a certain Sum reserved ; but here 'tis disputable what the antient Rent was ; and 'twas intended that a certain Sum should be reserved where the Rent would be indisputable, for a certain Sum in all Cases must be reserved, and the contrary would produce great Inconvenience, for always a certain Sum was antiently reserved, and so it was intended by having the Counter-Parts ; and I rely upon it in this Case, that he is under greater Disadvantages than any Freeholder formerly hath been ; for let us consider what it is that by allowing this Lease to be good the Reversioner must prove ; he must prove the Lands and Rent he avows for to be

within the descriptive Words of the Lease, and that the Lessor was in Possession, which he can't do here because 'tis promiscuous, and can't be known what Lands, for what Rent ; but if there had been a Counter-Part, the Lessee would be forced to say the Lessor was in Possession, and so the Lease would be a Conclusion, at least an Evidence of the Rent ; but here he must prove that such a Sum as he declares for, and neither more or less, was the antient Rent, or the Tenant will baffle him as often as he pleases ; the Rent here reserved is neither like, nor the same Reservation or Rent that used antiently to be reserved ; and to argue, that though an express particular Sum had been reserved, the Tenant might put it upon him to prove that it was the antient Rent or more, and so he in Remainder must prove what was the antient Rent, although a certain Sum had been reserved, that is not to be argued ; for 'tis a hard Supposition that a Man should go about to destroy his own Lease he holds under, for so 'twould be ; for otherwise he can never avoid Payment in an Action of Debt for the Rent ; and if in such Action he should deny that to be the antient Rent, the Lessor, or he in Remainder, might bring his Ejectment, and upon shewing the Denial upon Record. would recover the Land and put him out ; now this Case varies here, for the Tenant may baffle the Lessor 20 Times over, and yet keep the Lands in despite of his Teeth ; but if the antient Rent had been Reserved there would be no Danger, and the Remedy as well as the Lease had been good, but now he may shift here, as often as he can shew there was antiently any Rent reserved, which differs from that demanded. So that I must be of Opinion that this Reservation in the Manner here worded is reserving a worse Rent than used antiently to be reserved ; and that the Restraint in [60] the Settlement means, that he in Remainder shall have the same in all material Qualities, as well as the Quantity of the Rent, and a Remedy to attain to the Certainty, and to recover the Rent as well as the former Freeholders could. There are many Cases put to this Point, in *Mountjoy's* Case, in 5 Coke. And I take them all to be very good Authorities, because, because being put by Counsel at the Bar, they were never deny'd to be Law ; as a Reservation of Rent to be paid at two Days, where antiently it had been paid at four, not good ; so if paid in Silver, where antiently it had been in Gold, yet many others there put on other Points, were deny'd to be Law.

Fourthly, That this Lease, as against the Lessee, is not void, but against the Remainder-Man it is void, because not so beneficial as usual ; and a very Minute Difference will serve to avoid it, which might have been prevented in pursuing the Settlement, by reserving more than the antient Rent ; but here is none, and if there be it must have all the beneficial Qualities of the Rent antiently reserved, and those ought to be respected, received and observed, as *Mountjoy's* Case says ; and there are several Cases for want of that deny'd to be Law, as Silver for Gold, or two Parcels or two Manors conjoyn'd, or a Part of a Manor at a proportionable Share of Rent, or Part of the Rent ; as if 20 Acres had been let for 20s. each, of equal Value, it is not a good Lease if 15 of these are let at 15s. Rent each ; and our Case is much stronger, because the Original Parties to the Original Power have laid a Stress on this very Thing, as if they foresaw and would prevent it ; for the Lessee by that is to execute and sign a Counter-Part of the Lease, but the Deed here signifies nothing, 'tis a mere Shadow ; and as the Manors were antiently parcelled out at distinct Rents, the Tenant may deny he holds any particular Parcel ; he may say these and these Lands are not contained in any *Box* (as I may call it), of *several Leases*, and insist upon any Rent he pleases, in twenty several Actions, brought by the Remainder-Man, and may Nonsuit him on the Evidence of every one of them, and he is estopp'd to say (nothing but signing and sealing) it was intended that several Leases should be made, and several Counter-Parts, and several Rents certain reserved, &c., which can never ascertain that, for which the Settlement, and the Parties intended to provide.

Another Reason, or rather an Observation, which may serve to answer what my Lord Chief Justice *Holt* said, *That if the Settlement were certain, the Deed was as certain ; and that the general Words in the Power are good for a Reservation.* But a true Way to execute a Power like this, is not to do it in the general Words of the Power ; in all such Cases they must reduce the Rent to a Certainty by particular express Words. Suppose (as I have seen in some Deeds) that there was a Proviso in every Lease, there should be inserted such Covenants as are usual to be inserted in Leases in that Country where the Lands lie, &c., and a Lease should be made with a Proviso in the very Words of the Deed, that would not be good ; nor could it be aided by any Special Verdicts, finding the Covenants usual, &c., and the Words *or more* alter it extreamly,

and the Lessor must lay hold on the antient Rent, or [61] more ; whereby 'tis denoted, that in Obedience to it, he must do it one Way or other ; but still it must be certain.

A third Observation or Argument which I make is, admitting the Rent reserved not necessary to be a certain Sum, sure it must at least refer to an absolute Certainty ; as in the Case of *Levison and Piggot*, there was an absolute Mathematical Certainty, than which nothing can be more certain ; for the Power provides, that it should be at least 12s. for every *Cheshire* Acre, so that it must refer at least to something certain ; but this refers to nothing that is so ; but on the contrary, to a Thing that is a fluctuating Custom or Usage : 'Tis certain, that at the Time of an old Lease there was a Rent existing, and it was then known certainly what it was, and to make it good, it must now be also known what it is ; but may be it is unattainable by human Knowledge. As to the Thing in Question, it is certainly absolute and general ; but we mean useful Certainty, for the Benefit of Property : And in that Respect, referring to Usage and Custom is uncertain, and therefore *Certum est quod certum reddi potest* ; if fitted to maintain, that whatever is in itself once certain, must be ever certain, will not be granted ; for it may or may not be certain, according to future Events, and much less to bind a third Person ; and it is contradicted by *Owen and Apree's* Case, Cro. Car. 95. Suppose it had been referring to a Lease or Leases between such a one and such a one, that also had been void between the Lessee and the Remainder-Man, because the *Reversioner* might lose the Lease ; and so there is not an Equivalent, to which he may at all resort to be ascertained, as in *Levison and Piggot's* Case : Therefore 'tis not a good Reservation, where 'tis not certain in itself, but refers to ancient Usage and Custom. There is one Uncertainty as to Nature, and another as to the Understanding. As for saying that a Verdict would have ascertain'd it, that would be aiding a legal Defect ; and to go before a Master or Jury to find what were the ancient Rents, is Supplying a Defect which has been made in executing a Power against common Right : Here is really not an absolute, but a conditional Reservation, good indeed between the Lessor and Lessee, but not to bind the Remainder-Man ; the Condition is, *I let these Lands absolutely ; and if an ancient Rent can be found, and you the Remainder-Man can prove it, then I reserve it to you ; but if there be none, or if there be, and you can't prove it, you are to have none.*

There is another Uncertainty, which I don't need to rely on, and that is in the Thing demised, and that runs to *Apree's* Case : Where Lands are demised by sufficient Description, the Lessee can't go back, unless he forfeits the Lease ; but here they are so demised, that tho' the ancient Rent had been reserved, yet the Tenant may say they are either more or less ; but if they had been distinctly demised, and he should say so in Pleading, he would forfeit his Lease : But here is no Light at all for the Lessor to go by, tho' he finds the certain Rent ; so that 'tis only a bare Possibility, that by the Help of great Charges, and good Fortune and Industry, he may come at his Rent if he can ascertain the very Lands anciently demised, and their respective Rents ; for if either the Lands or Rents be mistaken, he is still to seek ; for if Lands [62] are leased for the Rent reserved anciently on those Lands, and there be more Lands in the Lease than anciently were let, that is not a good Lease ; but if less or fewer Lands than anciently were let be demised for the same Rent, it's certain that had been well.

In the next Place, If there had been a Recovery, and a Lease of divers Lands in the Recovery, that had been bad, and the same Uncertainty would hold ; but the ancient Rent being a Sum of Money, you might reserve more than the ancient Rent ; and so it appears, that tho' I had reserved by the Words *ancient and accustomed Rent*, that would be void ; whereas if I had reserved a Sum of Money, though it was no more than the ancient Rent, that had been good : So that *Certum est quod certum reddi potest* will not do in this Case. Besides, if you can maintain the Reservation on the Lease, yet the Lease is not in Severalty, as the Lands were formerly devised : And therefore 'twill be that Case cited in Point. Or if you should make it a Several Lease, yet there are more Lands ; and then it will be a stronger Case against you, than if there had been less. But say you, 'tis the ancient Rent is reserved only for the Lands anciently demised : That won't follow, for the same Lands are not demised in the same Several Lease : The Words are *Severally*, and not *Jointly*, of all the Lands in the Settlement ; reciting the Messuages, Tenements and Hereditaments in several Manors, in the County of *Chester*, and all and singular the Lands comprised in the recited Power, *Habendum* for 99 Years, if Sir *Charles Orby*, &c., shall so long live ; *Yielding and paying therefore yearly the ancient and accustomed Rents usually*

reserved, and payable (not said heretofore) in the leasing Part : only there is a Severalty (for the Lease is several, and not joint) of all the Lands in the County of Chester, &c., and also of all the other Estate, &c. 'Tis indeed a Severance, but the minutest that can be supposed. Suppose a Lease is of four Fields, and four Messuages severally, where usually only two Fields and two Messuages were let, that would not be good ; for it ought to be a Severance of all the Things demised, and take the Words to be such, that the Lands are usually perhaps let by Manors, &c., and the Reservation is severally, &c., but may have a Relation to the Usage or Custom ; and in the demising Part it is said *anciently demised* : So that the Construction that is endeavoured to be put upon it, would carry the Reservation to be several, farther than any Case yet has done. The Lands pass by this Deed, all during the Life of the Lessor ; and therefore 'tis one Reservation singly of all the Rents, for all the Lands and Manors. *Thereof reserving several Rents* will not be good for a Demise of them, where they are usually let single or together ; and the calling them ancient respective accustomable Rents, is denoting what they were, not what Rents are reserved ; and cited Dy. 309 a ; Hob. 303 ; Moor, 201. 'Tis true, the several ancient Rents are reserved, but not for the several ancient Tenements ; and *respectively* only denotes, *but does not reserve (or refer)* : Therefore I am of Opinion that the Demise, tho' several and not joint, cannot be made any other Severalty than the old Demise, and that won't do the Plaintiff's Turn, for that will be for all the Lands ; and that will be *Owen and Apree's Case*, and so let in a Manner never let before. Here are more Lands than *anciently [63]* were let ; you won't say that the Rent was not as well reserved for the Lands not *anciently demised*, as for those Lands that were ; the Lease did pass as much ; and as for the Reddities, 'tis for all that was leased ; and that Part that was not *anciently demised* being evicted, it must be apportioned, for there is no Covenant for the Lessee to pay the ancient Rent for the old Lands, in case the rest should be evicted : Therefore agreeable to common Right, against which the Power is made, and to what was then intended by the Settlement, the Lease not being severally, much less singly, 'tis void ; for the general Course being in executing these Powers, to make the Deeds and Leases in particular Terms, and not according to the general Words of the Power ; and now, since that, when these Powers have been perhaps, and I believe are much *ancienter* than the Statutes for enabling Ecclesiastical Persons ; this is the first Attempt that ever was made to delegate the Power generally (as I may say) that was to be executed particularly, in the same Manner as they were done before ; and for that it would be fatal to all Remainder-Men, because the Tenant for Life might on a sudden at any Time make a Disposition of the whole Estate in this uncertain Manner ; and being a new Invention in Derogation of Common Law, and tending to introduce Perjury, Forgery and Frauds, the Courts of Equity won't aid it by any Means ; 'tis to be utterly exploded, like the Attempt of Justice *Richell*, mentioned in *Littleton* ; and therefore I am of Opinion 'tis not a good Lease to bind the Remainder-Man.

And the Lord Chancellor accordingly decreed, Sir *Henry Hobart* should be Trustee for the Uses in the Settlement, and permit his Name to be used, and decreed an Account of the mortgaged Estates ; and if the Plaintiff sets up Title for the Inheritance and Mortgage, he must account for the whole Profits, as the Defendant's Counsel insisted on ; but if the Account was any way delayed, then a Receiver to be appointed. But he refused to speed the Account upon the Face of the Decree, because 'tis to be presumed all Parties will obey. Then it was moved, That for the Sum of £8000 devised by the old Earl *Charles* to the Lady *Gerard*, and by her devised to young Earl *Charles*, who devised the same to the Defendant's Interest, might be discounted for the same by the Plaintiff, as Administrator to Earl *Fitton*, the Time Earl *Fitton* enjoyed the Estate : But to this the Chancellor answered, That Earl *Charles* the younger having the Fee-Simple in Reversion, and the Fee being now fallen into the Party who was to have that Money, shall he not have it out of the Estate ? For 'tis not personally due to Earl *Fitton* ; and it is too hard to give Interest for it to you that have the Fee, the same being a Personal Demand. 'Twas urged, *Arwood and Thomas's Case* in the House of Lords was the same, where she recovered her Portion after the Fee had fallen into her : But the Chancellor said, Perhaps that was because of Fraud in the Trustees, and so would not decree any Interest for it ; but that all Writings, except such as concerned the mortgaged Estate, should be delivered up, and those also when the Possession came to the Defendant ; and decreed Costs for the £4000 only, as Mortgagees usually have in this Court.

[64] LECHMERE and others *against* BLAGRAVE and others. [1707.]

Where Legacies devised, shall be taken in Satisfaction of Debts, Marriage-Portions, &c.
See 2 P. Will. 343.

A. agreed with B. to give the said B. £2000, to be laid out by the said A., and this he gave as a Marriage-Portion : The Marriage took Effect, and the said A. laid out the Sum of £1000 in a Purchase, and afterwards mortgages those Lands, and then settles according to the Articles, only he failed in one of the Limitations directed by the Articles : A. after made his Will, and devised those Lands to his Wife for Life, and also a Money Legacy, and gave Legacies to B. and his Children, and died without Issue of his Body, leaving the Children of B. his Heirs at Law, who together with B. brought their Bill against the Widow and Executor of A. to have an Account of the Profits, and for Performance of the Articles. The *Chancellor* said, That the Lands that were settled according to the Articles of Inter-Marriage, were a good Performance, so far as the Value was over and above the Mortgage ; and 'twas insisted on by the Counsel, that the Legacy should go in Exoneration of the rest of the £1000 which the mortgag'd Lands would not answer for : That if A. be indebted to B. and by his Will gives B. a Legacy, that Legacy, if equivalent to the Debt, shall ever be taken to be in Satisfaction thereof. But it was urged on the other Side, that the Legacy so devised to the Children was a Grandfather's Bounty, and could not be intended to go in Exoneration of the Heir's Demand, to whom the Estate was to come ; especially, because at the Time of the Legacy it was not known whether he would be Heir, or take any Thing by the Settlement : Besides, it was given in Company with his Sisters, and the Controversy is now between the Executor of A. and the Plaintiff, and not between him and a Creditor : Also the Plaintiff and Defendant are Legatees in equal Degree, and there are Assets enough to answer all, and no Creditors in danger. Yet the *Lord Chancellor* directed the Master to inquire what Assets by Descent in Fee, and other Personal Estate, came into his Hands, to be as Part of the Satisfaction of his Demand, and put the Case of A.'s receiving £1000 to my Use, who dies and makes me Executor, that shall be a Satisfaction ; and for these Reasons farther, that he gave Legacies to all that could take by the Limitation agreed upon in the Articles : Wherefore the Case is stronger than where it is given to one he owes it to ; for 'tis harsher to understand, as the Counsel for the Plaintiff argue, his Interest shall guide his Intent, which is a very fallacious Way ; for he did not intend any Thing but to satisfy, and if not satisfied, then in Strictness of Equity he would have applied it so ; and if you be satisfied, then you are mistaken as to the Intent, and so the Legacies must go in Satisfaction : And in Case where one has a Debt due, either in Law or Equity, and the Debtor bequeaths him a Legacy, if other Creditors prefer their Bill against the Executors, to be paid their Debts, that such Legatee not having received his Legacy, must elect to come in as Creditor ; for if he should be a mere Legatee, the Creditors must be first satisfied, and then perhaps there would not be sufficient left to pay him : [65] whereas, if he was a Creditor, he was in equal Degree with other Creditors ; and that if such Legatee prefers a Bill to be paid, 'tis the safest Way for him to sue as Creditor, and not as Legatee ; and that when the Money is paid him, it shall go in Exoneration of both : And he said likewise, that where the Obligee is Heir to his Father, he shall have Satisfaction of the Executors, notwithstanding he has Assets by Descent ; and that the Legatee in such Case, if he will receive any Benefit, where other Creditors are bringing in the Executors to Account to pay them, he must elect to come in as a Creditor, yet the Creditors by Consent may admit him to come in as Legatee, to have an Account with them.

DAVISON *versus* GODDARD & Ux' & al'. [1708.]

The Testator charges his Estate with £10 *per Ann.* to B. A. the Devisee also charges it with £10 *per Ann.*, after which he in Remainder charges it with £20 *per Annum* :
Quære, if A. shall have £40 or only £20 *per Ann.*

John Walker by his Will devised £10 *per Annum* to A. for Life, chargeable on several Houses whereof he was possessed, and made his Wife sole Executrix, and died ; and after she made her Will, and J. S. Executor, and thereby also devised £10 for Life to A.

And *J. S.* being afterwards seised in Fee of an Estate of Inheritance of his own, settled his Estate on himself for Life, Remainder to his first, second, &c., Sons in Tail, Remainder to Trustees for 99 Years, in Trust to pay his Debts and Legacies, and afterwards that the said *A.* should have and receive the Sum of £20 a Year for Life, and gave other Annuities, and afterwards died without Issue, whereby the Term vested in the Trustees to execute the Trust; and the said *A.* preferred his Bill against the Trustees for Payment of the £20 devised to him by the several Wills, for that *J. S.* having wasted the Assets, 'twas a Debt due to him to which the Trust was subject, as also for the £20 Annuity: And the Question was, whether the said *A.* should have the £20 only, or £40 in regard that the several Annuities of £10 amounted to the Sum of £20? And the Estate on which the said several Annuities were charged coming to the said *J. S.*, and he having out of his own Estate also granted an Annuity of £20 to the said *A.* for Life, Question, Whether that shall be construed in Satisfaction of the £20 he was obliged to pay, pursuant to the several Wills? *Mr. Dolbin* and *Mr. How* argued, that they were several and distinct Annuities, given and granted at several and distinct Times, and issuing out of several Estates, and that therefore it could never be construed that the £20 by the Settlement granted, should go in Satisfaction and Exoneration of the £20 Annuities that were bequeathed by several Wills.—*Mr. Vernon* argued to the contrary, that it could be but one £20 *per Ann.* and not two; and there are Incumbrances on his Estate, and he owes Debts, and therefore 'tis plain he intended the last £20 should go in Satisfaction of the first: And that is a common Case, where a Man is obliged to make a Payment, and he by Will or Deed gives any Thing to the same Person, it shall be intended *prima facie* for the Debt. The Cases of *Brice and Brice*, *Jusson and Jusson*, and *Keywick and Thomas*, are in Point. Sir *William Keywick* having two Estates in several [66] Counties, subjects one at one Time for Payment of £5000, and at another Time subjects the other Estate to the Payment of £5000, but both were for Portions for younger Children; and altho' the Maintenance and other Terms in both Deeds were different and several, yet it was decreed here, and affirm'd in the House of Lords, that but one £5000 was charged on both the Estates. So *Jusson* upon Marriage settled his Estate, subject to the Portions of younger Children, and afterwards purchases another Estate, and subjects it to like Portions; and 'twas decreed to be only a double Security, not a double Charge. *Mr. How* distinguishes strangely, when he says it could not be intended that £20 should go in Satisfaction of £15 because 'tis more. I think it were more strange, that £15 should go for £20 because 'tis less; and yet even there it would be no Obstruction, as it has been often ruled: 'So if I owe one £100 and bequeath him £1000, the £1000 is given in Equity. It is said, that the £10 devised by *Walker*, is not for separate Maintenance, nor is it material it should; let them agree that among themselves; for what comes in Lieu, will have the same Qualification: But it is material, that the Person employed to draw the Deed, had Instructions to swear what he was obliged; and he swears this was intended a Satisfaction for the Annuities: 'Tis also considerable, that if all the Debts were paid, and also those Demands, there would be nothing left; now 'tis not to be presumed he would give £20 Annuity over and above the former, and leave the Heir starving: And so another Witness swears, that he intended the £20 should go in full of all Demands: Besides, at the Time of the Settlement, though he knew all this, he directed £20 and £20 Annuities, which might possibly fall upon his Estate; but it was impossible they should take Place, if this Construction, if both 20 Pounds, was to hold. *Lord Chancellor* agreed the Gifts by the Will good, and that where a Man being Debtor in £10 gives £20 that it shall be a Satisfaction, not a Legacy; and that he believed in his own private Opinion, that £20 Annuity was intended for Satisfaction, and that as *Mr. Dolbin* said, there was no Case like this in Point. Yet 'twas agreed the Costs should be decreed against *A.* the Plaintiff, because he knew in his Conscience that *J. S.* intended Satisfaction. 'Twas also agreed in this Case, that the Defendants might read their own Answer by the Draught; but if it had not been their Answers, it must be by Office-Copy, &c., that what an Infant receives in Right of her Mother, of the Estate, must be subject to his Annuity; for the Parol shall not demur in prior Incumbrances, nor in Trusts for Sales, but in Equities of Redemption only: And the Court decreed the £10 first devised, must be paid prior to the other £10 by the Executor; and if *A.* will take the £20 Annuity by the Settlement, he may subject himself to all Incumbrances; but the Incumbrances prior in Point of Time to be preferred, and the other Incumbrancers had Notice of the Deed to

be posterior to their Incumbrances; and therefore the Incumbrance by Judgment being a Lien on the Land, prior to the Grant of the Annuity, shall be preferred before the Grant of the Annuity, because his Charge on the Land is posterior.

[67] Sir GEORGE HUNGERFORD *against* WALTER HUNGERFORD. [1708.]

Devise of Lands in Trust to sell, &c. See 2 P. Will. 320 & 397.

Edward Hungerford, 18 May 1663, devised his Manor of *Chilton* to *William Battyman* and *Walter Hungerford*, in Trust, to sell after his Decease, and to pay the Money to his Executors, who were to divide the Purchase-Money in four Parts; the first Part thereof to come and be payable to his second Son *Robert*, and three Parts to his youngest Son *John*; and his Tenements in the County of *Wills* to be sold by them, and the Money to be paid to his Executrix, to be recommended to her as a Legacy to *Robert* and *John*'s Use, and if one of them die, the Legacy to be void, and made his Wife sole Executrix, and died: *John* survived a Year, but no Sale was made in that Time, and afterwards died the 13th of *October* 1668. The Act of Distribution was made afterwards in the Year 1670, the Mother, the Executrix, never administered to the said *John*, but after her Death the Administration generally (not *de Bonis non*, &c.) was granted to the Defendant, who was the eldest Son, by the Settlement or Will; the Residue of the Estate of his Father was limited to Sir *George* the Plaintiff for Life, *sans Waste*, with Power to make Leases for three Lives; Remainder to A. for three Lives; Remainder for Life to his Son *George*; Remainder to the first, and every other Son of *George* the Younger, in Tail-Male; Remainder over. Young *George*, at the Instance of his Father, agreed to suffer a common Recovery, and charge the Estate with £4000 Mortgage; £1500 to one *Robert Stanley*, and £2500 to one *Thomas Edwards*; and in Consideration of his joining, the said *George* parted with all his Powers, and in Lieu had given him a Cottage called *Coltman's*, in Fee worth £28 *per Ann.*, and *George* the Younger dying, the Estate came to his Brother *Walter* the Defendant in Remainder, with whom Sir *George* the Father coming to an Agreement about paying the Interest of the Mortgage, he accepted of a Letter of Attorney, to have, take and receive the Rents of the whole Estate, and to see and pay off the Interest of the Mortgage 1673. The Mother, the Executrix of *Edward*, by the Name of the late Wife, and Relict of *Edward* (though Administration was never granted to her for *John*), and the Trustees, join'd and sold all the Legacy-Estate to *Robert*, the Son and Legatee of *Edward*, and he devised to one *Hungerford* and *Smith*, to the Use of young *George Hungerford* and his Heirs for ever; by which Means *Coltman's* came as before to the Plaintiff and his Heirs, by the Disposition of the said *George*; and the rest of the Estate came to the Defendant by Descent, who having Occasion for Money, sold *Chilton* for £1500, having first got about £500 Fine for a Lease, and gave a £2000 Bond, to make a Conveyance thereof, to which the Father should be Party, who claimed a Title thereto as Administrator to *John*, to have the same sold, and three Parts of the Money arising by the Sale. The Plaintiff refused to join, unless he had Half the Purchase-Money: The Defendant offered him £300 at length, in Consideration (as it was alledged) that he would let the Defendant come into present Possession [68] of 100 Years of the Estate. It was agreed that the Plaintiff should have £1000, of which £600 was at several Times paid to clear his Debts; and there is a Deed not witnessed nor indorsed, but sealed and delivered by Sir *George*, dated 18 Feb. 1700, for £222 and £99, acknowledged to be received by Sir *George*; and also a Bond of £95 from young *George* to one *Owen a Taylor*, who had sued Sir *George* for £122 for Work done, of which £20 was for himself, and £102 for young *George*; and Sir *George*, upon Payment of the Debt, took it up and cancell'd it; but one *Butler*, who was *George's* Executor, was not before the Court. 'Twas agreed in the first Place, that Sir *George* was intitled to the Legacy of *John* as his Administrator, or to three Fourths of his Estate to be sold, as Brother and Heir, because the Words, *became due and payable*, referred only to the Time of Sale, and he died before his Interest vested, and so it must descend; or else the Words are unnecessary, especially in this Case, when he left neither Wife nor Child, on the Reason of Sir *Thomas Doleman's* Case. But the Chancellor told the Solicitor General, that *John* had survived *Edward* the Devisor, and if he had survived the Sale, and left Wife or Child, it would vest; and so if he left any Representative, the same would vest also in such Representative; and that tho' no Time is limited for the Sale, yet a reasonable Time was intended, and

the Administrator had a Right to join in the Sale as the Mother did, though without Administration for the distributive Right vested, if any Body dies ; and he who has such a Right, it shall go to his Executor or Administrator : And agreed, she had the Possession as Executrix to her Husband, and the equitable Right as Administrator to her Son : But Mr. *Solicitor* denied that she could have any distributive Right, being before the Act of Distribution, or any Interest in her, and so it must result to Sir *George*.

Another Question arose about the Sale, whether good or not, when the Executor and Trustees had join'd to sell ? for the Trustees by the Deed may sell, and pay the Money to the Executrix. But the *Chancellor* said, by their having Notice of the Trust, they should sell it, seemed that all Parties in Interest had join'd ; but did not give any Opinion in it. The next Question was, Whether the thousand Pounds was for joining in a Deed for the Sale of *Chilton*, or for the Annuity also ? And the *Chancellor* said, That though in his own private Opinion he thought the Annuity was agreed to, yet it being in Proof and a colourable Title in Sir *George*, as Administrator to *John*, and that £100 being offered, and Half of the Purchase being treated for, he allowed the £600 already paid, and all the Securities to be delivered up that were paid off by the Defendant.

Another Question was about the £4000, if Sir *George* must pay any Part of the Principal, or only keep down the Interest ? And after a long Argument, and many Diversities taken by Sir *Thomas Powyss*, 'twas agreed ; as where a Devise is of an Estate incumbered, and where a Tenant for Life prevailed on the Remainder-Man, to be Security in joining, to subject the Estate ; and my *Lord Chancellor* took Occasion to mention the said *Huntingdon's* Case, who having prevailed on his Wife to join in charging her Estate, he afterwards paid off the [69] Incumbrances, and would have continued the same thereon, and had the Decree of this Court for that End against all Equity ; but that Decree was reversed in the House of Lords : For if a Man mortgages Lands for my Debts, and I afterwards pay the Debts, and get an Assignment of the Mortgage, yet the Land is discharged : Now the Case here differs, for it seconds in Contract the Parting with the Power, and Vesting the Fee in *George*, who could only by a common Recovery create a *conditional* Fee, viz. by barring of his Issue, have only an Estate to him and his Heirs whilst he had Heirs of his Body, and by this joining of Sir *George* he had the whole Fee ; and because of these Considerations young *George* could not compel his Father to pay the Principal, but only keep down the Interest, much less the Defendant, who had accepted the *Letter of Attorney*, by which Sir *George* was bound only to pay the Interest, no Possession being thereby given to the Defendant but a bare Power to receive, upon which he could not have even any Salary for his Trouble, which though revokable at Common Law, yet it is a good Evidence and Contract in Equity, and shall debar the Defendant for demanding more by his Acceptance ; and agreed that a Remainder-Man can only force the Tenant for Life to keep the Interest down if the Land be charged, that he can't compel him to redeem directly, tho' indirectly he may by purchasing in the Mortgage, then to pay but one Third, or part with the Possession ; and Sir *Thomas Powis* insisting that the Money was borrowed by the Plaintiff, he ought to discharge it, and the Defendant had the same Remedy in Equity as in a Personal Security. The *Chancellor* took a Difference, that where a Person was Security in a Contract, there is a joint Contract that the Principal shall indemnify the Security, and that the Ground of Equity is, that when the Money is due the Equity arises ; but Sir *Thomas Powis* said that one may exhibit his Bill before the Time or Payment ; but where the Land, or the Land and Person are both Security, the Estate stands at Stake to enable the Principal to owe it as well as the Security to pay it or borrow it thereon ; and the Contract of the Security is, that he shall continue to owe it on the Credit thereof, and not to go to Gaol the next Day ; for even in a Personal Security you must the next Day apply for a Reimbursement, for what was Equity one Day was Equity the next ; but here are the Conditions fallen, in which note a Difference, tho' it is a Damage after the Contract, and ought to be indemnified if it stood singly on the Bond, yet the minutest Consideration would alter the Case. *Master of the Rolls* demanded, whether they both covenanted to pay the Money as well as give the Bonds, and was answered they did by the Deed ; then suppose Sir *George* had died, and his Son *George* survived, could he prefer his Bill against the Executors of Sir *George* ? *Chancellor*, If he had paid and took up the Bond, or paid, and had the Covenant assigned, he might, not else. It happened on the Deed 10 Feb.

1700, the Defendant had an Order to prove the Deed, by Virtue of which he would have proved the Death of one of the Witnesses, but it was denied, and so that Part of the Demand fell, and also that of *Owen* the Taylor, as well for want of Parties, as for [70] a Point more disclosed by him in his Depositions, that he was originally employed by Sir *George* to work for his Son, and tho' then of Age, the *Chancellor* agreed, if there had been Parties the Bond signified nothing; and as to the rest, he decreed first an Account of the Profits of the Trust Estate devised to Sir *George*, paying and restraining, and then to be assigned to the Trustees *Hungerford* and *Smith* the Surplus, a Moiety to go to the Plaintiff, and a Moiety to *Francis*, and reserves Costs. Secondly, as to the Coal Mines only decreed to the Plaintiff, but the other Part of *Robert's* Estate to the Defendant, who claims the Equity of Redemption of that and the rest of the Estate in Mortgage after the Plaintiff's Death; in the mean Time the Defendant to have and receive the Rents, paying the Interest of the Mortgage to the Mortgagee, and the Overplus to his Father, but not to meddle with the Possession in Sir *George*; and that he paying the Interest duly may receive the Rents himself; but the Defendant must see and have the doing of it, and it can't be put into other Hands; for though revocable at Law, yet in Equity Sir *George* must be holden to this Letter of Attorney, and no Allowance is to be for the Defendant's Trouble in receiving; because 'tis his own voluntary Act. Thirdly, As to *Chilton*, the Devise is of all the Lands in *Bucks*, and he had no other Lands there; and though a full Consideration was paid for it over and above his own third Part, yet Sir *George* having a Colour of Title, which by his setting up, frighten'd the Purchaser, the Defendant offering Money, and 6 or £700 since actually paid, the Deed executed by him who had Colour, who insisted on it, and who was offered and treated with, joined, and Money paid pursuant to all this, appearing judicially before me, and no Proof of the Annuity or the £1000, though in my own private Opinion I am satisfied, because of the Smallness of the Purchase, and other Circumstances of the Case, that it was as the Defendant says; yet no Proof appearing the Plaintiff must take all that he has already got towards the £1000, but no more; and the Defendant must give him all the Securities, for which he paid any Part of the Money for the Plaintiff, and therefore Costs. Note: in this Case publick Evidence prevailed against private Judgment, which is rare in a Chancellor.

MEREDITH versus WYNNE. [1710.]

Where a Marriage Portion unpaid shall go to the Husband or Wife's Administrator.
See Abr. Eq. p. 70, c. 15.

In this Case the Question was, whether a Wife's Portion of £1250, charged by Will on such Lands, pursuant to a Power in a Settlement, should go to the Administrator of the Wife as a Chose in Action, or to the Plaintiff who was Administrator to the Husband, they both being dead, and the Money not yet received; as to which the Case was, in short, that one *Wynne*, on the Marriage of his Son *William*, settles several Lands on that Marriage, with a Power for *John* by Writing, to charge the Lands with £2000 for such Uses as he should think fit; and after *John*, by Will reciting that Power, charges the said Lands with £2000 for his two Daughters *Dorothy* and *Barbara*, and directs that his Son *William* should within two Months [71] after his Death give them Security for £1000 a-piece, being the £2000 he had a Power to charge, and if he should refuse so to do, then he made *Dorothy* and *Barbary* Co-Executors with *William*, and likewise gave to his said two Daughters £250 a-piece, besides the said £2000; and dies; *William* gives his Sisters Bonds for their Fortunes; *Barbara* intermarries with one *Richard Middleton*, and on the Marriage Treaty Articles were entered into, whereby *Richard* agreed to clear his Estate, being £700 per Ann. of the Incumbrances that were then upon it, within six Months after the Marriage should be had, and for every £100 he received of *Barbara's* Fortune, to settle £10 per Ann. on her, for her Jointure for Life, and to settle Lands on the first and other Sons of that Marriage; *Barbara* was not party, at least never sealed these Articles; the Marriage took Effect; *Barbara* dies within the six Months without Issue: *Richard* on a second Marriage with one *Dorothy Pledell*, who had a Portion of £1600 in Trustees Hands, by Articles agrees to lay out the £1250 he was intitled to in Right of his first Wife, and this £1600, when received, in the Purchase of Lands, to be settled on *Dorothy* for a Jointure, and Provision for the Issue of that Marriage; which Marriage afterwards also takes Effect; then

Richard dies before he got in either of the Portions. The Plaintiff his Sister takes out Administration to him, and intermarries with the Plaintiff *Meredith*; they come to an Agreement with *Dorothy*, whereupon she was to retain her £1600, and to release her Title to the £1250 or to any Settlement to be made on her therewith; and this is reduced into Writing and executed: The Defendant took out Administration to *Barbara*; and against him and *John* the Grandson and Heir of old *John Wynne*, who had the Lands by Descent, subject to raise this £1250, was this Bill brought to have the Portion raised; and accordingly my *Lord Keeper* decreed it, because the Husband was a Purchasor of the Wife's Portion by his Agreement to disincumber his Estate and settle a Jointure on her, wherein he had proceeded so far as to sell some of his Estate to discharge the rest; and the Death of the Wife without Issue prevented his making a Settlement pursuant to the Articles; so that having done all in his Power, and being guilty of no Default, he ought not to suffer by the Death of his Wife, which was the Act of God; and the Plaintiff having now taken out Administration to him stands in his Place, and must have the Benefit thereof; besides, upon his second Marriage with *Dorothy Pledell*, he actually agreed, in Consideration of her Portion, to lay out this £1250 and settle the Lands on her, so that she became intitled to this Money as a Purchasor for valuable Consideration, and then she, after her Husband's Death, chose to have her own £1600, which belonged to the Plaintiff as Administratrix to the Husband, and the Plaintiff agreed to it, by which the Plaintiff likewise became a Purchasor for the £1600 they covenanted to give up to the Widow, and therefore decreed an Account to be taken of the Personal Estate of *John* the Grandfather, and because that fell short, it was to be made up out of the Real Estate come to the Defendant's Hands; and if any real Charges were paid out of the Personal Estate, the Plaintiffs to stand in their Place for a Satisfaction of the £1250 out of the Lands, to make [72] up so much as the personal Estate remaining should fall short to pay. Note: a Case was cited of *Burnet and Kinaston*, where a voluntary Disposition by the Husband of the Wife's Portion before it was got in, being secured by mortgaged Lands, and decreed it should not bind the Wife or her Representatives after his Death; but here the Husband was a Purchasor for a valuable Consideration. Another Point in this Case was, that Serjeant *Owen Wynne* had by his Will devised to *Barbara* £100 Legacy, and another Person had likewise by his Will given her another Legacy of £50, and of both these Wills *John* the Father of *Barbara* was Executor, and whether the £1250 given by the Father should go in Satisfaction of these two Legacies of £150 was a Question; but 'twas argued by Mr. *Vernon* (and not much opposed by the other Side), that this could not be taken to be in Recompence or Satisfaction of these two Legacies, because there was no Legacy given particularly to *Barbara*, but the £250 a-piece, as well as the £2000 he had a Power of charging, was given equally to his Daughters; and if this should be a Satisfaction to *Barbara's* two Legacies, she would not have an equal Share with her Sister of her Father's Bounty; and his giving the £1250 to his Daughters equally, shews he intended to put no Difference between them, as to the Shares they were to take.

HALL versus BROOKER.

Tuesday the 30th of October, 1711. J. G. in Court.

Personal Estate where to be applied in Ease of the Real, and *econtra*. Vide post, 123; 2 Peer Will. (620).

In this Case 'twas agreed by the Counsel at the Bar, and not denied by the Court, that if a Man devises particular Lands to be sold for raising Money for Payment of his Debts, and then gives several specifick Legacies out of his Personal Estate, and afterwards in the Conclusion of his Will, *all the rest and Residue of my Personal Estate whatsoever I give and devise to my Wife* (or any Stranger) *whom I hereby make Executor*; that in this Case the Personal Estate shall be first applied towards the Payment of Debts in Exoneration of the Real Estate so devised to be sold for the Benefit of the Heir at Law, and that the Real Estate shall only come in Aid of what the Personal Estate falls short to pay, because the Devise to the Executor was perfectly superfluous and idle, and no more than what the Law would have said if there had been no such express Devise, and therefore the Executor must take such Residue in the same Manner, and under such Charge as he would have done had it been left generally to fall upon

him as Executor, which must be after Payment of Debts and Legacies thereof, as the proper and natural Fund for that Purpose, and to the Payment whereof his Office, as Executor, obliged him ; but if the Devise of all the rest and Residue of his Personal Estate had been to *J. S.*, and he had made his Wife, or any other, Executor, there *J. S.* the Residuary Legatee, should have the Residue and Surplus so devised to him, exonerated and discharged of the Debts ; and in such Case the Real Estate, which was expressly devised to be sold, should in the first Place be wholly applied to that Purpose, and the Personal Estate should only come in Aid of the [73] Real so devised to be sold to make up what fell short to pay off the Debts : 'Twas likewise agreed, that if any particular Part of the Personal Estate, as a House, or £500 in Money, were devised to any one whom he also made Executor, that in such Case the Executor should not be chargeable in Respect of that particular Legacy to the Payment of the Debts ; that the Real Estate should in the first Place be sold for the Payment thereof, and in Case that fell short, the Executor should be chargeable only in Respect of the Residue and Surplus of the Personal Estate cast upon him by the Law, and not in Respect of such particular Legacy. And Mr. *Vernon* said there had been Cases decreed in this Court, that where a Legatee had been forced to abate of his Personal Legacy towards Payment of Debts, that in such Case he had been let in to stand in the Place of a Creditor to recover his proportionable Satisfaction out of the Real Estate devised to be sold for Payment of Debts : And in the principal Case the Question arose upon the Will of the late Lord Chief Justice *Hales*, who had by his Will devised particular Lands to his Wife during her Life, with Power for her by letting of Leases to raise Money for the Payment of his Debts ; and after having given away his Study of Books to such of his Grandchildren as should study the Law, and his Mathematical Instruments to his Wife, he devises the rest and Residue of his Personal Estate to his Wife ; and then goes on and gives several Directions touching other Things, and in the Close of his Will says, *I do hereby make and ordain my said Wife sole Executrix of this my last Will and Testament* ; so that it was a kind of a middle Case, and whether the express Devise to the Wife of all the rest and Residue of his Personal Estate in one Part of the Will should be so coupled with the last Clause, whereby he made her Executrix, as to be all one with the first Distinction, where a Man devises all the rest and Residue of his Personal Estate to his Wife, or any other, whom I hereby make Executor ; or whether this Devise of the rest and Residue of his Personal Estate, being a Distinct and independent Clause, should be looked upon as a specifick Legacy to her, and to exempt such Residue from being applied in the first Place towards Payment of the Debts, in Ease and Exoneration of the Real Estate expressly devised for that Purpose, as it would have been if another Person had been made Executor, was the Question. Mr. *Vernon* insisted that it should be exempted, that here he gave her the Residue of his Estate as a Legacy, before he seemed to consider who should be his Executors, that the making the Executrix was in a distinct Clause after, and had no Relation to the Devise in his Will to her before. But my Lord Keeper seemed to incline it would be all one, but said it was a Case which often might have happened, and therefore he would see Precedents ; and his Lordship and all the Bar agreed that the Cases wherein the Personal Estate has ever been applied in Ease an Exoneration of the Real Estate, are only where there was no express Exemption of the Personal Estate ; for if the Devise here was of such Land to be sold for the Payment of Debts and Legacies, and *I will that my Personal Estate shall not stand to be charged, or liable thereto* ; or if the Devise for [74] Sale of Lands for the Payment of Debts had been general, and he had after devised all the rest and Residue of his Personal Estate, *having already made Provision for the Payment of my Debts and Legacies out of my Real Estate, or out of such particular Lands, &c.*, or such like Clauses ; in those Cases the real Estate so subjected should not be exonerated by the Personal, and cited the Case of the *Lady Gainsborough* and of one *Yarway*, and several other Cases.—(See Abr. Eq. C. 320, and the Case of the *Earl and Countess of Gainsborough*, 2 Vern. 252.)

HYDE versus HYDE. [1710.]

[See Wills Act, 1837, 7 Wm. 4, & 1 Vict. c. 26, s. 7.]

Age of devising and consenting.

In this Case no Dispute was made, but that a Male Infant of fourteen Years of Age and a Female of 12 Years of Age, might make a Will of a Personal Estate : and Mr.

Gilbert said it was so agreed by my Lord Keeper *Wright* in the Case of *Sharp* and *Sharp*, wherein they follow'd the Rule of the Civil Law of *Justinian* for their Consent to Marriages at such Ages.

JONES versus WESTCOMB. [1710.]

[S. C. Prec. Chan. 316 ; 1 Eq. Cas. Abr. 245. Followed, *Andrews v. Fulham*, 1738, 2 Stra. 1092. Doubted, *Roe v. Fulham*, 1741, Willes, 314. See *Fonnereau v. Fonnereau*, 1745, 3 Atk. 315. Followed, *Avelyn v. Ward*, 1749, 1 Ves. Sen. 423. See *Frogmorton v. Holyday*, 1765, 3 Burr. 1624; *Mackinnon v. Sewell*, 1833, 2 My. & K. 210. Followed, *Underwood v. Wing*, 1855, 4 De G. M. & G. 662; *Warren v. Rudall*, 1858, 28 L. J. Ch. 72. See *In re Betty Smith's Trusts*, 1865, L. R. 1 Eq. 83; *Brookman v. Smith*, 1871, L. R. 6 Ex. 299. Followed, *Moore v. Beagley*, 1875, 33 L. T. 198.]

A Term devised to a Wife, Executrix, and a Child *ensient*, &c. The Surplus to be distributed. Post, 184, 204, 205, &c.

This was a Case wherein my Lord Keeper took Time to consider before he would give his Judgment, and was thus : A Man possessed of a long Term of Years devised it to his Wife for Life, and after her Death to the Child she was then *ensient* of, and if such Child died before it came to the Age of 21, then he devised one third Part of the said Term to his Wife, her Executors and Administrators, and the other two Thirds to other Persons, and made his Wife Executrix of his Will and died ; and this Bill was brought against her by the next of Kin to the Testator, to have an Account and Distribution of the Surplus of the Personal Estate not devised by his Will ; and two Questions were made, first, whether this Devise to the Wife of one third Part of the Term was good, because it happened she was not then *ensient* at all, and so the Contingency upon which the Devise to her was to take Place never happened. The other Question was, whether this Term being Part of the Personal Estate (it being expressly devised to her for Life, with such other Contingent Interest on the Death of the supposed *ensient* Child before 21), should exclude her from the Surplus of the Personal Estate which belong'd to her as Executrix, and so the Surplus go in Course of Administration, to be distributed amongst the Plaintiffs as next of Kin. As to the first, my Lord Keeper delivered his Opinion, that tho' the Wife was not *ensient* at the Time of the Will, yet the Devise to her of such third Part was good, and as to the other Point dismissed the Plaintiff's Bill, and so let in the Executors to the Surplus of the Personal Estate, notwithstanding the Devise to her of Part as aforesaid, and one *Littlebury's* Case was mentioned, where a Man made his Will and gave a Stranger a Legacy, and made him Executor ; and upon Suit in the Mayor's Court of *London* for a Distribution of the Surplus, Sir *Peter King* declared it accordingly ; but on Appeal to the House of [75] Peers, that Decree was reversed ; so that now the Resolutions seem to be against *Foster* and *Mount's* Case (vide post, 80, 184, 204, &c.), though I've heard say in that Case there was Practice in the Executor, for which he was punished with the Loss of the Surplus of the Personal Estate.

NICHOLAS BROWN and PITTMAN. [1710.]

Devise of Personal Estate in Trust, in Remainder, &c. V. 1 P. Will. 1, 2, &c. ; Post, 79, 105.

This Case arose upon the Will of one Mr. *Larder*, who being possessed of a Personal Estate to the Value of about £500, consisting chiefly of Money out upon Sureties, did by his Will in 1685 devise all his Personal Estate whatsoever to one *John Holland* for Life, and afterwards to all such Issue as he should have jointly, and for want of such Issue to *Nicholas Down* and to his Issue, and made three Executors and died. The surviving Executor made the Defendant and two others his Executors, in Trust for his Children and died. The Defendant only proved the Will of the surviving Executor, and acted in the Trust ; and now against him this Bill was brought by *Nicholas Brown*, as Administrator to *John Holland*, who died *intestate* and without Issue, to have an Account of the Personal Estate of *Larder*, the first Testator, as belonging to him by

Virtue of the Devise to *John Holland*, which vested the whole Interest and Property thereof in him ; and consequently the Devise over on Condition carried nothing ; but before the Cause came to a Hearing, the Plaintiff bethought himself, and for fear that Title should not hold, brought a Supplemental Bill, wherein he suggested that himself was the Person intended by the Testator's Will to have the Devise over, and that the calling him *Nicholas Down* was a Mistake ; and therefore if his Bill, as Administrator to *John Holland*, should not prevail, then he ought to have an Account as Devisee in Remainder ; and now the Cause was brought on to a Hearing on Bill and Answer, only that Mr. *Vernon* objected, that though the Plaintiff had in his Bill called himself Administrator of *Holland*, yet he having not reply'd no Examination could be to his Administration, or whether he were Administrator or not, and without that he could make no Title. Another Objection he made was, that the Plaintiff had not made proper Parties to his Bill ; for it appeared by the Defendant's Answer that there were four other Persons named Executors with him, and therefore they ought to have been made Parties, for they might have Debts out of the Estate, or other Allowances to be made them. But 'twas answered as to the first, that the Plaintiff had in his Bill set forth, that Letters of Administration were granted to him, as by the said Letters of Administration ready to produce might appear ; and this was not denied by the Defendant's Answer, and therefore they might render them in Court. As to the second Objection 'twas answered, that the Defendant had by his Answer confess'd, that he alone proved the Will and acted in the Executorship, and that the others never intermeddled therein ; and that in such Case, in an Action at Law, it would have been sufficient to have named him only who proved the Will, much more in a Court of Equity. (Vide 9 Co. 36 b, *Henslow's Case*, *ad contrary*.) And my Lord Keeper was of [76] the same Opinion as to both Points, and said, if the other Executors had any Demands out of the Estate, they might be at Liberty to come in before a Master if they thought fit to make them out : Then as to the main Point, whether the Devise over was good, the Counsel for the Plaintiff took it so clearly void that they offered no Argument in Support of it ; and the Counsel for the Defendant not much opposing it (as being a Kind of an Entail of a Personal Estate to *John Holland*, and therefore vested the whole Interest in him, and so belonged to the Plaintiff as his Administrator), therefore the Plaintiff had a Decree for an Account upon his Original Bill, and his Supplemental Bill, which was founded on the other supposed Title, was dismissed. Mr. *Vernon* said, this *Devise over* not being confined to *Holland's* dying without Issue in the Life of any Person in Being, could not be supported, and therefore offered nothing in Defence of it.

STAPLETON versus CHEALES. [1710.]

A Legacy devised payable at 21, is *Debita in præsentia*.—Where 'tis a lapsed Legacy.

See Abr. Eq. C. 294 and 295, *per totum* ; Post, 137.

In this Case it was argued by Counsel at the Bar, and agreed by the Court, that if a Legacy be devised to one, generally to be paid, or payable at the Age of 21 Years, or any other Age, and the Legatee die before that Age, that his Executors or Administrators may sue for it and recover it ; and with this agrees the Law of the Ecclesiastical Court, as was agreed by Doctor *Aubrey*, 1 Leon. 177, *Lady Lodge's Case* ; for this is *Debitum in præsentia*, though *solvendum in futuro* ; but if a Legacy be devised to one at 21, &c., or if, or when he shall attain that Age, and the Legatee die before, in this Case the Legacy is lapsed, and shall not go to his Executor or Administrator ; but if in that Case the Testator had added, that in the mean Time, or 'till the Legatee attains that Age, he shall have Interest for that Legacy at such a Rate from the Testator's Decease ; this Clause subsequent explains the Intent of the Testator, so as to make the Legacy, which was the Principal, vest such an Interest in him as should go to his Executors or Administrators, though the Legatee die before that Age, because, if the Principal were not due presently upon the Testator's Decease, there could no Interest accrue to the Legatee at that Time ; and this has been settled in *Cloberry's Case*, 2 Vent. 342, and in *Yates and Falley's Case*, and several other Cases in this Court ; but if such Portion were to arise out of Lands, or out of a Term for Years, though it were limited to the Party generally, to be paid, or payable at such an Age, and the Party died before that Age, there, for the *Benefit of the Heir*, the Portion should sink, and not go to the

Representatives of the Party so dying ; and the *Master of the Rolls* said the Provision for Payment of the Interest, in the mean Time, where the Legacy was given generally, and at, or if, or when the Party should attain such Age, that that should make it an Interest vested presently, was an Alteration of the Law from what it was held in Co. Litt. 299 b. When he read that Book, which was about 50 Years ago, tho' the Reason [77] of the Law, as then taken, was because there was no such additional Clause to explain it.

MASON *versus* DAY. [1711.]

A renewed Title descends not to the Heirs of the ancient Right. See Abr. Eq. C. 272, 273, 326, 327.

Elizabeth Mason having purchased a Lease to her and her Heirs, during three Lives, from the Archbishop of *Canterbury*, died, leaving *Mary* her Daughter and Heir an Infant : Two of the Lives being dead, the Guardian of the Infant, out of the Profits of the Estate, took a new Lease from the Archbishop to the Infant and her Heirs, during three other Lives, *i.e.* during the Life of *Cestuy que vie*, and two others ; then the Infant dies without Issue, and the Question was, Whether this should go to the Heirs of the Part of the Father, or to the Heirs on the Part of the Mother ? 'Twas agreed it should go to the Heirs on the Part of the Mother, it being only a Renewal of the old Lease, and under the old Trust ; and if the Infant-Heir had died without Issue before the Renewal, leaving the surviving *Cestuy que vie*, there had been no Question of it ; and so ought this new Lease, being renewed out of the Profits of the old Lease. But 'twas answered, and resolved by the *Master of the Rolls*, that this new Lease was a new Acquisition, and vested in the Daughter as a Purchasor, and therefore should go to the Heirs of the Part of the Father, the Renewal by the Archbishop being gracious and spontaneous ; and he differenced the Case from a Copyhold, for there the Lord is only Trustee for the Heir, and is bound to admit him ; and though the Lord be the Original Grantor, yet it is only in Virtue of the Trust reposed in him by Law for that Purpose, and 'twas decreed accordingly : And my *Lord Keeper* coming into Court, and being asked his Opinion in it, said he was of the same Opinion, to prevent a Rehearing.

GREENHILL *versus* GREENHILL. [1711.]

[S. C. 1 Eq. Cas. Abr. 174 ; Prec. Chan. 320 ; 2 Vern. 679. Not followed, *Torre v. Brown*, 1855, 5 H. L. C. 573.]

See Lucas's R. 528, &c.

Devise of all his Estate passes an Estate agreed for by Articles only. See Post, 91 ; 2 P. Will. 335.

This Cause came on upon an Appeal from a Decree made by Lord Chancellor *Cowper*, and the Case upon Opening appeared to be thus : One Mr. *Greenhill* desired Mr. *Young* to purchase an Estate for him, of about 10 or £12,000 Value, in such a Place ; and Mr. *Young* meeting with an Estate which he thought would answer Expectation, agreed for the Purchase of it : And thereupon by Articles dated the 10th of April 1706, between the Vendors and their Wives on the one Part, and *Young* of the other, the Vendors agree to deliver Possession at *Michaelmas* following, and to execute sufficient Conveyances thereof ; and *Young* covenants to pay the Purchase-Money at *Michaelmas*, when Possession was delivered. In June after Mr. *Greenhill*, for whom the Estate was purchased, makes his Will, and thereby devises all his Personal Estate to be sold, and the Money to be laid out in the Purchase of Lands, to be settled together with his Freehold Estate on the Plaintiff ; and in another Part of the Will devises all his Lands of Inheritance to the Plaintiffs and [78] their Heirs, at *Michaelmas* following. Possession was accordingly delivered to *Young*, and this Money paid, but Conveyances were not executed till about a Year after : Then *Greenhill* dies, without new Publication of his Will ; and the Plaintiffs brought their Bill against *Young* and the Heir at Law, to have Conveyances executed to them, pursuant to the Devise. Part of the Estate so devised was customary, and lay in *Cornwall* ; and by the Custom there, a Surrender to the Use of his Will was necessary to pass such Lands, though otherwise they passed by Lease and Release, as Lands at Common Law, and so were not Copyhold. The Defendant *Young*, by his Answer, confessed the Trust : And the Question upon this Case was, Whether the Will was sufficient

to pass the Trust of these Lands ? And Chancellor *Cowper* decreed it was. Now it was argued by Sir *Joseph Jekyll* and Mr. *How*, that that Decree ought to be revers'd : They both took a Distinction between an Agreement for the immediate Purchase of Lands of such a Value, and an Agreement for the future Purchase of Lands, &c., as that was ; they agreed that if the Articles had been for the present Purchase of these Lands, then the Vendor had been a Trustee presently for the Purchasor, and then such Devise of them had been good in Equity : But here the Possession was not to be delivered till *Michaelmas* following, nor was any Money to be paid before that Time ; and then the Purchasor had not Power to devise them sooner ; no more than a Devise of Lands, which one should after purchase, would be good, as has been settled in the Case of *Brunker and Cooke*, which was adjudged in both *B. R.* and *C. B.* and afterwards affirmed on Error in the House of Lords. So if a Man had a Judgment or Statute against another, though that bound Lands of Freehold or Inheritance, from the Time of the Judgment given, or the Statute acknowledged, so that the Conusee has not so much Interest as he can devise, even before Execution actually taken out, yet 'tis otherwise of Copyhold and Customary Lands.

'Twas likewise urged that these customary Lands could not pass by the Will, for want of a Surrender previous thereto.

'Twas likewise argued on the other Side by *Vernon*, in Support of the Decree, that these Lands were bound immediately from the Execution of the Articles : That the Possession not being to be deliver'd till a future Time, made no Difference in Equity : That if Mr. *Greenhill* had died before *Michaelmas*, the Equity would have descended to his Heir, and that Heir might have brought a Bill against Mr. *Greenhill's* Executors to compel the Payment of the Purchase-Money out of the Personal Estate : That in that Case the Money was bound by the Covenant ; and if the Plaintiffs should not have those Lands, they would lose both Money and Lands too ; for if the Money had been at Liberty, that would have passed by the Will to the Plaintiffs ; but now that being bound by the Covenant, if they can't have the Lands, they must lose both : That the Case here was different from the Case of *Brunker and Cooke* ; because here the Lands were immediately bound by the Articles, and were in Equity as much the Testator's as if he had been immediately let into Possession : And as to the Customary Lands, no Surrender was necessary ; for even in Case of Copyhold, tho' to pass [79] the Lands themselves, a Surrender to the Use of the Will might be necessary, yet the *Cestuy que Trust* could make no such Surrender, for he had no Estate in the Lands ; and if Copyhold Lands were in Mortgage, yet the Mortgagor might devise the Equity of Redemption without any Surrender, for he had no Estate in them whereof to make any Surrender ; and for that Point the other Side gave it up.

And the *Lord Keeper* said, he saw no Reason to vary that Decree, for he thought such future Interest was devisable as well as if it had been in Possession ; and that the Lands and Money were actually bound from the Time of the Articles ; and that the Heirs might have compelled the Executors to have paid the Money in case there had been no Will, &c., and so affirmed the Decree. (See *Lucas's Rep.* 528, 529 ; 2 Ch. Ca. 144.)

Note : It did not appear in this Case that the Testator had any other Estate of Freehold or Inheritance, and so the Devise in such Manner was sufficient to describe that Estate so as to carry it by the Will.

GIBBS versus BERNARDISTONE. [1711.]

Devise of Personal Estate over in Remainder void. *Abr. Eq. C.* 199, &c. ; *Post*, 105, & 91 ; *Ante*, 75, &c., *ibid.*

In this Case 'twas held clearly, and decreed, That a Devise of a Personal Estate to one and his Issue, or to one, and if he dies without Issue, the Remainder over to another, that the Devise over is void, and that the whole Interest vested in the first Devisee, so as to be liable to his Debts : and *Vernon* said, that the Reason that a Devise over of such Personal Estate upon a Life only was good, was because in Construction of this Court the first Devisee had but the Use of it, and not the intire Property.

COLESWORTH *versus* BANGWIN & al', Executors of HENRY DARBY. [1711.]

Devise of a Bond-Debt good, though the Debt was paid.

I did not hear this Cause open'd; but upon the Argument of Counsel it appear'd to be, that the Testator having Debts to the Amount of £50 owing to him from the Defendant, did by his Will forgive him that Debt, and gave him £50 more, and some Household Goods to the Value of £100, so that in all he gave him about £200 and made him and the Plaintiff Executors, and died without making any Disposition of the Surplus of his Personal Estate, which was considerable: And now the Plaintiff brought this Bill against the other Executor, for an Account of the Personal Estate; and that he might have the Surplus to himself, upon Pretence that the Testator having given the other Executor these Specifick Legacies, intended him no more, and so that the whole Surplus would belong to him.

For the Defendant 'twas insisted, That the Plaintiff was a Stranger, and the Defendant a near Relation of the Testator: That he gave him these Legacies only that he might, at all Events, be secure of something: That he took these Legacies in another Capacity than as Executor, and so they could not exclude him of his Share of the Surplus [80] which the Law casts upon him as Executor, and so in another Capacity.

And the Lord Keeper was clearly of this Opinion, and that 'twas a much greater Question, whether this Devise of the particular Legacies to one Executor did not exclude both from any Share of the Surplus, because both came in but in Representation of the Testator, and made but as one Person? And so suppose the Defendant had been made sole Executor, he made it a great Question whether this Legacy would not have excluded him from that Surplus. Indeed the Reason urged against it is, That if no such Legacy had been given him, he would come in for the whole; and his Giving him a Part only, ought not to exclude him from the Residue, which without any such Devise of Part, the Law would have thrown upon him: But the Case of *Foster* and *Munt* settled that long since; and though that Case has of late been shaken in the Case of the *Duchess of Beaufort*, and in *Littlebury's* Case in the House of Peers, yet they were because the Legacy given to the Executor was no beneficial Legacy, so as to exclude him from the Surplus, because Mourning was a Decency required on such an Occasion: But this Legacy here to the Executor was a beneficial one; but this not being the Point in Question, he made no Decree concerning it, but decreed that the Executors should come in equally for their Share of the Surplus of the Personal Estate, notwithstanding these specifick Legacies to one Executor.

Note: If the Law be as has been lately held, yet it seems no Contradiction to *Foster* and *Munt's* Case, which was decreed only upon the Fraud in the Executor, as the Lord *Guernsey* declared.

POVEY and BROWN *versus* AMHURST & al'. [1711.]

The same Day.

Legacy, &c.

In this Case one *Selby*, Uncle to the Defendant's Wife, had by his Will given her £1000 Legacy, whilst she was Sole; afterwards, on a Treaty of Marriage, 'twas agreed by Articles, that £700 of this Legacy should be applied towards Payment of his Debts; and after his Marriage the Defendant, without his Wife, assigns the remaining £300 to the Plaintiffs, who were Creditors likewise: And they brought this Bill against the Defendant and his Wife, and the Executors of *Selby*, to have a Satisfaction of their Debts out of the remaining £300, and 'twas decreed, that an Account should be taken, and that upon the Plaintiffs proving themselves to be real Creditors, and that the Assignment was *bona fide*, they were to have a Satisfaction accordingly; and the Residue, if any, of the £300 was to be put out, for the Benefit of the Wife.

[81] WHITTHILL and PHELPS. [1711.]

Custom of London, as to Freemens Widows. See Eq. Abr. 209, &c.

The Case upon Opening appears to be this: One *Mary Phelps*, Widow of *Charles Phelps*, having a considerable Fortune, and several Children, on Treaty of a second Marriage with one *John Whithill*, agreed he should have only £600 of her Fortune,

and the Residue to be settled for her separate Use, and after her Death for the Benefit of her Children ; and accordingly an Indenture was prepared and executed before Marriage, whereby she with his Consent assigns over her Fortune to Trustees, in Trust that she should receive the Profits of it for her own separate Use during her Life, and after her Death that the same should go and be equally divided amongst the Children ; and *Whitthill*, in Consideration of the said intended Marriage and Marriage-Portion of £600 makes a Settlement on her, and at the End of the Deed covenants, That if the said *Mary* should survive him, then his Executors or Administrators should deliver and pay to the said *Mary* £600 out of the Personal Estate. The Marriage takes Effect ; *Whitthill* dies Intestate, and without Issue, in 1709, and about a Year after *Mary* makes her Will, and the Defendant her Son Executor, and dies : The Defendant likewise obtained Administration to the Husband ; but that was afterwards revoked, and granted to the Plaintiff his Mother, who brought this Bill, for an Account and Distribution of the Intestate *Whitthill's* Estate. The Defendant by his Answer insisted, that *Whitthill* was a Freeman of *London*, and so on his Death his Widow was intitled to the £600 in the first Place, pursuant to the Marriage-Agreement, and to the full Moiety of the remaining Personal Estate, as his Widow, by the Custom of *London*, and to a Moiety of the remaining Moiety by the Statute of Distributions ; and now she being dead, the Defendant, as her Executor, stood in her Place, and had the same Right as she herself had.

'Twas argued for the Plaintiff, that this £600 which the Husband had covenanted should be paid her by his Executors, in case she survived, must be taken to be in Satisfaction of her customary Part, tho' there were no Words to that Purpose : That this was a compounding for a Customary Part ; and being before Marriage, by the Custom of the City, bound her from demanding more : That in this Case she had waived any Right under the Custom, by making a particular Division for herself before-hand ; and *Mr. Vernon* cited a Case of *Lee and Pitt*, decreed by *Cowper*, where a Man and Woman before Marriage agreed by Articles to settle £2000 upon themselves and their Issue, and a Covenant from the intended Husband, that if the Wife survived, she should have this £2000 at her own Disposal ; the Wife survived, and the Husband being a Freeman, this £2000 was decreed not only to be in Satisfaction of, or as a Composition for her Customary Part, by the Custom of *London*, but also to exclude her from any Share by the Statute of Distributions in the Husband's Estate, tho' dying Intestate : And that this Case stood now in the Paper to be re-heard ; and though [82] perhaps the Court may not go quite so far now, yet certainly it ought to exclude her from any Customary Part.

On the other Side it was endeavoured to distinguish this Case from that which was cited, That here it was only her own £600 back again, and that could be no Composition for any Share she might be intitled to of her Husband's Personal Estate ; but here it was only giving her back her own again.

But *Lord Keeper* directed it to be in Satisfaction of her Customary Part, and took Notice, that the Deed was expressly worded, In Consideration of Marriage, and as a Marriage-Portion ; so that he was absolute Master of that £600, and so it must be looked upon to come out of his Personal Estate : But as to a Moiety of the other Moiety, upon the Statute of Distributions, there was no Question made of it, but the Widow would be intitled thereto ; and an Account was decreed accordingly.

Note : For the other Moiety, which belonged to the Intestate, the Custom of *London* gives no Direction, where there are no Children, and so that is wholly under the Direction of the Statute of Distributions ; but the Custom of the Province of *York* extends to give such Moiety to the next of Kin to the Intestate : And in the Principal Case the *Master of the Rolls* was of the same Opinion, and took Notice, that the Deed was expressly mentioned to be made between the Parties, Citizens of *London*, so that the Custom of the City might well be supposed in their View ; and so that compounding for the £600 in all Events, exempted her out of the Reason of the Custom, which was to provide for those who should be otherwise left without any Provision ; and here she would not trust to the Customary Provision, and so ought to have no Benefit by it. *Quære* also, If the Custom was not intended for Orphans ?

ORME *versus* SMITH.

[Feb. 22, 1711.]

[S. C. 1 Eq. Cas. Abr. 302 ; 2 Vern. 681.]

Ademption of Legacies.

The Defendant's late Husband made his Will in Writing, and thereby, amongst other Things, he devises as follows ; viz. *I give and devise unto Mr. Thomas Orme, my good and only Uncle, the Sum of £500, that is to say, that Bond and Judgment which he gave me for £400, and £100 in Money* ; and makes his Wife the Defendant Executrix, and desires her to be kind and assisting to his Uncle, that he might live as became a Gentleman. The Uncle afterwards sold an Estate, and with the Money paid off £320 and took up the Bond, and had the Judgment vacated, and gave a new Bond for the remaining £80, and some Time after the Testator died : And now the Uncle, the Plaintiff, having Notice of the Will, brought his Bill here for his Legacy of £500. The Defendant insisted, this was a specifick Legacy of that particular Bond and Judgment ; and they being cancelled and altered before the Testator's Death, it was an *Ademption of the Legacy*, and so the Plaintiff could have no Right but to the remaining £100, and cited Ray. 335, *Paulett's Case*, and the Case of *Theobald and Wynn*, cited there. Swinb. 450, 452.

[83] On the other Side 'twas insisted for the Plaintiff, that upon these Books the Diversity is, where the Money is paid voluntarily in by the Person who owes it, and where the Testator sues for and recovers it : In the first Case the Legacy continues still good, because Money only comes home to the Personal Estate ; but in the other Case, the Testator suing for it, shews that he intended to make it his own, and so would not leave it to the Legatee to recover.

And the *Lord Keeper* was clear of the same Opinion, and decreed the £80 Bond to be delivered up, and the Residue of the Legacy to be paid, but gave no Costs : Also 'twas said, That the Justice of the Uncle ought not to prevent the Affection of the Nephew, no Alteration of his Intention appearing.

BILL *versus* Commissary HYDE & Ux'. [1711.]

[S. C. Prec. Chan. 328. See *Murray v. Barlee*, 1831, 4 Sim. 93 ; *In re Turnbull*, [1900] 1 Ch. 186.]

A Feme Covert to appear and answer without her Husband. See Abr. Eq. C. 61, 64, 65.

On a Motion for Discharge of the Defendant's Wife, who was taken upon an Attachment for not appearing and answering the Plaintiff's Bill, the Case appeared to be thus : The Defendant's Wife being a Widow, and having a considerable Fortune, upon the Defendant's Application to her by way of Marriage, proposed the settling her own Fortune upon herself separately, wherewith he was not to intermeddle ; and accordingly, before Marriage, a Settlement was made and executed, and the Marriage took Effect. Some Time after the Defendant, being very much in Debt, was arrested, and the Creditors were going on to take out Execution, and to seize his Goods ; but to prevent that, the Wife gave a Note, that if they would discharge the Action, which was for £2000, she would pay the Debt out of her own Personal Estate ; and accordingly the Action was discharged : but she afterwards refused to make good her Agreement ; and now this Bill was brought to inforce an Execution thereof. The Bill was brought against the Husband and Wife, and Process taken out against both, and actually served upon the Wife at her House, but the Husband could not be found : After which, neither the Husband nor Wife appearing, an Attachment was taken out against both ; and the Husband still keeping out of the way, the Wife was taken upon the Attachment, and now moved to be discharged, on several Affidavits that her Husband was actually gone to *Holland* before the Filing of the Bill, and so Process against her without her Husband was irregular, and that she ought to be discharged ; and 'twas said, at Law there could be no Proceeding against the Wife without her Husband, and that Equity followed the Law in this Particular.

On the other Side 'twas said, That the Wife in this Case was not to be considered as a *Feme Covert* : That she having an Estate settled on her before Marriage, for her separate use, this made her a Feme Sole, and a separate Person from her Husband, and

so her Agreement was binding upon her : That they had done all they could to bring in the Husband ; that they had made him a Party to the Bill, taken out a *Subpœna* against him and his Wife, and for not appearing they have [84] taken out an Attachment likewise against both : That if they could not in this Case proceed against the Wife, the Justice of the Court would be eluded, and it would be easy for any man to settle all his Estate upon his Wife, and then get out of the Way, and so bid Defiance to his Creditors. And Sir *Joseph Jekyll* said, 'twas the Saying of a very great Man, *Est boni Judicis ampliare Jurisdictionem* ; and he thought to extend the Arm of Justice farther than usual, when otherwise there would be a failure of Justice, was the Duty of every Court : That in some Cases a Woman may sue without her Husband ; and nothing was more common, than for a Wife in this Court even to sue her own Husband ; and surely in this Case the Plaintiff ought not to lose the Benefit of the Wife's Agreement, by her sending her Husband abroad ; and cited a Case of *Duboise* and *Dowle* to this Purpose. But the *Lord Keeper* seemed to be of Opinion, that the Process in this Cause, without the Husband, was irregular, and that they ought to stay till the Husband's Return, when they might renew the Process against both. To which 'twas answer'd, Suppose the Husband should never return, must they then be totally deprived of the Benefit of this Agreement ? On which my *Lord Keeper* said, he would ask the *Master of the Rolls's* Opinion, and be governed by that. And afterwards the *Master of the Rolls* coming into Court, was clearly of Opinion that the Process in this Case without the Husband was regular ; that the Husband was joined in the Suit only for Conformity, and said, a Woman by her Marriage did not lose her Understanding or Discretion, but rather improved it by her Husband's teaching ; and cited *Moor* and *Hussey*, Hob. 93, where several Cases are cited, wherein a Feme Covert without her Husband shall be chargeable, and said the Practice of this Court had been constantly so : On which the Defendant prayed Time till the first Day of next Term, to put in her Answer ; and on her entering her Appearance with the Register, and paying the Costs of the Motion, 'twas granted, and she too discharged out of Custody.

Note : *How* in this case moved that the Defendant ought not to be heard to move for her Discharge, because she not having appeared by her Clerk in Court, was not at all in Court, but a perfect Stranger, and so could not regularly make any Application by her Counsel, till she had brought herself into Court, by directing her Clerk to enter an Appearance for her : But of this no Notice was taken, either by the Court or Counsel on the other Side. *Vide Compleat Attorney*, 326, 328.

ANONYMOUS. [1711.]

[S. C. Prec. Cha. 331.]

A Messenger to bring in the Party.

The Plaintiff's Bill being dismissed with Costs, and Costs taxed to £160, a *Subpœna* was awarded against him to pay these Costs, and for not obeying it an Attachment ; on which Attachment the Sheriff of *London*, to whom it was directed, took Bail, and returned a *Cepi Corpus* : And now on this return a Motion was made for a Messenger against the Plaintiff ; and 'twas urged to be the Course of the Court, that a Messenger should go in all Cases where the Sheriff takes Bail, [85] where the Party is not bailable, as in this Case he is not, and the rather, for that in this Case the Bail-Bond was taken of a Member of Parliament, against whom (the Parliament being now sitting) they can have no Remedy ; and *Hawkins's* Case was cited, where in a like Case a Messenger was sent to bring in the Party ; and so 'twas ordered in this Case.

HUNING *versus* FERRERS. [1711.]

Where Notice to a Remainder-Man confirms a void Lease. See *Abr. Eq. C.* 330, 331.

The Plaintiff having a Lease of certain Mills for 12 Years, which were near expired, the Lessor upon his Marriage makes a Settlement of those Mills to the Use of himself for Life, then to the first and other Sons of that Marriage in Tail Male, Remainder to his own right Heirs ; afterwards the Plaintiff takes a new Lease of these Mills from the Father for 30 Years, and lays out £2800 in new Building and improving them.

The Defendant was the eldest Son of the Issue Male of the Lessor, and during the Time the Plaintiff was making the Improvements, went to his Father, and told him he had not Power to make any such Lease ; that after his Death the Estate would be his, but never acquainted the Plaintiff with that, or of the Settlement made on his Father's Marriage ; but on the contrary writ to the Plaintiff to take Care to keep one of his Mills in particular in Repair ; then the Father dies, and the Son recovers in Ejectment against the Lessee, who thereupon brought this Bill to be quieted in the Possession of the Mills, during the Residue of his Lease, for that the Defendant was fully acquainted with the Circumstances of this Lease, and knew his Father had not Power to make it, and yet never forbid or cautioned the Plaintiff from going on with the Repairs, but on the contrary stood by, and encouraged him in the Proceeding therein ; and so the Plaintiff had a Decree to hold during the residue of his Term ; for though the Defendant was not Privy to the making of this Lease, but that was only the Fraud of the Father, yet he being to have the Estate after his Father's Death, and taking Notice thereof to his Father, and that he had not such Power to make any such Lease, and yet suffering the Plaintiff to go on in the Repairs thereof, with a Design to reap the whole Benefit thereof when his Father was dead, was such a Fraud and Practice in him as ought to be discountenanced in this Court. For *Qui tacit consentire videtur* ; and *Qui potest & debet retare jubet*. And it was decreed that the Plaintiff should enjoy during the Residue of his Lease. See 2 Lev. 152, *Edlin v. Battaley* in Chancery.

[87] CASES HEARD AND DECREED IN CHANCERY TEMPORE GEORGH I.

SAYER *versus* SAYER. [1714.]

[S. C. Pre. Chan. 392 ; 1 Eq. Cas. Abr. 200 ; 2 Vern. 688.]

Michaelmas Term. J. G. in Court.

Devise of all his Personal Estate passes all he had at the Time of his Death, &c. See 2 Vern. 418, 747, 739, 538, &c. ; Abr. Eq. C. 208, 209, 210, &c.

A Man by his Will gives all his Personal Estate in *Wanstead*, except his Bed and Bedding, to *J. S.* and afterwards devises £300 out of his Personal Estate, and his Houses in *Cannon-street*, to the Plaintiff, who now brings his Bill for Discovery of Assets, and to charge the whole Personal Estate with the Payment of his Legacy ; and it was proved in this Case that the Testator at his Death was possessed of a Coach and Horses at *Wanstead*, and that there was likewise some Arrears of Rent due to him at his Death out of Lands at *Wanstead*, to the Value of about £300, besides the Houses in *Cannon-street*. The first Question was, Whether the Devise of all his Personal Estate at *Wanstead* was not such a Specifick Devise thereof, as to exempt it from coming in Aid of the other Personal Estate towards Payment of this Legacy ? Another Question was, Whether the Coach and Horses, and the Arrears of Rent at *Wanstead*, passed likewise as Part of the Specifick Legacy : And my Lord Chancellor *Cooper* decreed, That the Personal Estate at *Wanstead* was not to be applied towards Payment of the £300 Legacy ; *First*, Because it appeared that the Testator had a Personal Estate over and above that at *Wanstead*, to the Value of about £300, and his Intent seems plainly to charge that alone with the Legacy, he not having devised it out of all his Personal Estate whatsoever, or wheresoever, or inserted any Words to shew that his whole Personal Estate should stand charged with it. *Secondly*, Because he having such other Personal Estate, to the value of about £300, which he might presume sufficient to answer that Legacy, yet as a Supplement to and the Deficiency of it, in Case it should fall short, he has likewise charged his estate in *Cannon-street* with it, which shews he has intended to provide for it out of some other Fund, and not out of his Personal Estate in *Wanstead*, which he had before specially given to another ; but the Case might so happen, that a Specifick Legacy shall be charged with the Payment of a Pecuniary Legacy, as in this [88] Case ; after he had devised his Personal Estate at *Wanstead*, if he had likewise devised his Personal Estate at such another Place, and then devised such £300 Legacy out of his Personal Estate generally, and died, having no other Personal Estate than in the two Places beforementioned,

this £300 Legacy must come out of his Personal Estate at large in both Places, though otherwise Pecuniary Legatees generally are to abate in Proportion, where the Personal Estate, not specifically devised, falls short to answer their Legacies, and shall have no Aid of the Specifick Legatees to make up their Pecuniary Legacies, especially if they are devised generally and at large, without saying out of his Personal Estate, or out of all his Personal Estate whatsoever, or Words to that Effect; and it was clearly agreed that this Devise of his Personal Estate at *Wanstead* was as much a Specifick Legacy of it as if he had enumerated the several Particulars of it. Secondly, It was decreed that the Coach and Horses were Part of his Personal Estate at *Wanstead*, where he lived; for since there is no other Period for fixing this when a Devise shall take Place but the Instant of the Testator's Death, and you can't say that what he had a Week or a Fortnight, or any other Time before his Death, should pass, rather than what he had at any Time longer; therefore in Case of a Personal Estate which is fluctuating and changing, the Instant of his Death is the only Time to ascertain it, and we have therein no other Rules in Equity for the Construction of Wills than what are at Common Law, and here at his Death the Coach and Horses were at *Wanstead*; so for the Arrears of Rent they are Part of his Personal Estate at *Wanstead*, for they were issuing out of Lands there, and no where else; and for the Objection that the Devise of the Personal Estate at *Wanstead* should carry only his Household Goods, because he thereout excepted his Bed and Bedding, which was urged as an Argument of his Intent to pass only Things of the same Nature with those he had excepted; this was looked upon as an Objection of no Weight at all at the Bar, and the Court took no Manner of Notice of it.

ATKINS *versus* DAWBURY. [1714.]

What Things or Interests may be assigned over. See 1 Chan. C. 232; 3 Chan. Rep. 90; 1 Roll. Abr. 380; 2 Vent. 362; 2 Vern. 391, 428, 595, 764, 563.

A Man by his Will gives a Legacy of £300 to a Feme Covert without creating any separate Trust of it, for her Benefit, and this Legacy was made payable out of a Reversion of Land expectant on an Estate for Life: The Husband of the Legatee some Time after makes an Assignment of this Legacy to Trustees in Trust, and for the Benefit of his Children, and after by his Will takes Notice again of the same Legacy, and devises it in like Manner for the Benefit of his Children, and makes his Wife, to whom the Legacy was originally given, his Executrix, and dies: The Estate for Life drops, and the Widow applied to the Executor of the first Testator for the £300 Legacy, and thereupon she and the Executor come to an Agreement that she should accept of £200 only, in full of her said Legacy, and accordingly the Land was sold (the Widow joining in the [89] Sale) the £200 paid, and the Widow gave a release for her whole Legacy; and now this Bill was brought by the Children to have the Benefit of this £300 under the Assignment and Will of the Father: It appeared in this Cause that tho' she was Executrix to her Husband, and knew not only of his having devised the £300 for the Benefit of his Children, but also of his Assignment thereof, in the Manner beforementioned, yet that she gave no Notice, or said any thing of it to the Executor: And the Court decreed, That forasmuch as the Husband, who had a Power to extinguish or release this Legacy, had made a good Assignment thereof in Equity (tho' as a Chose in Action it was not assignable at Law) 'tis actually recovered; and having again by his Will confirmed that Assignment, and given it again in the same Manner, bound the Wife the Legatee; and she giving no Notice of this Assignment to the Executor, should be answerable to the Children for the £200 she had receiv'd against her express Knowledge of the Childrens Title to it; but as to the other £100 which the Executor had drawn her in to release, that he himself should stand charged, to answer that to the Children, he being thereby no ways injured, since he ought at first to have paid the whole Legacy; and tho' this Legacy was charged on a Reversion which was not an immediate Fund for the raising it, yet being given to the Wife *in presenti*, when the Wife comes in it shall carry Interest from the Testator's Death, which must likewise go to the Children.

Sir JOHN TALBOT and IVORY *versus* Duke of SHREWSBURY & al'. [1714.]

An uncertain or contingent Provision or Legacy no Satisfaction for what was certain.

In this Case it was said by Mr. *Vernon*, and agreed by the *Master of the Rolls*, that if one be indebted to another in a Sum of Money, and does by his Will give him as great or a greater Sum of Money than the Debt amounts to, without taking any Notice at all of the Debt, that it shall nevertheless go in Satisfaction of the Debt, so as that he shall not have both the Debt and Legacy ; but if such a Legacy was given upon a Contingency, which if it should not happen, the Legacy would not take Place, in that Case though the Contingency does actually happen, and the Legacy thereby become due ; yet it shall not go in Satisfaction of the Debt, because a Debt which is certain shall not be lost, or merged by an uncertain and contingent Recompence ; for whatsoever is to be a Satisfaction of a Debt ought to be certain in its Creation, and at the very Time it is given ; which such contingent Provision is not ; and cited the Case of one *Pollexfen* to be so decreed by my Lord Chancellor *Harcourt*, and affirmed on Appeal in the House of Lords ; and as it is in the Case of a Will, so 'twill be likewise if the Provision were by Deed : If the Provision be absolute and certain, it shall go in Satisfaction of the Debt ; but if it be uncertain and contingent, it can be no Satisfaction, because it could not be so in its Creation ; and the happening of the Contingency after will not alter the Nature of it. Another Point in this Case was, that the Lands were devised to Trustees, [90] in Trust, out of the Rents and Profits (without saying, or by Sale or Mortgage) to raise Money to pay Debts (see 2 Peer Will. 13 to 20), and to settle the Lands themselves for several Uses ; but because it appeared that the Rent and Profits of the Land annually would not satisfy the Debts in any reasonable Time, an Account was directed to be taken of the Testator's Personal Estate, and what that fell short to pay the Debts was to be made up by a Sale of Part of the Real Estate ; and the *Master of the Rolls* said this was the common Course of Equity, where the Rents and Profits are not sufficient to pay the Debts in a reasonable Time ; but if it had been devised to be raised out of the Rents only, it had been otherwise.

THOMPkins *versus* THOMPkins. [1714.]

Daughters Portions, charged on Stock and Real Estate, how to be raised. See Abr. Eq. 335, 336, &c. ; 1 Vern. 219, 336, 7, 452, 458 ; 2 Vern. 321, 458, 460, 665, 640, 760 ; 3 Chan. R. 190 ; 1 Salk. 159.

The Plaintiff's Father by his Will in 1682 devised £500 a-piece to the Plaintiff his Daughter and to two other Daughters, to be paid at their respective Ages of 21 Years, or Days of Marriage, which should first happen : The said Portions to be raised and paid out of his the said Testator's Stock, and then devises the rest of his Real Estate to his Wife for Life, and in Lieu, and in Satisfaction of her Dower, and for the Maintenance and Education of his Children, and also for and towards the raising and making up the said Portions to his said Daughters, and then goes on, *And after my Debts and Legacies paid and satisfied, I give and devise all my Lands, Tenements, and Hereditaments to my Son* (one of the Defendants) *and his Heirs*, and makes his Wife and the Defendant his Son Executors, and dies, leaving not in Stock above the Value of £100. The Wife enters, and the two other Daughters marrying had their Portions paid ; and this Bill was brought by the third Daughter who had attained her Age of 21 and was unmarried, to have her Portion ; the Wife had been dead some Time, and the Defendant the Son and surviving Executor insisted, that his Lands ought not to be charged with the raising this Portion, in regard 'twas directly expressed to be raised out of the Stock and the Rents of the Estate during the Wife's Life ; and that if the Wife had exhausted, or consumed the Surplus of the Rents, which should have raised the Plaintiff's Portion, she ought to follow her Assets ; or however, that the Plaintiff could not lay the load on his Estate if the Wife left no Assets. But the Court was of Opinion that in this Case the Defendant's Estate was chargeable to make up the Portion to the Plaintiff ; for several Gradations in his Will shew, that the Portions were at all Events to be made good to his Daughters ; and therefore he charges them on his Stock, and afterwards devises them to be made up out of the Surplus of his Rents

during his Wife's Life, and afterwards gives the Land to his Son, subject thereto, by devising them to him after his Debts and Legacies paid, which in a Will amounts to a Charge on his Lands for Payment thereof, since the Son by the Will is not to have the Lands 'till after the Debts and Legacies paid; and therefore 'twas decreed that an Account should be taken of the Stock, and what the Proportion thereof (after a proportionable Deduction for [91] the other two Legacies) fell short, should be made up out of the like proportionable Surplus of the Rents, during the Wife's Life; and that if they fell short, to be supplied out of the Defendant's Estate. But it was not determined with any Clearness, whether, if the proportionable Part of the Stock, and of the Surplus of the Rents, which were appointed the Fund, in the first Place, for the Payment of these Legacies, were wasted by the Wife; whether the Loss thereof, as to the Plaintiff's Legacy remaining unpaid, should fall upon the Plaintiff herself, or if she should, by Reason of such wasting, load the Real Estate so much the heavier, to make good her Legacy: Though my *Lord Chancellor* seemed to incline, that her Legacy, as this Case was, should be made good to her at all Events out of the Real Estate, in Case the other Funds provided for it proved deficient, or were wasted, or at least so much thereof, as by any Misapplication during her Minority was lost and gone of the other Fund; though he said, from the Time of her attaining her full Age, it might perhaps deserve another Consideration. Another Point in this Case was, that the Defendant the Son had mortgaged this Estate to some other of the Defendants, who had full Notice of the Will, as was proved in the Cause; and whether they should be affected with this Legacy, was the Question? Though there was little said in Defence of this Point, but that the Defendants were only Executors of the Mortgage, and knew nothing of the Transactions in taking the Mortgage (Q. 2 P. Will. 439). And Mr. *Vernon* argued, that in this Case, if there could be any Doubt made of it, as he thought there could not, yet that the Defendant the Son, who received the Money, would be chargeable therewith, and that the Plaintiff might in the Nature of a *Cestuy que Trust* prosecute him as a Trustee, for a Recompence thereto, till her Legacy paid; and cited the Case of *Cherrys* and *Ferrars* in this Court, to have been so decreed: But my *Lord Chancellor* seemed to turn this Reasoning upon him, that there the Wife for the proportionable Part of the Surplus was but in Nature of a Trustee, and the Plaintiff must expect her Recompence for what she had wasted out of the Assets, and not load her Son therewith; but yet he was decreed to an Account, as before was mentioned.

LINGEN *versus* SOURAY. [1715.]

See 1 P. Will. 172, & Abr. Eq. C. 175, S. C.

Devise. What Estate or Interest may be devised, &c. See 3 Lev. 427, 428; 1 Rol. Abr. 378; 2 Salk. 237; 2 Chan. Cas. 144; 2 Vern. 679.

On a Treaty of Marriage, Articles were entered into, whereby the Sum of £700, being the Wife's Portion, and £700 added to it, on the Part of the Husband, in all £1400, was agreed to be laid out in the Purchase of Lands, to be settled on the Husband's Life; Remainder to the Wife for Life; Remainder to the first and other Sons of the Marriage in Tail-Male successively; Remainder to the Issue Female of that Marriage; Remainder to the right Heirs of the Husband. The Marriage takes Effect, the Husband dies without Issue, and before any Purchase pursuant to the Articles, having first made his Will, and thereby he devises all his Personal Estate to the Defendant, who was his Wife, and devises all his Real Estate to the Plaintiffs, who were his Nephews, [92] and one of them, his Heir at Law, makes his Wife Executrix, and takes no manner of Notice of the £1400, and whether the £1400 should go to the Nephews, as they should have the Lands, *i.e.* after the Wife's Death, if the Purchase had been pursuant to the Articles, was the Question? It appeared in the Cause, that the Wife, at the best Computation that could be made, had above £77 a Year by the Devise to her of the Personal Estate, which was £7 *per Ann.* more than she would have been intitled to, in Case the Purchase had been made; and therefore 'twas decreed the £1400 was bound by the Articles, and should go to the Plaintiffs as the Land would have done, if a Purchase had been made pursuant to the Articles, and was in a Court of Equity to be looked upon as a Real Estate (see *Lucas's R.* 528), and well devised to the Plaintiffs by this Will; and though the Wife could not be shut out of the Provision

intended by the Articles for Life, if she thought fit to abide by the Articles, yet the Devise there of the Personal Estate being more than an Equivalent, if she chose to take by the Will, it must in this Court of Equity be taken to be a Satisfaction of the Articles as to her Right, and no Manner of Hardship to her : And 'twas said, as the Case was, if a Purchase had been made, even after the making this Will, though at Law such Lands would not pass, yet in this Court there could be no Question but the Plaintiffs would have the Benefit thereof, by the Relation to the Articles. And my *Lord Chancellor* was clear of the same Opinion ; and Mr. *Vernon* said, it had been several Times held in this Court, that if a Man by his Will give several specifick Legacies, and devises the Residue of his Estate to another, and after his Circumstances alter, so that the Residuary Part becomes very inconsiderable, yet the Residuary Legatee must content himself with it, and must have no Assistance from the specifick Legatees ; no more shall the Wife, in this Case, when the Plaintiffs come to carry the Articles into Execution, which will take away so much of the Personal Estate : And this being so decreed by my *Lord Chancellor Harcourt*, was now, on Re-hearing, affirmed by my *Lord Chancellor Cowper*.

ROACH *versus* HAMMOND. [1715.]

A Devise of the Personal Estate to his Relations, is to go according to the Statute of Distributions. See 2 Vern. 106, 153 ; 3 Chan. R. 1 ; 1 Chan. Rep. 211, 224 ; 2 Vern. 405, & 710.

A Man by his Will in 1704, devises all his Real and Personal Estate to the Defendant, to the Use of his Relations, without specifying any in particular, or using any other Words, and makes the Defendant his Executor, and in 1706 died : And now the Plaintiffs, who were the Mother and three Sisters of the Testator, brought this Bill as his nearest Relations, for a Discovery and an Account of the Personal Estate. It appears in the Cause, that the Testator left no Real Estate ; and 'twas referred to a Master, to take an Account of the Personal Estate, and the Plaintiffs to come in according to the Course of Distribution, settled by 1 Jac. 2, c. 17. And 'twas agreed to be the Rule of this Court, in Construction of such Devises to Relations, that those who by the Statute of Distributions, would be intitled to the Personal Estate, in case he had died Intestate, should upon such general Devises [93] be let into the same Proportion : And my *Lord Chancellor* said, he thought it the best Measure for settling Bounds to such general Words, and that it had been oftentimes ruled accordingly in this Court. *And by this Rule I conceive Colonel Norton's Will may be regulated.* W. B.

BEALE *versus* BEALE. [1715.]

See P. Will. 1 Vol. 244, S. C.

The Interests of Daughters Portions decreed for their Maintenance. See before, p. 77, *Greenhill's Case*, & p. 90. Also *postea*, *Lord Coventry's Case* [Gilb. Rep. 160], 2 Vern. 236.

This was on a Re-hearing ; and the Case appeared to be shortly thus : The Plaintiff's Father being Tenant for Life, with Remainder to his Brother in Tail, prevails with his Brother to join with him in a Common Recovery, whereby the Estate was settled to the Use of the Plaintiff's Father for Life ; Remainder to Trustees, during his Life, to support contingent Remainders ; Remainder to such Woman as he should happen afterwards to marry, for her Life, for her Jointure ; Remainder to the first and other Sons of the Plaintiff's Father, in Tail-Male successively ; Remainder to the Brother in Tail ; Remainder to the right Heirs of the Plaintiff's Father ; and in the Deed, declaring the Uses of the Recovery, was a Proviso, That it's held to be lawful for the Plaintiff's Father, by Writing or Last Will, to charge the Estate with any Sum or Sums of Money, not exceeding £2000, for the Portion of Daughters or younger Sons, to be paid at such Times, and in such Proportions, as the Father should direct : The Father afterwards married the Defendant, and by her had Issue two Daughters, the now Plaintiffs ; and by his Will, taking Notice of his Power, appoints the Sum of £2000 to be raised out of the said Estate, for his said two Daughters, to be paid and payable to them at their respective Ages of 21 years, or Days of Marriage, which should first

happen, without saying after the Death of his Wife, or any other Proviso, that it should not affect the Wife's jointure : Then the Father died ; and now this Bill was brought by the two Daughters, who were under 18, and unmarried, to have Interest for their Portions till payable. My Lord Chancellor *Harcourt* decreed, that they should have Interest, after the Rate of £3 *per Cent.* for their Portions, till 12 ; and from thence, till payable, at £4 *per Cent.* But they not liking this Decree, brought on the Cause again, and pressed much for an Allowance of £6 *per Cent.* for their Portions, till payable : But Lord Chancellor *Cowper* said, he thought the former Decree very tender in the Provision thereby made, and that 'twas rather a Recommendation to the Mother, to make them that Allowance, than a Decree to charge her Jointure therewith : But since they were not satisfied by that Decree, as appeared by their bringing the Cause to a Re-hearing, he must now give them no more than what in strict Justice they deserve ; and since their Portions was not payable till 18 or Marriage, they could not charge the Jointress with Interest thereof in the mean Time ; but said, that the Reason of postponing thereof, till that Time, being in Favour of the Jointress, she ought to maintain them out of the Profits of her Jointure-Lands ; but in regard the said Portions could not in Strictness carry Interest, till they became payable, they should be allowed £6 *per Cent.* on the [94] same, from that Time. But whether the Portions, on the Daughters Attaining the Age of 18 or Marriage, should be immediately raised, so as to charge and affect the Jointure-Estate for Life, or wait till her Death, my Lord said it would be Time enough to consider of that when it became the Case.

ATKINS & al' *versus* WATERSON. [1715.]

What shall bar a Freeman's Widow of her Customary Share. See [1] Abr. Eq. 157, 158 ; 1 Vern. 132 ; 2 Vern. 110 ; Vide ante.

On a Treaty of Marriage, to be had between the Defendant's late Husband, *Edmond Waterson*, deceased, Indentures of Lease and Release, bearing Date the 15th and 16th of August 1696, by Way of Settlement, were executed ; whereby, in Consideration of the said intended Marriage, and £2000 Marriage-Portion, Lands to the Value of £200 *per Ann.* were limited to the Defendant for Life for her Jointure, and in full of all Dower, and Title of Dower, to any Land, Tenements, or Hereditaments, whereof or wherein her said intended Husband was or should be seised of any Estate of Inheritance, during the Coverture between them : And in the Release, *William Waterson*, Father to *Edmund*, covenanted, that in case *Edmund* survived him, that then all his Real and Personal Estate, whereof he should die seised or possessed, should descend and come to *Edmund*, his Heirs, Executors, and Administrators. The Marriage took Effect : *William Waterson* dies, whereby some Real Estate, and a considerable Personal Estate, came to *Edmund* ; then *Edmund* makes his Will, and having no Issue, devises £500 to his Wife, and some other Legacies, and devises the Residue of his Personal Estate to be laid out on a Purchase, to be settled on the Plaintiffs the *Bennels*, who were his Nephews, and made the Plaintiff *Atkins* his Executor, and dies : And now this Bill was brought against the Widow, for a Discovery and Account of the Personal Estate, and that it might be laid out in a Purchase and settled, pursuant to the Direction of the Will. The Defendant by her Answer says, That the Husband was a Freeman of *London*, and that he dying without Issue, she, as his Widow, was intitled to a Moiety of the Personal Estate, as her Customary Share : And whether she were so intitled or no, was the single Question ?

For the Plaintiff 'twas urged, by Sir *Joseph Jekyll* and others, that she was not ; for that by this Settlement she was provided for already ; and by the Custom of *London*, where the Widow is compounded with, as they call it, she cannot be let into any other Part of her Husband's Personal Estate : That this was founded on very good Reason, that the Wife may not depend for her Satisfaction on the Casualty of Trade, and other Contingencies, whereto this Personal Estate may be liable ; and now, since she had, in all Events, secured herself of a Provision, and taken out so much of her Husband's Power of disposing, so she ought to rest satisfied with that Provision, and not to ask any more : That if this had not been intended in full of her Customary Part, there would have been Negative Words, or some Proviso in the Settlement, that it should not extend to exclude her of her Customary Share : That the Personal

Estate was under [95] their Consideration, as appears by the Covenant concerning the Disposition of it, in case the Husband survived the Father ; and now the Provision being general, must be intended to be compleat, and must exclude her from any other ; and cited *Love's Case*, 33 *Car. 2* [1681-82], and *Hancock and Hancock*, and *Pitt and Lee*, lately decreed in this Court.

But on the other Side 'twas argued, by *S. Cowper & al'*, that she ought not by this Settlement to be excluded from her Customary Part : That if no Settlement had been made, she would on her Marriage be intitled to Dower at Common Law out of the Real Estate, and to her Customary Share out of the Personal Estate : That this Jointure came only in Lieu of Dower of the Real Estate, and that but by a late Act of Parliament 27 *Hen. VIII.* and now could be no Recompence for her Customary Share of the Personal Estate : That she was intitled to one by the Common Law, and to the other by a Custom, and a Recompence provided ; for one of them only could be no Recompence for the other, which she claimed by a distinct independent Title : That there being no Negative Words in the Deed, made it the stronger, that they did not intend to exclude her of her Customary Share ; and now 'twas ty'd up barely in Bar of her Dower and Title of Dower ; and suppose by the Settlement there had been a Provision for her out of the Personal Estate only, and that had been expressed to be in full of her Share of the Personal Estate, Would that have excluded her from Dower out of the Real Estate ? No more ought this Jointure, which goes only in Bar of her Dower of the Real Estate, be construed to exclude her from the customary Share of the Personal Estate ; and the Entries in the City-Books must be intended, where the Composition was only out of the Personal Estate : And as to the Cases cited, 'twas said they were not at all to this Purpose, for the Case of *Hancock and Hancock* was upon a Settlement of Personal Estate, and was to this Effect : A Freeman of *London* having Children by his first Wife, and being about to marry again, made a Settlement of some Leasehold Estate on his intended Wife, and the Issue of that Marriage ; the Marriage takes Effect, the Husband dies having Issue, and a considerable Personal Estate ; the Children, by the first *Venter*, brought their Bill for an Account of the Personal Estate, and insisted it wholly belonged to them, and that the second and her Issue ought to be excluded from any Share thereof, by Reason of the Provision made for them. 'Twas decreed, that this Composition with his Wife before Marriage, bound her ; but the Children, being Infants, were left to make their Election when they came of Age, whether they would abide by that Provision made for them by that Settlement, or relinquishing that, come in for their Customary Shares only : And afterwards, on a Re-hearing what should become of the Customary Part, 'twas held to fall into the Husband's Share ; and in case no Disposition was made thereof by him, it must go according to the Statute of Distributions. As to the Case of *Pitt and Lee*, that was thus : A Widower and Widow being about to marry, and having a Personal Estate only, by Articles before Marriage 'twas agreed, that in case the Husband survived, he should have £2000 [96] only out of his Wife's Personal Estate, and the Residue to be at her Disposal ; and in Case the Wife survived, then she was to have £2000 out of the Husband's Estate, without saying *only* or *no more*, the Husband being a Freeman of *London* ; and his Wife brought a Bill for an Account of the Personal Estate, over and above her £2000, and to be let into her Customary Share thereof ; but 'twas decreed, that the equal Construction of these Articles must be to exclude the Wife from any farther Share out of his Estate, as he was expressly excluded from any farther Share out of her Estate ; and though the Words were not so full as to exclude her, yet the Intent of the Articles appearing to be a mutual Reciprocal Agreement between them, for setting Bounds to each other's Claim, ought not to be extended larger on the one Side than the other ; and so 'twas decreed, that the Wife should have only the £2000. But they said these Cases were by no Means applicable to the present, where the Provision for the Wife only was a Real Estate.

Lord Chancellor said, he thought the Reason of the Case very strong for the Defendant ; but that this Point may be settled in a proper Way, he desired to have the Custom certified, whether such Jointure before Marriage, being only limited to be in Bar of her Dower, should preclude her likewise of her Customary Share.

CHALLIS *versus* CASBORN. [1715.]

[S. C. Prec. Chan. 407.]

A defective Surrender, &c., made good. See 2 Chan. Rep. 218; 2 Vern. 163, 565, 585, 609, 680; 1 Vern. 132; 1 Salk. 187; & Ante, *Mapletoft's Case*. And Note 2 P. Will. 490.

In this Case 'twas said by *Vernon*, and agreed to by the Court, that if a Man has a Debt owing to him by Mortgage, and another on Bond by the same Person, that he may tack them together against the Mortgagor, and that he shall not be let into a Redemption without Payment of both, because the Lands in his Hands are chargeable with the Bond, even at Law: And now, since the Statute against Fraudulent Devises, the Devise of the Equity of Redemption is in the same Case; he can't redeem without Payment of both, because the Statute makes such Devise void, as against Creditors, and then the Devisee stands in the same Place as the Heir must have done, if no Devise had been made; but before that Statute such Devise would not be liable to the Bond-Debt, no more than the Mortgagor himself.

Another Point in this Case was, that a Man seised of some Freehold Estate, and also of Copyhold Estate, devised all his Estate Real and Personal for the Payment of his Debts, and died without any Surrender of the Copyhold Estate to the Use of his Will and Coheir; this Court would supply the Want of such Surrender, as they would have done if the Copyhold Estate had been expressly mentioned in the Will as Copyhold.

Mr. *Williams* said, the *Master of the Rolls* had supplied the Defect of a Surrender, in the Case where there was no Freehold Estate at all; and he thought it the same Case here, where the Freehold Estate was not sufficient for Payment of the Debts.

But the *Chancellor* said, he had never known it carry'd so far, because he thought the Devise of the Real Estate did not shew any Intention to [97] pass a Copyhold, which in the Eye of the Law was of the lowest Regard, and looked upon only as an Estate at Will, though Custom had now fixed it in the Copyholder; and said, unless they could shew some Precedents, he could not assist them.

A third Point was, that the Devisees of the Real and Personal Estate were made Executors; and so Mr. *Vernon* said 'twas a settled Distinction in this Court, that they ought to apply the Estate in such Case, in a Course of Administration,* because if the Estate was sold 'twould be Personal Assets in their Hands, and then to Pay a Debt of inferior Nature before one of a superior, would be a *Devastavit*; but if they had not been made Executors, then the Creditors should have come in all equally, because in Equity all Debts are equal, and they as Trustees could give no Preference, and would be in no Danger as Executors in such Case.

But the *Chancellor* thought the Accident of their being made Executors ought to make no Difference in Equity, but that all Creditors should be considered equally, and would see Precedents; tho' Mr. *Vernon* said it had been a settled Distinction, and several Precedents in Point.

BASSE *versus* GREY.

[S. C. 2 Vern. 692.]

5 July [1715]. J. G. in Court.

An Annuity, &c., limited in Remainder. See 2 Vern. 38, 43, 59, 195, 668, 680; 1 Vern. 329; 2 Chanc. C. 94; 1 Chanc. R. 129, 260, 419; 2 Chanc. R. 66, 153; 1 Salk. 156.

Sir *James Grey* being possessed of an Annuity of £14 *per Ann.* for 99 Years, out of the Exchequer, on his Marriage covenants with A. and B. to pay this £14 to his Wife for her separate Use, and after the Death of either of them, then to the Survivor for Life, and after the Death of both, to the Child or Children to be begotten between them, and in Default of such Child or Children, then to his own Executors and Administrators for the Residue of the Term. Sir *James* and his Lady have Issue one only Son, who lived to five and then died, and after the Death of Sir *James* and his Lady the Plaintiff took out Administration to the Son, and brought this Bill against the Executors

of Sir *James* and his Lady for this Annuity. (The Son seems to have survived Sir *James* and his Lady.)

And 'twas insisted by Mr. *Vernon*, that the Limitations to the Executors and Administrators of Sir *James* were void, being after a Limitation to the Child or Children, which is the same as if it had been limited to the Issue, and a Settlement of a Term on Trustees, in Trust to permit the Father to receive the Profits for as many Years of the Term as he should live; and after to permit the Mother to receive the Profits for so many Years as she should live, and then in Trust to permit the Child or Children, or Issue, to receive the Profits; for the Residue of the Term will bear no Limitation over, in Default of Issue or Child, in Case there be any one in Being, no more than such a Limitation of the Term itself would be good; for this would be to revive and introduce all the Inconveniences of a Perpetuity, which has been so long since exploded; and the Trust of a Term must be limited in the same Manner as the Term itself will bear a Limitation.

But the *Chancellor* said, this being by Way of Covenant, no more passed out of him than to serve the Uses expressed, and 'twas not a [98] Disposition of the Annuity itself, but only a Covenant to pay the £14 in such Manner: And since it was never devested out of Sir *James*, he would not on this Bill, by any Pretence of Equity, tear it out of him or his Executors, and so dismissed the Bill, though he did not at all dispute the Case, if it had been a Term, or the Trust of a Term, settled in such Manner that the Remainder would not have been good; but here 'twas only a Covenant to pay the £14 and not the Annuity itself, which was thought by some at the Bar to be an over-nice Distinction.

But this Decree seems to be reasonable, because the Administrator comes for a specifick Performance of the Covenant, and that he can't do who was not originally in Contemplation, or intended to be provided for by the Covenant, but that the Term had actually been vested to these Uses; then the Interest of the Term being vested in the Child and the Heirs of his Body, as it must be, if the Settlement had been drawn according to the Covenant, then it must have gone to his Administrator.

CASEY *against* BEACHFIELD.

Monday, Nov. 7, 1715. *J. G. in Court.*

[S. C. Prec. Chan. 411.]

Plaintiffs not to be examined as Witnesses. *Contra* of Defendants. See Lucas's R. 19.

In this Case 'twas said by Mr. *Vernon*, that the Reason you can't examine any of the Plaintiffs as Witnesses in the Cause is, because if the Cause miscarries the Plaintiffs will be liable to Costs, and therefore their Swearing is to exempt themselves; and 'tis their own Choice that they are made Plaintiffs, for without their Consent they could not have been made so; but the Defendants are forced into the Cause, and if their being made Parties should absolutely invalidate their Testimony, it would be in the Power of any one who had a Mind to oppress another, and deprive him of his Defence, to make the most material Witnesses Defendants in the Cause; and therefore any of the Defendants to a Suit may be examined as a Witness, saving just Exceptions to their Credit, Capacity, &c.

PARKER *against* WINDHAM and others.

Wednesday, Nov. 9, 1715. *J. G. in Court.*

See this Case cited 2 Peer Will. 111, by the Name of *Packer*, &c.

How far a Wife's Fortune shall be subject to the Husband's Administrators or Creditors, &c.

The only Question in this Case was whether any, and what Part of the Wife's Fortune should be subject to answer the Plaintiff's Demand, who were Sisters and Heirs at Law, and also Administrators and Creditors of the Husband against the Defendant, who was Administrator of the Wife who survived her Husband; as to which the Case was thus: Mrs. *Anne Ash* being intitled to the Sum of £5500, secured to her by a Mortgage for Years on the Estate of Sir *Edward Bacon*, taken in the Name of Trustees; and likewise to £3000, secured to her by a Mortgage for Years on the Estate of Sir *Humphry*

Briggs, taken in her own Name ; and also to a Bond-Debt of £400 and to several Jewels and other Things of considerable Value. The said Mrs. *Ash* became a Lunatick, and on a Commission of Lunacy issued out of this Court for that Purpose, the Custody of her Person, [99] and Estate was committed to one of the Defendants. Some Time after *Philip Parker*, Esq. the Plaintiff's Brother, by some Contrivance got the Lunatick and married her, without making any Settlement or Provision ; and for this Contempt he and others concerned in procuring the Marriage were committed by this Court. But the Marriage was sentenced in the Spiritual Court to be good, and that Sentence afterwards affirmed on an Appeal to the Delegates ; and 'twas ordered at the same Time, that all the Deeds and Securities relating to the Lunatick's Fortune should be brought before, and lodged with one of the Masters of this Court, in order to secure a Provision for the Wife in Case she should survive her Husband ; and likewise for the Children of that Marriage in Case there should be any.

Some Time after, on Mr. *Parker's* Application to the Court, by Petition, to supersede the Commission of Lunacy, and to have the Wife's Portion delivered to him, an order was made the 19th of *March* 1712, whereby the Commission of Lunacy was superseded ; but in Regard of Mr. *Parker's* Estate was much incumbered, and he had made no Settlement on his Wife ; 'twas at the same Time offered, that so much of the £5500 as was necessary should be applied towards the disencumbering his Estate, and the Residue to be laid out in a Purchase of Lands, which, together with so much of Mr. *Parker's* Estate as would make up £500 *per Ann.* was to be settled on Mr. *Parker* for Life ; Remainder to his Wife for Life for her Jointure ; Remainder to the Issue of that Marriage, &c., with a Remainder to Mr. *Parker's* right Heirs ; and upon Mr. *Parker's* making such Settlement, the Residue of his Lady's Fortune was to be paid and delivered to him, and in the mean Time he was to be examined on Interrogatories touching the Incumbrances on his Estate. Mr. *Parker* never complied with any Part of this Order, but being indebted to one *Gooding*, in a considerable Sum, *Gooding* brings his Action against him and recovers Judgment, and took out a *Fieri facias* ; and thereupon the Mortgage Term of Sir *Humphry* was sold by the Sheriff, and the Debt paid. After this, Mr. *Parker* being indebted to the Plaintiff's Sisters in about £2000 a-piece, given them for their Portions, does, by Indenture, taking Notice thereof, assign the said £5500 and all Securities, and also all the Fortune and Portion belonging to him in Right of his Wife, to Trustees, in Trust, in the first Place, to pay thereout to the Plaintiffs their Portions, and after in Trust for himself, his Executors, Administrators, and Assigns. Some Time after Sir *Edward Bacon* paid in £5500 due on his Mortgage ; and Mr. *Parker* having not complied with the Term of the last Order, the same was again placed out at Interest, on a Security taken in the Name of the Senior Master of this Court ; after which Mr. *Parker* died intestate, and without Issue ; and about two Years after Mrs. *Parker* died likewise intestate, and without Issue ; whereupon the Plaintiffs, who were Sisters and Heirs at Law to Mr. *Parker*, and also Creditors, as abovementioned, took out Letters of Administration to Mrs. *Parker* the Wife, and brought a Cross Bill, to have the Fortune and Securities delivered over to them ; and for them (being Plaintiffs in the Original Case) 'twas argued,

[100] That they had an undoubted Right to this Fortune of the Wife, not only as Creditors, but also as they were Representatives and Heirs at Law to the Husband ; that if the Settlement had been made pursuant to the Order, the last Limitation being to the right Heirs of Mr. *Parker*, would have carried the Lands to them ; that tho' no Settlement were made, yet as Representatives to Mr. *Parker*, they were entitled to it ; so that call it *Land*, or call it *Money*, it equally belonged to the Plaintiffs ; that a *Chose in Action*, (Post 103) belonging to the Wife may be released by the Husband ; and if the Trustees for the Wife's Fortune should pay it to the Husband, his Wife would be without Remedy ; that a Wife on her Marriage, is to forsake Father and Mother and cleave to her Husband, and surely her Fortune is to go along with her ; that a Husband may maintain Trover for his Wife's Goods taken from her before Marriage, without joining her in the Action ; so is 2 Lev. 107, &c. ; 1 Mod. 25. And if a Husband before Marriage agrees to make a Settlement, and afterwards makes a Settlement accordingly, this intitles him to all her Fortune, though 'twas standing out on the Bond and other Securities, which would otherwise survive to the Wife ; for this Settlement makes him a Purchasor of his Wife's Fortune, especially if it were made in Consideration of that Fortune ; and therefore his Representatives shall go

away with it, tho' the Wife survives ; and this had been several Times settled in this Court. And here, tho' no actual Settlement has been made, yet the Wife has had the Benefit of her Fortune preserved to her for Life, which is all she should have if the Settlement had been made. That she being dead, and no Children to be provided for, her Fortune ought to go over to her Husband's Family, and not to her own. That though *Choses in Action* are assignable, yet such Assignments are supported every Day in this Court ; and the Plaintiffs in this Case are Creditors, and therefore more strongly intitled to the Benefit of her Husband's Assignment. That the Security being lodged in the Court makes no Manner of Difference : for the Court is but in Nature of a Trustee for them, *i.e.* for the Husband and the Wife ; she herself has no distinct Property therein ; but the Property is still in the Wife, and consequently in the Husband ; and a Deed made by *Cestui que Trust*, is binding upon a Trustee in a Court of Equity, and even at Law ; if a Man brings Debt upon his Wife's Bond, and recovers Judgment, this alters the Nature of the Security, and makes it the Husband's ; and so it has been lately adjudged in the King's Bench, where such a Judgment was assignable within the Statute of Bankrupts, for the Benefit of the Husband's Creditors. For when the Husband recovers Judgment, the Debt is turned into *Rem Adjudicatam*, and is no longer a *Chose in Action* ; but my Lord Chancellor seemed to think that such a Judgment would not have carried it to the Husband's Representatives against the Wife surviving, if that had been the Point of the Case.

It was likewise urged, that the Order of the 19th of *March* had not at all varied the Case, for the Intent of that was only to secure some Provision for the Wife ; but she being now dead, that Order has had its Effect, and the Plaintiffs who stand in the Husband's Place ought to have the Residue of the Wife's Fortune.

[101] On the other Side 'twas argued, That by this Commission of Lunacy the Property of her Fortune was vested in the Crown ; and this Commission being in Force at the Time of the Marriage, prevented the Husband's Power over it ; That he had indeed been very justly committed for his Contempt in marrying her ; but that would be a very insignificant Punishment, if he might at the same Time go away with all her Fortune : That at least the Crown had Power to preserve the Estates and Fortunes of Lunatics against any Disposition of their own, and that Power was lodged in this Court : That the Court had more than a bare Custody of this Lady's Fortune : That by the Order of *March* 19, 1712, Mr. *Parker* was not to have any Part of her Fortune till he made the Settlement thereby ordered : That this was a Consideration in the Nature of a precedent Condition, and he not having performed his Part thereof, had no Title to the Fortune : That the Husband's Assignment could not be presumed to affect the £3000 on Sir *Humphry Bigg's* Mortgage, the Sheriff having made an absolute Sale of the legal Term on the *Fieri Facias* before that, and the Vendee by that Sale was become the absolute Owner thereof ; and Mr. *Vernon* cited a Case of *Burnett* against *Kinaston* (2 Vern. 401 ; Abr. Eq. C. 69), where a Wife having a Sum of £1400 out on a Mortgage, the Husband after Marriage made an Assignment of this Money, and agreed, when it was paid in, the Trustees should invest it in the Purchase of Lands, to be settled to several Uses ; then the Husband died, and afterwards the Wife died before the Money was paid in ; and it was decreed for the Representatives of the Wife : The Reason of which Case he said was, that the Husband could not transfer to Account more than he himself had ; that he had but a Power of calling in this Money ; but if he had made Use of that Power, and receiv'd it, the Property had been absolutely in him ; that his Assignee who stood in his Place could have no other Interest than the Husband himself had ; and since the Assignee had not reduced it into Possession during the Husband's Life, the Wife being Survivor became intitled to it as a *Chose in Action*, and consequently it must go to her Representatives ; and this he said was a Case similar (*Q. Abr. Eq. C. 68, 69*). It was likewise urged, That if this Fortune should go to the Representatives of the Husband, it might have proved a very great Hardship on Mrs. *Parker*, for she might have married again, and have had Children, and they must have been left destitute of any Provision : That as to the Husband's Assignment, it was general ; and if such general Assignment should prevail, it would soon put an End to the Doctrine of Real Chattels and *Chose in Action* surviving to the Wife ; for then 'twould be only for the Husband, immediately after Marriage, to make a general Assignment of all his Wife's Fortune, and that would prevent her taking any Thing after his Death,

though nothing more were done by the Husband to alter the Property : That as the Plaintiffs could, with no Colour, have ask'd the Decree they are seeking for against the Wife herself, if she were living, no more ought they to prevail against the Defendant, who is her Representative, and stands in her Place. Mr. *Vernon* also cited the Case of *Pheasant and Pheasant* (Abr. Eq. C. 156 ; 1 Chan. Cas. 181), where a Man married a City Orphan without the Leave of the Court of Orphans, and for this he was committed and fined ; and that sometimes that Court has fined a Man in such a Case to the full Value of his Wife's Fortune, and yet that Court is of a much inferior Jurisdiction to this ; and though such Proceedings may be somewhat arbitrary, yet they have never been condemned nor prohibited ; and therefore he submitted to the Court whether Mr. *Parker's* marrying this Lady, who was under the Care and Protection of this Court, without their Leave, was not such a Contempt as might amount to the Forfeiture of her Fortune : And 'twas urged by most of the Defendant's Counsel, that the Power of the Crown over Lunaticks was such a Prerogative as vested their Fortunes in the Crown, though the Committee was accountable for the Profits to the Relations of the Lunatick, or the Lunatick himself if he recovered ; and if so, the Portion of the Wife was divested before the Marriage, and consequently the Husband had no Power to dispose of her Fortune : But this was thought by several to be no Law ; and the Court thought it of so little Weight, that no Answer was made to it.

Lord Chancellor. As to the Marriage, that is out of the Case, having had its Agitation in a proper Court, and a Sentence pronounced upon it, and therefore it's to be look'd upon as valid and good. As to the Order of the 19th of *March*, I think likewise that's out of the Case ; for as the Husband, if he had complied with the Terms of that Order, had been a Purchasor of his Wife's Fortune, so having not complied with it, it's now as if no such Order had been made : So on the other Hand, the Wife being now dead, and no Children left, the Reason of the Court's interposing is at an End, and then the £5500 being paid in during the Coverture, was the Husband's money, and the Property absolutely vested in him ; and though the Court thought fit to lay their Hands on it, and had Power so to do, being in the Master's Hands, yet that was only in the Nature of a Caution for his Wife, and it was the Husband's Money ; but the Court had a Power to detain and keep it from him, till he made such Provision ; but the Wife being now dead, and no Children to be provided for, the Reason of their keeping the Money from him is at an End, and *Æquitas sequitur Legem*, and must give it to the Husband's Representatives, to whom by Law it belongs. As to the £3000 on Sir *Humphrey Bigg's* Mortgage, that being sold by the Sheriff on a *Fieri Facias* before the Husband's Assignment, it must take Place against the Assignment, though perhaps the Defendant may have an Equity to the Remainder, after the Payment of *Goodwin's* Debt ; for the Husband may assign over a term or Mortgage for Years, which he has in Right of his Wife ; and so he may likewise the Trust of such a Term ; and this shall prevail against the Wife, tho' she survive : And this will be different from the Case of *Burnett* against *Kinaston* ; for in that Case the Mortgage to the Wife was a Mortgage in Fee, which the Husband alone could not dispose, and therefore the Estate being still in the Wife, carried the Money along with it to her Representatives ; but of a Term for Years, or the Trust of such a Term, the Husband hath absolute Power, and may dispose of it without his Wife's joining with him ; and therefore this Assignment of his might have been good, if it had not been for the antecedent [103] Sale by the Sheriff : But however, this Question is not now before me, and till you bring the Cause of *Goodwin's* Creditors, I shall say nothing farther in it. As to the Bond of £400, that I think was plainly a *Chose in Action*, and must go to the Defendants (see before, 100, & 2 P. Will. 497), notwithstanding the Husband's Assignment, because it was a Thing not assignable at Law, and here seems no Equity to support it against the Defendant : But as to the Jewels, they must go to the Plaintiffs ; for this Court receives them only as a Pledge and Caution, and the Property was still in the Wife, and consequently in the Husband ; and here was no Tort or tortious Act to divest that Property, and turn it to a *Chose in Action* ; for the Possession of the Court is not such as will divest Properties, and therefore the Plaintiffs, who are Representatives of the Husband, have a Right to them likewise : and 'twas said, the Difference between a Bond, and such like, and a Term for Years, where the Husband was intitled in the Right of his Wife, was, that the Bond, &c., was merely a *Chose in Action*, and not assignable by Law ; but a Term for Years was only a Chattel Real, which the Husband might assign without his Wife,

by Law ; and so he might the Trust of such a Term, and consequently the Money secured upon it.

DAWLEY *versus* BALLFREY.

Saturday, 12 Nov. 1715. *J. G. in Court.*

See 1 P. Will. 285 [1 Eq. Cas. Abr. 300], S. C.

A Legacy to an Infant-Son paid by the Executor to the Father, and afterwards assign'd by the Commissioners of Bankrupts. *Vide post*, 140.

A Legacy of £100 was devised to an Infant of about 10 Years of Age ; the Executor paid the Legacy to the Father, and took his Receipt : When the Infant came of Age the Father told him he had such a Legacy of his in his Hands, but could not pay it immediately ; but however he would not have him trouble the Executor about it, for he would give him £200 for it : Upon this the Son rested satisfied for about 14 or 15 Years, and he and his Father carried on a joint Trade together, and then became Bankrupts ; and upon a Commission taken out against the Son, this Legacy of £100 was assigned, among other Things, for the Benefit of the Creditors : And the Plaintiff, the Assignee of this Commission, brought this Bill against the Executor, to have an Account and Payment of this Legacy.

For the Defendant 'twas insisted, That 'twould be a hardship on him if he should be obliged to pay it over again ; that he had already fairly and honestly paid it to the Father, whilst he was in good Circumstances ; and if Application had been made to the Defendant sooner he might have had his Recompence over against the Father : That the Father was the natural Guardian of his Children, and such Payments to him have formerly been allowed good, 1 Chan. Ca. 245, tho' indeed the Court hath thought fit to extend their Care for such Children farther, and disallowed such Payment : But from the Circumstance of this Case, 'twas hoped that the Defendant would not be answerable for it.

My Lord Chancellor. If the Father had not made the Son such Promise, and the Son had required the Money in Time, the Case might have been more doubtful ; but this Promise of the Father drew him in from applying to the Defendant sooner ; and since the Father [104] had not, nor could not make good his Promise (being a Bankrupt likewise), the Reason of the Son's Forbearance was at an End ; and he thought the Rule of this Court, in not suffering Parents to receive their Childrens Legacies, was founded on very good Reasons : And therefore lest this Case might be cited hereafter as a Precedent, when the Circumstances attending it were forgotten, and to discountenance and deter others from paying such Legacies to the Parents, though he did not deny the Hardship of this particular Case, he affirmed the former Decree against the Executor (this being upon a Rehearing).

DEMARY *versus* METCALF.

Wednesday, 16 Nov. 1715. *J. G. in Court.*

[S. C. sub nom. *Demainbray v. Metcalfe*, 2 Vern. 698 ; 1 Eq. Cas. Abr. 324 ; Prec. Chan. 419.]

Jewels worth £600 are pawn'd for £200. The Pawnee after lends divers other Sums on the Pawner's Notes. No Redemption without paying the whole.

This was a Case wherein my *Lord Chancellor* took Time to consider, to be attended with Precedents ; and it was shortly thus : A Man borrows £200 upon the Pawn of some Jewels worth about £600, and takes a Note from the Pawnbroker, acknowledging the Jewels to be in his Hands for the Security of £200. Afterwards the Pawner borrows at several Times three several other Sums of Money of the Pawnee, and gives his Note for every Sum, without taking any Manner of Notice of the Jewels, and dies ; and his Executors brought this Bill to redeem the Jewels on Payment of the £200 first lent thereon, and Interest : And the only Question was, Whether he should not likewise pay the other Sums secured by his Testator's Notes, before he should be admitted to redeem ? So the Plaintiffs were to produce Precedents, that the Redemption might be on Payment of the first Sum, and Interest only, but could not find any Pre-

cedents. And therefore my *Lord Chancellor* now gave his Opinion, that the Plaintiffs must pay all the Money due on the several Notes ; and said, since there was no Precedents to guide him, he thought the constant Maxim of this Court sufficient for this Purpose, viz. *That he who would have Equity, or comes here for Equity, must do Equity* : And since the Plaintiff can't have back these Jewels without the Assistance of this Court, 'tis reasonable and just he should pay the Defendant all the Money due to him ; for 'tis to be suppos'd the Pawnee would not have lent him those Sums, but on the Credit of the Pledge he had in his Hands ; and said the nearest Case he could find that came to this, was the Case of *Saintjohn* versus *Holford*, 1 Ch. Ca. 97, though he agreed that Case might be distinguished from this, being between the Heirs of the Mortgagor and Sureties : And tho' (he said) the Reasons he now gave for his Opinion are not mentioned, in that Case as the Reasons of that Resolution, yet the Case would very well admit them, and he now decreed accordingly. But Mr. *Vernon* said, that if there had been any Creditors of the Pawner by Bond, or a Commission of Bankruptcy out against him, the Defendant must have come behind them for his Debts on the several Notes, and could not have tacked them to the Pawn, so as to prefer himself before them ; but that not being the present Case, my Lord decreed, that if the Plaintiff would redeem (the Time for Payment being lapsed) he must pay all ; and so as I was informed, he had [105] declared his Opinion, that if the first Sum had been secured by a Mortgage of Lands, he should not have been admitted to redeem after the Day of Payment was lapsed, without paying likewise all that was due to the Mortgagee on Notes or Simple Contracts ; otherwise if such subsequent Debts had been secured by Bond.

SEALE versus SEALE. [1715.]

See 1 Peer Will. 290, S. C.

A devise of Personal Things in Remainder void. See before, p. 79. But a Devise of Money to be laid out, &c., may be good in Tail, &c., Q.

In this Case a Man being seised of a good Real Estate, and also possessed of a considerable Personal Estate, and having an Intention to settle and secure both in his Name, does by his Will in Writing, after several Legacies and Bequests, give and devise all the rest and Residue of his Real and Personal Estate to the Plaintiff, and the Heirs Male of his Body to be begotten, for ever ; and for want of such Issue, to the Defendant and the Heirs Male of his Body to be begotten, for ever ; with like Remainder over to several other of his Name, and makes the Defendant his Executor and dies ; and now this Bill was brought to have an Account of the Personal Estate, and that the Plaintiff might enjoy the same to his own Use absolutely, the Remainder over being void ; and the Defendant brought a Cross Bill, upon Pretence that there were Directions in the Will to have the whole Personal Estate invested in the Purchase of Lands, to be settled in the Manner abovementioned. But upon reading of the Will my *Lord Chancellor* was clear of Opinion, that those directions tended only to such Part of the Personal Estate as was out upon Government Securities (which was about 8 or £9000), and for the Residue (which amounted to about 14 or £1500) that was plainly taken no other Notice of, than in the Devise abovementioned, of all the rest and Residue of the Real and Personal Estate.

And for the Plaintiff 'twas said, that the Devises over were absolutely void, and the whole vested in the Plaintiff as not capable of bearing any further Limitation ; and this Point the Defendant's Counsel gave up.

But then they insisted, that the Intent of the Testator appearing to be to continue the Real Estate, and the Lands to be purchased in the Name of the Testator, this Court would order that the Settlement should be made in such Manner that the Plaintiffs might not have Power to defeat the Remainder ; therefore that the Plaintiff should be made but Tenant for Life, with Remainder to his first and other Sons in Tail Male, and so for the others in Remainder. And the *Attorney General* said the House of Lords had lately made the like Provision for the Benefit of the Issue, that they might not be defeated by the Father. But my *Lord Chancellor* said that was in a Case of Marriage Articles, where the Intent was plainly to provide for the Issue of the Marriage ; but here the Testator has expressly given it to the Plaintiff, and therefore he thought this Court could not vary the Limitation ; besides that, the Defendant has here Chancery

for the Remainder, if the Plaintiff should die without Issue before any Recovery suffered ; and [106] mentioned a Case where such a Remainder took Place by the Death of the Tenant in Tail without Issue, before he could compleat a Recovery, and therefore ordered the Settlement in this Case to be made in the like Manner, and the Deeds and Writings to be brought before the Master for that Purpose.

HOWEL *versus* PRICE.

Friday, Nov. 18, 1715.

See [1] Eq. C. Abr. p. 270, and 1 Peer Will. 291 [Prec. Chan. 423], S. C.

A. mortgages Lands by Lease and Release, to be void, &c., on Payment of Money ; but no Covenant for the Payment. And then settles and devises the Lands to his Wife and Daughter, &c.

One *Davis* made a Mortgage of Lands in *Wales*, by Way of Lease and Release, to one *Reynolds* and his Heirs, in Consideration of £300, and the Proviso was, that if the Devisor his Heirs or Assigns should on *Michaelmas* 1702, or at any *Michaelmas* following, pay to *Reynolds* his Heirs or Assigns the Sum of £300 and all Arrears of Rent and Interest, which should be then due, then the said Conveyance was to cease. But in this Conveyance was no Covenant for Payment of the Money, as usual, but only Covenants for quiet Enjoyment ; and that the Estate was free from Incumbrance. *Davis* pays the Interest of this Money during his Life, and settles the Lands to the Use of himself, Remainder to *Mary* his intended Wife for her Jointure, Remainder to his own right Heirs ; after which, having Issue by his Wife one only Daughter named *Maud*, he by his Will gives several Legacies, and afterwards devises in these Words, *All the Rest and Residue of my Personal Estate I give and devise to my Wife Mary and my Daughter Maud, who I make also Joint Executrixes, as well to pay my Debts as levy my Debts*, and dies. *Maud* the Daughter was then an Infant, and died soon after, under Age, and without Issue : And now this Bill was brought by the Plaintiff and his Wife, who was Heir at Law to *Davis*, against *Mary* his Widow and Executrix, and against the Assignee of the Mortgage, to be let into a Redemption of the Estate, and to apply the Personal Estate in the Hands of the Widow and Executrix in Aid and Exoneration of the Real Estate, for the Benefit of the Plaintiff the Heir at Law.

But the *Lord Chancellor* thought this a quite different Case from those, wherein such Directions had been given, and said that there being no Contracts for Payment of the Money, there was no Contract at all between them, neither express nor implied, nor could any Action lie against the Mortgagor to subject his Person, or to compel him to pay this Money ; but that this was in the Nature of a conditional Purchase, subject to be defeated on Payment by the Mortgagor, or his Heirs, of the Sums stipulated between them at any *Michaelmas* Day, at the Election of the Mortgagor or his Heirs ; so that here was an everlasting subsisting Right of Redemption, descendible to the Heirs of the Mortgagor, which would not be forfeited at Law like other Mortgages ; and therefore this could be no Equity of Redemption, or any Occasion of the Assistance of this Court, but that the Plaintiffs might even at Law defeat the Conveyance by performing the Terms and Conditions of it, which were not limited to any particular Time, but might be performed at any *Michaelmas* Day to the End of the World. [107] And since there was no Covenant, no Contract either express or implied, to charge the Personal Estate of the Mortgagor, he thought there was no Reason to lay the Load of the Debt upon that which was given to other Persons ; and tho' *Maud* which was Joint Executrix with the Defendant was also Heir at Law to the Mortgagor, yet he did not think her Moiety of the Personal Estate ought to be employed towards disincumbering this Estate, but it must go to the Defendant as the surviving Residuary Legatee ; and for the Expression in the Will, concerning the Payment of his Debts, that being coupled with the other Words, *who I make Joint Executrixes, as well to pay my Debts as to levy my Debts*, shews that he meant such Debts only as belonged to the Office of an Executor, which this did not, there being no Remedy against them for want of a Covenant for that Purpose ; and it was at the Election of the Heirs of the Mortgagor for ever, whether they would redeem this Estate or not. But he agreed, if a Redemption were now to be of it, the Defendant having the Estate for Jointure during her Life, must pay one Third, and the Plaintiff the Heir at Law must pay the other two Thirds

of the principal Money, and that the Defendant in the mean Time must keep down the Interest ; but there being some other Points in the Case which required a further Discussion, and might be properly triable at Law, my Lord made no Decree, but ordered them to search for Precedents ; and 'twas said to be a common Practice in *Wales* to make Mortgages in this Manner, with Design to keep the Estate for ever in their Families.

WHITE & Ux' *versus* THORNBOROUGH & al'.

Saturday, Nov. 19, 1715. J. G. in Court.

[S. C. Prec. Chan. 425 ; 2 Vern. 702.]

An Orphan's Marriage Portion paid, but no Settlement pursuant to Agreement after the Death of the Husband and Wife. A Settlement decreed for the Daughter, &c. But note a Difference as to Copyhold and Freehold.

Isaac Jackson the Plaintiff *Mary's* Father, being seised in Fee of a Freehold Estate, and also of a Copyhold Estate, having married an Orphan of the City of *London*, does, after Marriage (in Consideration of £1700 which was her Portion, and was but then paid him), by Indenture 1 *October* 1673, covenant with the Chamberlain of the City of *London*, and other Persons, to levy a Fine of the Freehold Estate to the Use of himself for Life ; Remainder to the Issue of *Mary* his Wife for her Life for her Jointure ; Remainder to the Heirs Male of his Body, and the Body of the same *Mary* to be begotten, with Remainder to his own right Heirs ; and by the same Indenture covenants to surrender the Copyhold to the same Uses ; the Copyhold was not surrendered, nor was any Fine levied of the Freehold. After this he had Issue by his said Wife *Abraham* his only Son, and *Mary* his only Daughter, and Wife of the now Plaintiff, and died ; after his Death *Mary* his now Widow brought a Bill, and had a Decree to hold the Estate during her Life. *Abraham* the Son contracted Debts to the Value of £1400, for which the Defendants became Securities ; and for better securing the Payment of those Debts, *Abraham* does by Indenture in *August* 1714 covenant to levy a Fine of his Freehold Estate to the Use of *Mary* his Mother, who was then living, for Life ; Remainder to the Defendants for 500 Years ; Remainder to himself in [108] Fee ; and the Trust of the Term was declared to be for the Payment of the £1400 and Interest, with a Covenant for further Assurance ; and at the same Time *Abraham* surrenders his Copyhold Lands to the same Uses. After this *Abraham* makes his Will, and devises all his Freehold and Copyhold Lands to the Defendants, for the better indemnifying them against the said £1400 and Interest, and makes them Executors, and then goes a Voyage to the *East-Indies*, where he died without Issue, leaving the Defendant *Anne* his Widow and Relict ; but no Fine was ever levied by him of the Freehold Estate, pursuant to the same Indenture ; and now *Mary* the Plaintiffs Mother being dead, the Plaintiffs brought their Bills for a Discovery of the Writings, and an Account of the Rents and Profits of the Real Estate, as belonging to the Plaintiff *Mary* ; and that the Defendants might be likewise obliged to surrender back the Copyhold Estate to her : And my Lord Chancellor *Harcourt* decreed accordingly for the Plaintiffs, saving only to the Defendant *Anne* Dower out of the Freehold Estate ; and the Reason of this Decree was, that he took the first Indenture only to be in the Nature of Articles for a Settlement ; and that if a Bill had been brought to have carried it into Execution, the Settlement would have been so, as to have made both the Son and Daughters Purchasers of the respective Rents ; and as to the Copyhold, that being intailed by the Articles, would not afterwards by a bare Surrender be defeated, without a Particular Custom had been found to have warranted it ; and from this Decree the Defendants have now appealed.

And for the Plaintiffs 'twas argued, that they were Purchasers under the first Settlement made by the Father, in Consideration of £1700 paid ; that though this Deed was executed after Marriage, yet the Portion being paid at the same Time, it would not be looked upon to be voluntary, but would be as effectual as a Settlement before Marriage ; and so it had always been held, where the Portion was paid at the Time of making the Settlement. That if the Fine had been levied, pursuant to the Deed of Covenant, there had been no Question but it had been an effectual Settlement ; and then *Abraham* the Son being Tenant in Tail, his Covenant to levy a Fine could not have bound his

Issue, much less the Plaintiff *Mary*, who claimed as a Purchasor by Way of Remainder, as Heir of the Body of her Father; that though no Fine was levied, yet in a Court of Equity it was to be looked on as if there were; and there is no Doubt but if a Bill had been brought by the Trustees in the Father's Life-time, the Court would have obliged him to compleat the Settlement by levying the Fine: That the Plaintiff *Mary* was a Purchasor for valuable Consideration under this Settlement, and therefore ought not to lose the Benefit of it. That as to the Copyhold Estate, that was actually surrendered by the Uses of the Deed; and then *Abraham* being Tenant in Tail thereof, could not, without a particular Custom for that Purpose, defeat either his Issue or the Plaintiffs by a bare Surrender; and therefore 'twas prayed the former Decree might stand.

[109] On the other Side 'twas argued, That the Defendants were just Creditors for £1400. That if this Estate was taken from them, they might intirely lose their Debts: That the Fine being levied, pursuant to the first Deed, the Legal Estate continued still in the Father, and from him descended to *Abraham* his Son, and he had by his Will devised it to the Defendants: That it was very extraordinary for the Plaintiffs to ask the Assistance of a Court of Equity to take it from them: That *Abraham* the Son was but Tenant in Tail in Equity, and therefore though he did not levy a Fine, yet that was not material; for a Bargain and Sale, a Feoffment or Covenant, to levy a Fine by such an equitable Tenant, has been held sufficient to bind his Issue: and so it was settled in the Case of *Alee* against *Alee*, where that Point came solemnly in Debate: That though the Plaintiff claimed by Way of Remainder, as Heir of the Body of her Father, yet 'twas held such a Remainder as was actually vested in the Son; and if the Settlement had been prosecuted, he might by his Fine have barred not only his own Issue, but also the Plaintiff, and then his Covenant to levy a Fine ought in Equity to have the same Effect: That as to the Copyhold Estate, there could be no Intail of a Copyhold; or if there could, yet a bare Surrender by such Tenant in Tail has been always held sufficient to bind his Issue, unless some particular Custom were found that a common Recovery were needful: And therefore 'twas prayed that the Decree might be reversed.

But my *Lord Chancellor* said, he thought these Deeds of Covenant were to be looked upon only in the Nature of Articles; and then if a Bill had been brought to carry it into Execution in the Life-time of the Father, the Court would have decreed the Limitation to have been to the first Son of the Heirs Male of his Body, with Remainder to the Daughters and the Heirs of their Bodies begotten; and the Remainder to the Heirs of the Body of the Father, being manifestly to let in the Issue Female; and in such Case, though the Son by a Common Recovery might have barred the Remainder to the Daughters, yet they would have a Chance for it, in Case no such Recovery had been; which proves the Reasonableness of pursuing strictly the intent of such Agreement, by ordering the Settlement to be actually made accordingly, and not to vest it in the Son in Fee; for a Tenant in Tail, through Ignorance or Forgetfulness, may omit to suffer such a Recovery, or he may be prevented by Death, before he has compleated it, and then the Remainder will take Place; but he thought in this Case, from the Circumstances of paying the Portion at the same Time, and the Chamberlain of *London* being a Party, that it was more than Articles, and ought to be looked upon as a Settlement, though he said 'twas a very infirm and imperfect one: But taking it as a Settlement, then by the Limitations thereof, as they now stand, though the Son would have both Estates in him, and might have barred them by a Fine, yet this Covenant to levy a Fine only, can't affect the Plaintiff, who now derives her Title, not under the Son, but as Heir of the Body of her Father; and so she is in *Paramount* the Estate in Tail Male, which the Son took. But as to the Copyhold Estate, that could not be looked upon as a [110] Fee-Simple conditional (which the Counsel for the Plaintiff contended for), not being able to support it as an Intail (and that the Son could not alien it before the Condition performed, by having of Issue): But my Lord said, this could not be imported by no Means; for that every Body knew Copyholds were at first but a kind of Tenure in Villenage, and in respect of their base Nature were determinable at the Will of the Lord, though now indeed they have been supported and hardened by Time; but *prima facie* it must be taken, that a Surrender by such Tenant in Tail will bind his Issue, without a particular Custom was found, that there ought to have been a Common Recovery; and that not appearing in the Case, he thought the Defendants had a good Title to the Copyhold, and therefore reversed the former Decree as to the Freehold, and thought the Defendants having the Estate

in Law in them by the Devise, and being just creditors, ought not to have this Estate taken from them by the Assistance of a Court of Equity, and thought the Distinction of an *infirm Settlement* unintelligible. Note : In this Case the Defendants themselves had by their Answer plainly confess'd, that they had Notice of the first Deed at the Time they became Securities, and took the Covenant to levy the Fine.

THOMAS *versus* TERRY. [1715.]

See [1] Abr. Eq. C. 139, S. C.

A Mortgage, without any Covenant, to repay the Principal, &c.

A Man borrows a Sum of Money on the Mortgage of a Ship, and covenants, that whatever Money the Mortgagee should advance for the Insurance of the Ship in a Voyage she was then about to make, that he would repay it ; but there was no Covenant for the Repayment of the principal Money itself. The Mortgagee insures the Ship, and the Mortgagor repaid him that Money. Then the Ship proceeds on her Voyage, and returns home ; and being afterwards to go out again on another Voyage, the Mortgagee treated with a Person concerning the Insurance thereof, but could not agree for the Rate ; and thereupon the Ship went out, and was lost in the Voyage : And now between the Mortgagee and the Mortgagor's Executors, the Question was, Whether the Mortgagee should come in for his principal Money as a Creditor by Simple Contract ?

And 'twas argued, that he ought not, because there was no Covenant for Payment of the Mortgage-Money ; so that he must be supposed to rest himself on the Ship only for the Security, and that being lost, so is his Money too. But on the other side, 'twas argued by Mr. *Vernon*, that if he had taken no Security at all, he had then without Question been a Creditor on Simple Contract ; and surely the taking Security ought not to put him in a worse Condition, especially now that the Security being lost, his Debt rests wholly on the Simple Contract : And my Lord Chancellor *Harcourt* was of the same Opinion, and pronounc'd his Decree accordingly.

[111] TROTT *versus* VERNON. [1715.]

[S. C. Prec. Chan. 430 ; 1 Eq. Ca. Abr. 198 ; 2 Vern. 708.]

What Words in a Will shall, by Implication, bind the Real Estate to pay Debts and Legacies.

A Man being seised of a Real Estate, and also possessed of a Personal Estate, makes his Will in Writing, and thereby devises by these Words : *Imprimis, I devise all my Debts, Legacies, and Funerals shall be paid and satisfied in the first Place. Item, I will and devise* ; and then proceeds to dispose of his Real and Personal Estate : And now his Personal Estate not being sufficient, the Question was, Whether that Clause in this Will should amount to a Charge of the Real Estate for the Payment of his Debts, Legacies, and Funerals ? And my Lord Chancellor *Cowper* was clear of Opinion, it should ; for as to his Debts, 'twas but natural Justice they should be paid ; and his Personal Estate should have been liable to the Payment thereof, whether he had given any Directions about them in his Will or not. When therefore he wills and devises that his *Debts, Legacies, and Funerals shall be paid and satisfied in the first Place*, these Words must be intended to give a Preference for those Purposes to any other whatsoever : And since he does not devise his Real or Personal Estate to any Person in particular for those Purposes, the Persons who come within that Description must be supposed to be in his View ; and it must be taken as a Devise for the Benefit of Legatees and Creditors, preferable to any Disposition whatsoever, either of his Real or Personal Estate, and consequently both of them are made liable thereto.

PAGETT *versus* HOSKINS.

Wednesday, Feb. 9, 1715. J. G. in Court.

The Benefit of Marriage Articles decreed, &c.

Peter Whitcombe, being a Freeman of *London*, and having Issue two Daughters only by a former Venter, makes his Will, and devises thereby £6000 a-piece to his two Daughters, makes his second Wife Executrix, and dies: The Widow after his Death proves his Will, and on a Treaty of Marriage to be had between her and *Sir Bennet Hoskins*, she gives in an Estimate of *Mr. Whitcombe's* Personal Estate, amounting to about £18,000, whereof £6000 being her own Share, she had taken Tallies and Orders to that Value in her own Hands, and produces them, in order to have a Settlement made on her by *Sir Bennet Hoskins*, adequate to that Value. Thereupon by Articles reciting a Marriage intended to be had between her and *Sir Bennet Hoskins*, and that 'twas computed her Fortune upon the Account would come out to be £6000, *Sir Bennet*, in Consideration thereof, agrees to settle upon her by Way of Jointure £600 *per Ann.* for Life; and that she at the same Time makes an Assignment of the Dower she was intitled to out of *Mr. Whitcombe's* Real Estate, to Trustees, in Trust to make good any Loss or Deficiency that might happen in the Assigning of her £6000 Fortune. The Marriage takes Effect, and *Sir Bennet* receiving the £6000, settles £600 *per Ann.* on his said Wife for Life, pursuant to the Articles: And it happening afterwards, that a Loss of £12,000 really befel *Mr. Whitcombe's* Personal Estate, this Bill was now brought by the Daughters, after [112] the Death of my Lady *Hoskins*, and *Sir Bennet*, who survived her, against the Plaintiff, who had taken out Letters of Administration to *Sir Bennet*, for an Account of his Personal Estate, and to have a proportionable Recompence thereout, for their Shares of the £6000, that being now, as the Case fell out, all the Personal Estate *Mr. Whitcombe* had left; and 'twas decreed accordingly by my Lord *Harcourt*, on a general Account: But afterwards, on a Rehearing, his Lordship varied that Decree, and directed an Account of the Personal Estate (exclusive of the £6000); from which Decree the Plaintiffs now appealing to my Lord Chancellor *Cowper*; 'twas insisted on for the Plaintiffs, that they ought to have an Account of the Personal Estate at large; that if they should not have this Account, they would be intirely defeated of their Portions; that this £6000 was all that was left, and *Sir Bennet* having Notice that it was subject to an Account, ought to be affected with it, especially as the Case is, where he has provided himself of a Recompence, in Case of a Loss or Insufficiency; that otherwise it would be in the Power of any Woman who was Executrix, to give away all her Testator's Assets with herself in Marriage, and so defeat such Creditors of their Debts; the Consequence whereof would be, that none from henceforth would run the Hazard, and so no Woman could be made Executrix: And though *Sir Bennet* is in the Nature of a Purchasor of this £6000 by his Settlement, yet he appears to be a Purchasor, with full Notice, and therefore his Assets ought to be liable to the Plaintiffs Satisfaction; and cited 2 Vent. 360, *Hodges versus Wadinton*.

On the other Side 'twas argued by *Mr. Vernon* and others, that if an Executrix commit a *Devastavit* and marries, the Husband shall be liable at Law, even during the Coverture, to make it good; but after her Death no Suit can be maintained against him at Law, whatever Fortune he had with her: That in Equity it has been held, that any specifick Assets of the Wife's Testator's may be followed in the Hands of her Husband, after her Death; so for any Thing he has merely in Right of his Wife, he shall be liable in this Court, so far as that extends, to make good any *Devastavit* committed by his Wife: But for the Fortune at large of the Wife's 'twas never carried so far, as to charge the Husband on Account thereof after her Death; especially where the Husband, as in this Case, was a Purchasor of his Wife's Fortune for a valuable Consideration, by making a Settlement on her: That if the Wife before Marriage had sold those Tallies and Orders to a Stranger, and wasted the Money, the Plaintiff could never have come against the Purchasor for a Recompence: That the Husband was equally a Purchasor in this Case, and ought not to be affected with the accidental Loss, which has since happened in *Mr. Whitcombe's* Assets: That if it should be otherwise, there would be no dealing with an Executrix; and where a Woman was made Executrix, she must never expect to marry. But my Lord Chancellor said, that *Sir*

Bennet Hoskins taking Notice in the very Articles that the £6000 was Part of her first Husband's Personal Estate, and that too upon Account open and unliquidated, he came in as a Purchasor thereof, subject and liable to [113] the Terms of the Purchase, and can be intitled to it no other Way. He does not take it as a stated liquidated Sum, whereto his Wife was intitled; but as so much, which upon the Account might be coming to her; and therefore takes it subject to the Event of the Account, and has accordingly provided himself a Recompence, in Case it should fall out to be less; and therefore he thought the second Decree which excluded the £6000 was wrong, and that the first Decree was right and ought to stand; but Mr. *Vernon* seemed to be very much dissatisfied with the Decree, and apprehended the Consequence might be very dangerous to Persons who should deal with Executrices for Purchase of their Testators Assets. But my Lord Chancellor said that Inference could not be made in this Decree, which was founded wholly upon the Circumstances of the Case.

Note: Mr. *Talbot* told me he remembered a Case, when the now Chancellor had the Seals before, where an Executor being possessed of a Term for Years in Right of his Testator, and being indebted to one in a Sum of Money on his own Account, agreed with his Creditor for the Sale of his Term, and that the Debt should be discounted out of the Purchase Money; yet upon a Bill brought against him by the Creditors of the Testator he was not allowed to sink his own Debt, and was decreed to pay the Money, because he purchased with full Notice. That this was a Testamentary Estate, and nothing came into the Executor's Hands as an Equivalent for it to make up the Quantum of his Testator's Assets; and he thought the principal Case here very much resembled that, because, though Sir *Bennet* be a Purchasor, yet with Regard to the Plaintiffs who have Demands out of this £6000, the £600 per Ann. settled in Consideration thereof on the Wife for her Jointure, does not come into her Hands as an adequate Recompence or Consideration for the £6000 which she has parted with, and said he was much satisfied with the Reason of the Decree in the other Case, and thought the principal Case not unlike it.

BURTON *versus* HASTINGS. [1715.]

See Abr. Eq. C. 393, S. C.

Marriage Articles.—A Remainder.—A Remainder to the Issue.—But the Settlement is a Remainder in Tail to the Wife.

On a Treaty of Marriage, Articles were entered into for settling of the Lands in Question to the Husband for Life; Remainder to the Wife for Life; Remainder to Trustees to preserve contingent Remainders, with Remainder to the Heirs of the Body of the Wife by the Husband to be begotten, with other Remainders over; the Marriage took Effect, and a Settlement was made to the Husband and Wife successively for Life; Remainder to Trustees to preserve contingent Remainders; Remainder to the first Son of that Marriage, and the Heirs of the Body of such first Son; and so to the second and other Sons of that Marriage in like Manner, with a Remainder to the Heirs of the Body of the Wife, *by her said Husband*. They had Issue one Daughter only, then the Husband died, and the Wife married a second Husband, and they both joined in a Fine and Recovery, by which the Daughter being at Law divested of her Inheritance, brought this Bill to carry the Articles [114] into Execution; for that by the Settlement, Care was taken of the Sons, pursuant to the Intent of the Articles, but no Care was taken of the Daughters, in Regard the Limitation to the Heirs of the Body of the Mother, by the first Husband, made her Tenant in Tail general, and consequently at Liberty to defeat her Daughters, as she has now done by this Fine and Recovery, which was contrary to the Intent of the Articles, which were to make an effectual Provision for all the Issue of that Marriage.

But my Lord Chancellor said, if no Settlement had been made, and they had then come hither to have enforced the making of one pursuant to the Articles, there this Court would have taken Care the Daughters should have been likewise secured of the Provision intended by the Articles, by limiting a Remainder to the Daughters, and the Heirs of their Bodies to be begotten, on Failure of Sons; but here a Settlement being actually made and accepted by the Parties, though a Provision be for the Sons stricter than the Articles themselves imported; yet the next Remainder being limited in the very Terms of the Articles, he could now make no Alteration in it; though Mr.

Vernon offered a Difference where a Settlement was made before Marriage, and where after. That where it was before, this Court could not interpose, as they could where 'twas after Marriage; yet the Court had no Regard to this Distinction, but too hastily dismissed the Bill.

NANDIKE *versus* WILKES.

Friday, May 4, 1716. J. G. in Court.

See [1] Abr. Eq. C. 393, S. C.

The Condition of a Bond on a Marriage Treaty decreed for securing the Issue.

On a Treaty of Marriage between the Defendant and the Plaintiff *Joanna*, the Defendant entered into a Bond to the Plaintiff *Joseph*, Father of the Plaintiff *Joanna*, with Condition, to surrender certain Copyhold Lands to the Use of himself for Life; Remainder to the Plaintiff *Joanna* for Life; Remainder to the Heirs of their two Bodies to be begotten, with Remainder to the Heirs of the Husband. The Marriage took Effect, and now this Bill was brought against the Husband to compel a Surrender, pursuant to the Intent of this Bond; and the Husband making Default at the Hearing, it was decreed that a Surrender should be made to the Use of himself for Life; Remainder to the Use of the first and other Sons in Tail General, with a Remainder to the Daughters of their two Bodies, to be begotten in Tail General; and that in the mean Time 'till such Surrender was made, the Court declared that the Copyhold Lands should be held and enjoyed according to these Uses. *Note*: this Decree was on a Bond, where, though the Penalty seems to have been the only Sanction intended for securing the Performance of the Condition; yet a specifick Execution was decreed, and in such a Manner too as effectually to secure the Issue from being defeated by making them Purchasers.

[115] SIMPSON *versus* HORNBY. Vide post, 120.

October 19, 1716. J. G. in Court.

Of Devises by Implication to a Son, Daughter or Grandson.

The Question in this Case arose upon the Will of one Mr. *Addison*, who having a Wife and only two Daughters, devised Lands in several Towns to his Wife for Life for her Jointure; and afterwards, towards the Close of his Will, devises all his Lands, Tenements and Hereditaments, after the Death of his dear Wife, to his Daughter *Bridget* and the Heirs Male of her Body; and for want of such Issue, to his Daughter *Jane* (who was his eldest, but had disobliged him by marrying improvidently) and her Assigns, during her natural Life, and after her Death to her first and other Sons in Tail Male successively, with several Remainders over. *Bridget* dies in her Father's Life-time, leaving Issue a Son, whom the Grandfather took into his own House, and expressed much Kindness for him. Afterwards the Grandfather adds a Codicil, which begun thus: *A Codicil to be annex'd to my Will*; and by that he gave some Part of a Leasehold Estate, which by his Will was given to his Daughter *Bridget*, to her Son, adds another Trustee for some Charities he had given by his Will, and duly executed this Codicil; but the Codicil was not actually annexed to his Will, so that the Execution of that could not amount to a Republication of the Will; and now the Questions were, *First*, Whether the Wife took an Estate for Life in the Lands remaining undisposed of, by Implication?

Secondly, Whether the Son of *Bridget* could take at all?

As to the first Point the Court seemed pretty clear, that the Wife took no Estate for Life by Implication, because the Implication, which shall disinherit an Heir at Law, must be necessary; and here is no necessary Implication, though the Daughters were Heirs; because it may be intended only of those Lands which were before expressly devised to the Wife for Life; so that they could not have them 'till after her Death: but for the others they could have them immediately; and therefore the Will shall be taken distributively, according to the Case of *Cook versus Gerrard*, 1 Saund. 108; 1 Lev. 212.

As to the second Point 'twas argued, that the Son of *Bridget* could take nothing

in this Case ; that as in the Case of *Brett and Rigden*, the Words *Heir of the Body* were only to express the Quality of the Estate ; likewise, that as in one Case the Devisee was intended to take a Fee-Simple, so in this Case the Devisee was intended to take a Fee-Tail ; and in either Case, the Words *Heirs* or *Heirs Male of the Body* are a Description or Designation of the Person who was to take by Purchase ; that as in the Case of such a Devise in Fee, the first Taker might immediately dispose and give it away from his Heirs ; so might the Devisee in this Case too by proper Conveyances. That this Point has been long since settled in *Hartop's Case*, in Gro. Eliz. 243, and in *Fuller and Fuller's Case* the same, Coke, 243. That this was held clear likewise in my Lord *Lansdown's Case*, lately in the *King's Bench*, where my Lord of *Bath* devised Lands to *Bernard Granville* and the [116] *Heirs Male of his Body* ; and *Bernard* dying in the Life-time of the Testator, my Lord of *Bath* afterwards made a Codicil, and the Will and Codicil lying both together on the Table, my Lord took up the Codicil and said, *this is my Will*, and then published it, and executed it in the presence of three Witnesses, and when he had done put both the Will and Codicil together in a Box ; and yet in that Case 'twas held, that the making the Codicil was no Republication of the Will, being not affixed together ; and then the *Heirs Male of the Body of Granville* could not take ; no more can they in this Case, without admitting the making such Codicil might amount to a Republication ; yet while the Words of the Will continued as they were, the *Heirs Male of the Body* could take no more than a Grandson could take as Son by such Republication, according to the Case of *Stead and Bernard*, 1 Vent. 341 ; 2 Mod. 213, &c. That a Codicil was a distinct Instrument of itself, and if the making of that should amount to a Republication of the Will, it would intirely elude the Statute of Frauds and Perjuries ; that in my Lord *Lansdown's Case* indeed, upon the Importunity of great Counsel, a Special Verdict was ordered to be found, tho' the Court was clear of their Opinions as to the Points, and that was afterwards agreed by the Parties ; that in 2 Sid. 53, 78, 79, a like Devise to four Daughters was held void for a fourth Part, by the Death of one of the Daughters in the Life-time of the Testator ; and so likewise was the Case of *Popham* against *Barnfield* (see Abr. Eq. C. 108) in this Court. And my Lord Chancellor was clear of Opinion that the Codicil in this Case could not help them ; but he said, the Construction of Law in these Cases was extremely rigid and severe ; that the testator in this Case must certainly mean, that *Jane* should have nothing whilst there remained any Issue Male of *Bridget* ; that the Words, *and for want of such Issue*, were not to be taken as Words of Course, but carried a plain Intention to give it to the Issue Male of *Bridget* ; that he would consider of the Will, and if any Thing could be found to distinguish this Case from those that have been cited, he would give Relief for a Moiety ; but if not, the Cases were so strong that he must submit to be bound by them, and afterwards gave his Decree accordingly.

BROWN versus BARKHAM.

Tuesday, Nov. 6, 1716. J. G. in Court.

Vide post, 131, S. C.

Of Devises in Trust.

Sir *Edward Barkham* being seised in Fee of the Lands in Question, by his Will, dated the 19th of Jan. 1700, devises all his Estate to Sir *Edward Massingberd* and *Dymark Walpole*, and their Heirs, in Trust to sell the same, or so much as would be sufficient to pay his Debts and Legacies : and after Payment thereof directed the said Trustees to convey the Residue of his Estate to his Cousin *Robert Barkham* and the Heirs Male of his Body ; and for want of such Heirs Male, to the Heirs Male of the Body of Sir *Robert Barkham*, his Great Grandfather ; and for want of such Heirs Male, to his own right Heirs for ever ; and gave to his Sister Mrs. *Newcomen* £2000, to be put out at Interest by his Trustees during her Life, and after her Death, to be [117] paid to her eldest Son ; and if she had no Son, then £1000 to go to her Executors or Administrators, and the other £1000 to go to his said Cousin *Robert Barkham*, or his Heirs Male ; and after some Legacies, all the Residue of his Personal Estate to the said *Robert Barkham*, and made him his sole Executor : But that if it happened that the said *Robert* was not in *England* at the Time of his Death, then he made the same Trustees his Executors in Trust for him till his Return ; but in Case the said *Robert*

died before he returned, then he made his Heir Male his sole Executor, and gave him all his Personal Estate, and soon after died without Issue. *Robert Barkham* the Cousin died without Issue in *Spain*, before the Testator; and now the Question arose upon this Will, whether *Edward Barkham*, who was the Heir Male of the Body of the Great Grandfather, or Mrs. *Newcomen*, who was Sister and Heir to Sir *Edward Barkham* the Testator, and likewise the Heir General of the Great Grandfather, had the better Title? 'Twas argued by Sir *Thomas Powys*, for Mrs. *Newcomen*, that *Edward* being living, and no Notice taken of him, 'twas plain the Testator never intended he should ever have it in the same Manner with his Brother *Robert*: That the £2000 was only a Recompence for the present Devise of the Estate-Tail to *Robert*, and not to be carried as a Recompence throughout the last Remainder; that that was only to go to those who fully come within that Description; that the Word *Heir* is either to denote the Person who is to take, and then it is *Vice Nominis* (vide post, 131 to 135; Abr. Eq. C. 213), and then it is to express the Quantity of the Estate which is to pass, Hob. 31. he that will take as Heir Male by Purchase, must be not only Heir, but Male too; and said, the printed Case of *Couden* and *Clerk*, and the Case of *Ashenhurst*, cited at the End of that Case, were directly in Point: That without all Question 'twas so in Limitations by Deeds, and had always been held to be the same in Wills; that in *Coke*, 1, c. 6, *Archer's Case*, 'twas held to be plainly a contingent Remainder to the next Heir Male of *Robert Archer*, and not such a Description of his Person as to vest in him presently, for then it could never have been destroyed by the Feoffment of the Father; and 2 Leon. *Challonor* and *Boyer*, comes up directly to our Case, and shews that the same Construction has prevailed in a Will as in a Deed; that in the Case of *Burchett* and *Durdant*, 1 Vent. 334 (post, 135), if it had not been for the Words *now living*, it had been a plain contingent Remainder; and so the Judges in that Cause agreed, and cited the Case of *Goodwright* and *Cornish*, 4 Mod. 255, to the same Purpose; and that in the Case of *Beaumont* and *Long*, the Word *begotten* was always held equivalent to the Words *now living*, and amounted to a Description of the Person: That there was a wide Difference between the Words, *and for Want of such Issue*, and the Words, *for Want of such Heir Male*; that, in the first Case, the Word *Issue* was an Explanation and Correction of the general Import of the Words *Heirs of the Body*; but in the last Case, the same Words being still used, none could claim who was not compleatly Heir Male by Purchase; but in this Case he seemed to have done with *Robert's* Family, when he limited it to him and the Heirs Male of his Body; and that he intended after it should go as the Law directed. *Lechmere* spoke to the same Intent, that the £2000 [118] given Mrs. *Newcomen*, could only be a Recompence for the Estate-Tail limited to *Robert*; that he only postpon'd his Heirs for the sake of *Robert* and his Issue Male; and whenever they failed, his Heirs must come in: That indeed of late Days, Limitations of this Kind had been carried much farther than in ancient Times; but he thought they ought not to be carried any farther, for that would shake a great many Settlements, and destroy the Peace and Quiet of many Families: That the Case of *Burchett* and *Durdant* was the first Case that made any Alteration in the Construction of Devises of this Kind; and said, in *Mandevill's Case*, *Coke* Lit. 26 b, 'twas held quite otherwise; that there was a great deal of Difference between a Lineal Heir Male and a Collateral Heir Male; and in that no Case had been carried so far as to let in a Collateral Heir Male, unless he was compleatly such: That in the Case of *Burchett* and *Durdant* the whole Stress and Foundation of the Resolution was on the Words *now living*, which they held to amount to the same as Heir Apparent; and yet that Case was strongly opposed, and went under a great Litigation: That in the Case of *Beaumont* and *Long*, the Words *then begotten* were held of the same Force as the Words *now living* were in the other Case; and that Case went on, *and for Want of such Issue*, which were plainly explanatory, and shewed, that the Word *Heir* was only meant the Issue of his Aunt *Long*; but here 'tis, *and for Want of such Issue Male*, which still preserved the Notion of legal Heir; and to take by Purchase, he must be both Heir and Male, which in this Case he is not: That the Case of *Couden* and *Clerk* had been always cited upon these Occasions, and was never yet doubted to be Law; that my Lord *Hobart* in that Case was clear of Opinion, that the Statute *De Donis* was only to preserve the Descent to the Heirs Male of the Body, not to direct taking by Way of Purchase; that by *Co. Lit.* 26 b, 164, if a Man has a Son and Daughter, and Lands are given to the Daughter and the Heirs Male of the Body of the Father, she takes only an Estate for Life, and the other Limitation is void, because she ought to be both Heir and Female, to take by

Purchase, which she is not in this Case, the Brother being Heir : and Mr. *Ayllof* argued to the same Intent, and said, that he that will take as Heir Male by Purchase, must be compleatly such, or otherwise he can't take.

On the other Side 'twas argued by Sir *Joseph Jekyll*, That there could be no sound Reason assigned for the Difference between the Heir's Male taking by Descent, and when he is to take by Purchase : That at Common Law, before the Statute *de Donis*, such Limitations were taken Notice of, and allowed to be good : That in a Will the Intent of a Testator, who was supposed to be *Inops Consilii*, was always to be regarded : That in the Case of *Pibus* and *Mitford* my Lord *Hale* was of Opinion, that if the Heir Male by the second Venter could not have taken by Descent, that he might have taken by Purchase : That the Case of *Beaumont* and *Long* was a Case in Point for them, though this was a much stronger Case ; for the Personal Legacies given to the Heirs at Law were given but once ; but here the £2000 is limited to the Heirs, so as in some Part to resemble Lands ; for 'twas to go to her eldest Son, if any ; and if not, then to her Executors, &c. That there was no Difference between the [119] Limitation for Want of such Issue, and for Want of such Heirs ; that in neither Case would it be carried farther ; and so 'twas held in *Dyer*, 171, *Trencham's* Case : That the Words then begotten in *Beaumont's* Case would be of no Weight to direct that Resolution ; for my Lord *Coke* tells us, in his 1 Inst. p. 21, that *procreatis* and *procreandis* are the same. The Attorney General to the same Intent : That if this had been an Estate-Tail in Sir *Robert*, the Great Grandfather, there could have been no Doubt the Defendant would have taken as Heir Male of his Body : That in this Case the Intent of the Testator was plain to exclude his Heir General : That he had sufficiently provided for her, by giving her £2000. That the Meaning of the Book, which says the Word *Heirs* is not a good Name of Purchase, is no more than that's not a sufficient Description of the Person who is to take ; but if by the Circumstances he is so described as to notify who is meant, then 'tis a sufficient Name of Purchase (vide Eq. C. Abr. 184, c. 27) ; and so is the Opinion of my Lord *Anderson*, in his Report in *Shelley's* Case, that a Limitation to the Heirs Male of the Body of one who was dead, was quasi an Estate-Tail in the dead Person ; that taking it in that Sense, would reconcile all the Differences, and answer all the Difficulties that had been objected against it ; and that 'twas to be taken in this Sense, 2 Leon. 23, 27, Cro. Eliz. 108, 9 Lit. sect. 30, Cro. Car. 24, *Hodgkinson* and *Manhood* ; and 1 Mod. 226, and 2 Mod. 207, the Case of *Southcote* and *Stowell* : That this differed from the Case of *Counden* and *Clerk* ; for the Heirs Male were not limited, or mentioned to be of his Body, as in this : That the Case of 16 Eliz. [1573-74] at the End of *Pibus* and *Mitford* in Vent. was a Case in Point with them. Mr. *Cowper* to the same Intent ; he thought the Distinction taken by the Attorney General would reconcile the Difference, and destroy all the Fictions of the Law against them ; that 'twould take away all Incertainty of the Description of the Person, and carry on the Descent as the Testator intended it ; that if this Notion of its being an Estate-Tail in the Great Grandfather were but a Fiction, yet it might be made Use of to destroy another Fiction, which excluded the Heir Male from taking. Sir *Robert Raymond* to the same Intent, That generally speaking, a Limitation to the Heirs Male, or Heirs Female, of such a one, will carry it only to those who are compleatly such ; but where there are any Words which will amount to a Description of the Person, so as to shew whom he meant by those Words, there 'twill be sufficient, though he be not Heir Male or Female in a strict legal Construction, especially where the Heirs General are excluded, as in this Case. As to the Objection, that the £2000 was a Recompence only for the Loss of the first Tail, he said it must be taken as a Recompence for the whole ; for the Defendant *Newcomen* could no more take under the Limitation to the Heirs Male of the Body of the Great Grandfather, than she would under the first Limitation to *Robert* in Tail ; and therefore the Recompence must be supposed to extend to the whole, and cited a Case of *Baker* and *Wall* in C. B. Paschæ, 4 W. Rot. 1484. Yet a Person may take as special Heir, where the Intent is manifest to exclude the Heir General. *Benson* to the same Intent, That the Will of the Testator was to be observed, as far as it might be : That 'twas here in the Case of a Trust, which this Court had the Direction [120] of : That they had sometimes varied from the Rules of Law, and when they had so done, the Courts of Law, from the Inconveniences that would otherwise follow, had come to the Rules of the Courts of Equity, as in the Settlement of Terms for Years beyond a Person's Life, and so they might in this Case. Mr. *Williams* on the other Side put this Case : If a Man has Issue A. and B., and A.

has Issue a Daughter and dies, and the Grandfather devises a Rent-Charge out of his Estate to the Daughter of A., and then devises his Estate to his Heirs Male, no Doubt but the second Son shall take, though the Daughter is Heir ; and said, they came into this Court only for Directions how they should be settled. *Lechmere*, by Way of Reply, said, that the Notion advanced by Mr. Attorney General, that the Heir Male of the Body of the Great Grandfather should be in *quasi* by Descent from him, was intirely new, and was attended with very great Inconveniences ; for then *Edward Barkham* would be quite out of the Case. Suppose the Sister had been dead, having a Son, he would be compleatly Heir and Male too ; and yet he could never take, because derived through a Female ; and if *Edward Barkham* was to bring a *Formedon*, he could not bring the *Esplees* in his Great Grandfather, and cited Lit. sect. 30, and my Lord Coke's Opinion thereon, and the Case of *Mandeville* there cited.

Lord Chancellor. This Will is perfectly Executory ; a Conveyance is still unexecuted, and they come into this Court to direct the Manner of it. Suppose *Edward* had been Heir and Heir Male of the Body of the Great Grandfather, the Conveyance would have been made in the very Words of the Will, for then he could not take at all ; it's like the Case of Marriage-Articles for Settlement of an Estate upon the Husband and the Heirs Male of his Body, yet when they come to this Court for a specifick Execution, the Court models the Settlement so as to make it effectual, and will give the Husband but an Estate for Life ; the special Heir Male in this Case was certainly within the Testator's Intention to take ; but as it had been so solemnly argued, he would take Time to look into the Books, before he would give his Opinion ; but said, he was strongly of Opinion for *Edward* the special Heir Male, and thought the Settlement ought to be to him and the Heirs Male of the Body of the Great Grandfather. Vide the Case of *Starling contra Eltrick*, 334.

SIMPSON *versus* HORNBY. Vide ante, 115.

Friday, Nov. 9, 1716. J. G. in Court.

A Devise of Personal Estate for Uses, &c., never perform'd, is a void Devise.

My Lord Chancellor, having taken Time to consider of this Case, did now deliver his Opinion, by which it appeared the Testator by his Codicil had given his Personal Estate to such Uses, as his Wife, with the Consent of his Trustees should direct ; and the Wife had taken upon her to dispose of it by her Will, without any such Consent, which my Lord said was a void Disposition ; and that the Testator, as to that, must be said to die intestate *ab initio*, and ordered a Distribution accordingly.

As to the other Points, he was of Opinion that the Wife took no Estate for Life by Implication, for he had, by the foregoing Part of [121] his Will devised several Lands to her for her Jointure, and in full of all Claims and Demands whatever, both in Law and Equity ; and when he after devises after the Death of his Wife, all his Lands, Tenements, Rents, Reversions, Profits and Hereditaments whatsoever (not before disposed of) to his Daughter *Bridget*, &c., this shall be taken distributively, that is to say, all the Lands which he had before given his Wife to give his Daughter after her Death, and all other his Lands not before devised, to his Daughter immediately ; and to make any other Construction would be absurd on these general Words, when he had after in such full and express Words provided for his Wife ; besides that, in no Case an Heir at Law is to be disinherited by Implication, unless the same be necessary, which in this Case it is not ; and as to the other Point, he said he has looked into the Books and found this Point already settled, that *Bridget* dying in the Life-time of the Testator, the Heirs Male of her Body could not take by Purchase, for those Words are inserted to express the Quantity of the Estate ; but if this were perfectly *Res Integra*, he thought it plainly the Intention of the Testator that *Jane* should not take 'till there were a Failure of Issue Male of *Bridget*, for so he thought the Words *and for want of such Issue* fully imported ; but since it had been so often resolved otherwise, he was bound meerly by those Resolutions, as it was a Point of Law ; but since it was so, and an Heir at Law disinherited as to a Moiety, he would decree no Account of the Rents and Profits, there being no Infant in the Case, but left them to their Remedy at Law by Entry and Ejectment, and said 'twould be very unequitable to assist them in this Case. After which Mr. *Jodrell* moved for some farther Directions touching the Dis-

position of the Surplus of the Personal Estate, and mentions the Case of *Button* and *Vashall*, where Mr. *Button* having several Children, gave to his eldest Son (who had disoblged him) £10, and no more, and gave his Executors a Legacy, and made no Disposition of the Surplus ; and it was decreed at the Rolls that the eldest Son should be let into the distributary Part of the rest of the Children ; but this Decree was reversed in the House of Lords upon the express Words of the Will, which excluded the eldest Son from any more than £10, but the Court said this was nothing like the present Case, which depended on other Circumstances : Accordingly the Decree was settled.

BISCOE *versus* CARTWRIGHT.

Wednesday, Nov. 14, 1716. *J. G. in Court.*

Where a Default of Surrendering a Copyhold shall be supplied. Vide ante 13, 96, 109, 110 ; [1] Abr. Eq. C. 122, &c. ; 2 Peer Will. 490.

This was a Bill brought to have the Defect of a Surrender of Copyhold Lands to the Use of a Will supplied in this Court for the Benefit of the Wife, under whom the Plaintiff claimed as a Purchasor ; but there being much Litigation, whether the Wife was not otherwise amply provided for out of the Testator's Freehold and Personal Estate, according to the Fortune she brought him, which was said to be upwards of £3000, and the Defendant, the Heir at Law, as was alledged, having no other Provision made for him but the Copyhold, which was not above £30 *per Ann.*, the Court said they could [122] make no Decree in it 'till those Facts were ascertained, and so sent it to a Master to inquire, and report it specially.

PETER *versus* RUSSELL.

Nov. 18, 1716.

See [1] Abr. Eq. C. 321, S. C.

The Trust of a mortgaged Term, &c., decreed against a fraudulent prior Mortgage.

This was an Appeal from the Rolls, and was shortly thus : One *Goffe* being possessed of the *Thatch'd House* at *St. James's*, on a Building Lease for 60 Years, mortgages it to Dr. *Lancaster* and one *Habberfield* for securing £600, which the Defendant afterwards paid off to *Goffe*, and advanced £600 more, and took an Assignment of this Mortgage, but had not the Original Lease delivered to him 'till some Days after the Assignment ; *Goffe* being afterwards in a declining Condition, proposed to borrow of the Plaintiff £350 on a Mortgage of a Vault and two Rooms, Part of the mortgaged Premises ; and on a Treaty for that Purpose Mr. *Remington*, who acted for the Plaintiff, desired to see the Original Lease ; *Goffe* told him that he had it not by him, but that his Lawyer kept all his Writings for him, as not thinking it safe to trust them in his own House, where all Sorts of Company resorted ; upon which he goes to the Defendant, who was an Attorney in the City, and tells him he was agreeing with a Person for the Rebuilding Part of the Premises at so much a Foot square, which would better his Security, and desired him to let him have the Original Lease that he might see the Dimensions of the House ; the Defendant would not trust him with the Lease in his own Power, but goes along with him to the *Thatch'd House*, and after he had been there some Time *Goffe* sent for the Plaintiff and Mr. *Remington*, told them he now had the Original Lease, which they might see ; and upon their coming into his House, *Goffe* goes into the Room where the Defendant *Russel* was, and desired him to let him see the Lease to shew to the Person he had mentioned, for that he was now in the House ; and accordingly the Defendant lets him have the Lease, which he carries to the Plaintiff and Mr. *Remington* ; they being satisfied therewith lent him the Money, and took a Mortgage of the Vault and two Rooms, insisting at the same Time to have the Original Lease delivered to them ; but *Goffe* argued that it concerned much more than the Plaintiff had, and that he could not part with it : The Plaintiff permitted him to keep it, and he thereupon, in an Hour's Time delivered it again to the Defendant *Russel*, without acquainting him with what he had done ; and the Defendant swore expressly in his Answer, that he had no Notice of this Transaction, or of the Plaintiff's Mortgage ; afterwards the Plaintiff lent *Goffe* a farther Sum of Money, and prevailed on the Defendant to let him have the Original Lease a second Time, but there was no Proof that the

Defendant knew the Occasion of it ; and he by his Answer expressly denied his having any Notice of it : Afterwards *Goffe* failed, and thereupon the Defendant brought his Ejectment, and recovered ; and now this Bill was brought to have the Defendant's Mortgage postponed, upon Pretence that there was a manifest Fraud on the Plaintiff, and that the Defendant was [123] privy to it : and at the Rolls the Plaintiff had a Decree accordingly ; but now on Appeal that Decree was reversed.

But my *Lord Chancellor* said, if a Man makes a Mortgage, and afterwards mortgages the same Estate to another, and the first Mortgagee is in a Combination to induce the second Mortgagee to lend his Money, no doubt this Fraud will in Equity *postpone* his own Mortgage ; so if such first Mortgagee stands by and sees another lending Money on the same Estate, without giving him Notice of his first Mortgage, this is such a Misprision as shall forfeit his Priority ; but here is no Manner of Proof that the Defendant knew any thing of the Plaintiff's lending this Money ; nay, if there had, yet the Plaintiff appears of so much the greater Neglect, that he ought not to prevail ; that the Defendant intrusted *Goffe* with his Original Lease but for a very little while. The Plaintiff takes his Word that he would not part with it, and leaves it wholly in his Power to go on in defrauding whom else he had a Mind to ; besides, it appears the Defendant was imposed on by *Goffe*, he parted with his Lease only to better his own Security, and had the most specious Pretence that could be for it ; and so it cannot, without manifest Proof, be objected to him, that he let *Goffe* have his Lease to shew the Plaintiff, or with a Design to draw the Plaintiff to lend his Money ; and therefore dismissed the Bill with Costs, unless the Plaintiff would in such a Time redeem the Defendant : The Cases cited were *Ray contra Pots*, and the *Countess of Bridgewater contra Russel* and one *Classe's Case of Yorkshire*.

Lord PAWLETT *versus* PERRY.

Nov. 20, 1716.

Real Estate subjected to a Legacy, tho' not charged thereon. See [1] *Abr. Eq. C.* p. 397, 398, 399 ; *Ante*, 72 ; *Post*, 125 ; 2 *Peer Will*. 620.

The Defendant's Father, by his Will in 1702, devises thus, *viz. As to the Disposal of my Estate I give and devise the same as follows* : Then he devises several Lands of about £4000 *per Ann.*, being the Bulk of his Estate, to his Son *Charles* the Defendant, who was his Heir, and the Heirs Male of his Body ; and for want of such Issue, to three others of his Sons in Tail Male, successively, with Remainder to his own right Heirs : Then he gives some Copper Mines, and other Estates, to his Son *Charles* in Trust, to be sold for the Payment of his Debts, and after gives his Daughter (with whom the Plaintiff had intermarried) £30 *per Ann.* 'till she should attain her Age of 12 Years, and after £50 a Year 'till she should be married, and gives her £1500 Marriage Portion, to be paid her by his Son *Charles* within three Months after such Marriage, and makes his Son Executor, and dies ; and this Bill was now brought to subject the Real Estate in the Hands of the Defendant *Charles* to the Payment of this Legacy. 'Twas agreed there was no express Clause in this Will for that Purpose ; but 'twas argued, that there were Words which were tantamount, that he begins with the Disposal of his Estate, which must be intended all his Estate, as well Real as Personal ; that the Word *Estate* more properly denoted his Real Estate than his Personal ; that this Legacy was expressly devised to be paid by his Son *Charles*, who had both his Real and Personal Estate, [124] and so in Defect of one, the other must stand charged in his Hands to make it up that 'twas in the Behalf of a Daughter who would be otherwise unprovided for ; and tho' the Estate was devised to his Son *Charles*, yet that could make no Difference, for 'twas a Charge that run along with the Estate, and bound it into whose Hands soever it came ; and they cited a Case between *Glontly cont. Pelham*, in September 1686, and another of *Wood versus Sherwood*, at the Rolls, to the same Point.

On the other Side 'twas argued, that here was no Intent to charge the Estate with the Payment of this £1500, that if it should be so taken the Devise to his Son *Charles* must be idle, for he must suffer a Common Recovery, and make himself Tenant in Fee in order to raise it ; that this would intirely destroy all the Remainders to his other Sons, and so frustrate his Devise to them, which he could never be supposed to intend by this Devise of £1500 to his Daughter, being all in the same Will ; that the Cases, Where such a Charge had been allowed on Lands, were where the Charge was expressly

mentioned in the same Clause as a Devise to his Son *T.* desiring him, or to the Intent that he should pay his Legacy ; that it could not be pretended that these Lands were charged with the Payment of his Debts, for he had made an express Provision for them out of another Part of his Estate ; that if he had intended to have charged his Land with this Legacy, he would likewise have made an express Devise for that Purpose, and that no Case had ever been carried so far as was now contended for.

Chancellor said, These last Arguments at present seem to him of more Weight than what had been offered on the other side, and desired to see the Precedents in black and white, and they after came out different from what they were cited : He observed that there was a Sort of an Inclination in each Side to make the Precedents generally speak for them ; that he did not speak this by Way of Censure, but commended it as the best Means to come at Justice, because there were learned Men on the other Side to put them right ; that unless the Precedents were very strong he could see no Reason to charge the Land in this Case, and so ordered them to be searched ; but in the mean Time sent it to a Master to take an Account of the Personal Estate, to see if on a probable Computation there was sufficient of the Personal Estate at the Time of making this Will to have answered the Legacy, and if any sold or purchased in Privy of the Legacy.

Note : *In the Devises of Residuums, &c., the Devisee is but a Trustee for the Legatee ; and so where a Sum is devised for Maintenance of a Child or near Relation ; And in such Cases where the Devisee has squandered or disposed of the Personal Estate, the Real Estate shall be liable, for both are bound where the Devise is in Trust, especially where 'tis in Consideration of Blood.* 2 Chan. C. 63, 76 ; 1 Chanc. C. 257, 176, and *ibid.* 57. The Testator's Estate is bound to pay such Legacies in whose Hands soever it comes. 2 Vern. 249, 444, 616.

[125] WAINWRIGHT versus BENDLOE. [1715.]

[1] Abr. Eq. C. 271, S. C.

Where the Real Estate is subjected to pay Debts, &c., by the Will, &c., the Personal Estate is discharged. *Q. ante*, p. 123, and see post, 128.

A Man devises by his Will all his Fee-Farm Rents in the County of *N.* to two Trustees and their Heirs, in Trust to sell for the Payment of his Debts ; the Residue of the Money arising thereby he devises to his two Sons, equally to be divided between them ; then he gives several of his Goods to go along with his Estate as *Heir-Looms*, and devises all the Rest and Residue of his Stock, Goods, Debts and Chattels, to his Sister the Defendant, whom he made sole Executrix : And this Bill was brought to subject the Personal Estate in the first Place to the Payment of Debts, in Ease and Exoneration of the Real Estate devised for that Purpose ; and 'twas urged, that this was the constant Course of this Court, and cited *Lord Gainsborough's Case*, and *Coot versus Moor*, upon the Earl of *Meath's Will*, and *Chichester versus Finch* (alias *French*), &c.

On the other Side 'twas argued, That here the Real Estate was an express Fund, devised for the Payment of his Debts : That there was a great deal of Difference between a bare Charge on his Real Estate for Payment of his Debts, as by a Devise of a Term thereout for that Purpose, and the Case in Question : That here he had given his Lands out and out, and had parted with them for ever ; and said, that he never intended any of them should remain in his Family : That these Lands were now to be looked upon as Money, and consequently in a Court of Equity were Part of his Personal Estate, and so had been held in *Roper and Ratcliff's Case*, upon the Popish Act of 10 *William III.* about two Years ago, and other Cases : That the Residue of his Goods and Chattels, and Stock, must be intended the Residue of those which were not specially devised as *Heir-Looms* ; and in 1 *Leo.* 203, there is an express Difference taken between a bare Charge on his Real Estate, and where 'tis devised, as in this Case, to be sold for the Payment of his Debts : And the *Lord Chancellor* was clear of this Opinion, and decreed, that the Personal Estate was not liable to the Debts in this Case.

BATCHELOR *versus* SEARLE.*Monday, Jan. 24, 1716. J. G. in Court.*

[1] Abr. Eq. C. 246 [2 Vern. 736], S. C.

Q. If the Surplus of a Personal Estate shall go to the Executors, or next of Kin.

The Plaintiff had married one Mrs. *Allen*, Sister to Sir *William Allen*, who being possessed of a Personal Estate to the Value of £2000 and being ill, makes his Will in Writing, the very Day before his Death, and thereby devises several Legacies to his Relations, and amongst the rest gives the Plaintiff his Sister about £1000, and gives £70 to Mr. *Searle* and his Wife, and their four Children, to buy them Mourning; and gives to his dear and most esteemed Friend *Sarah Searle*, one of the Daughters of Mr. *Searle*, to whom he made his Addresses by Way of Marriage, £500, and gives his Horse and Furniture to one of the Defendants, by his Christian and Surname, and his Clothes to be disposed of by his Executors, and then concludes thus: *As to the £700 I am intituled to in the South-[126]Sea Company, and the Rest of my Personal Estate, I will that the same shall be sold for the Payment of my Debts and Legacies, and I make Mr. John and Thomas Searle my Executors*, and dies. The Executors were two of the Children of Mr. *Searle*, and intituled to their Proportion of the £70 devised for Mourning, and one of them to the Horse and Furniture, but were no Ways related to the Testator: The Surplus of the Personal Estate came to about £600, and this Bill was brought against the Defendants the Executors, to have an Account thereof, and that it might be paid to the Plaintiff, whose Wife was the only Sister, and the next of Kin to the Testator. And for the Plaintiff 'twas insisted, That the Defendants the Executors were mere Strangers, no Ways related to the Testator: That they had particular Legacies left them for Mourning out of the £70, and one of them had a Horse and Furniture expressly devised to him; and so 'twas not reasonable they should go away with the Surplus, but that it ought to be accounted for, and belonged to the Plaintiff, and cited the Case of *Foster and Munt* to that Purpose.

On the other Side 'twas insisted, that the Defendants being Executors, represented the Testator; that they stood in his Place, and were intituled to whatever he left undisposed of: That this was the ancient Law for many Ages; and so the legal Title being with them, they ought not to be defeated of it, without a manifest Intention of the Testator to the contrary: That here appeared no such Intention in the Will; for they are not named either by their Christian or Surname, or so much as by the Name of their Office, till the very Close of the Will; nay, 'twas in Proof, that the Testator did not so much as consider whom he should make his Executors, till he had disposed of all the Legacies: That the giving one of them his Horse and Furniture, was only to exclude the other, who being Executor with him, would have been equally intituled to it, and could not be construed as a Legacy to shut them out of the Surplus, since it rather regarded the other Executor, than the Plaintiff the next of Kin: That they had it fully in Proof, that the Testator being asked whether he would give his Sister more, answered he would not; and being asked who should have the Surplus, or what should become of the Surplus, he said, his Will should stand as it was: That he had a very great Regard for the Defendant's Family, and was to have married their Sister; and moved, that these Proofs, being in Affirmation of the Disposition which the Law made to the Executors, might be read; and that so it has been allowed in my Lord and Lady *Gainsborough's* Case, and also in the Case of *Littlebury and Buckley*, upon an Appeal from the Mayor's Court, before the late Recorder of London: That as to the Case of *Foster versus Munt*, several Resolutions since that Time have pared away the Authority of that Case, and re-established the ancient Law: That so it had been settled in the *Duchess of Beaufort's* Case, in the House of Lords; and the Case of *Littlebury versus Buckley*; and also in a Case between *Ball and Smith* and others: And so 'twas prayed the Bill may be dismissed. And

[127] The Chancellor was clearly of this Opinion, and that the Proofs being in Affirmance of this Disposition, which the Law made, ought to be read, and accordingly they were; and said, they were so clear, as to make an End of this Case, and without a strong and violent Implication the Executors ought not to be defeated of this *Residuum*: That here was no such Implication in this Will, but rather the contrary, as

has been observed at the Bar : That to make Sense of that Clause, it must be construed as a Devise of the *South-Sea* Stock and the Rest of his Personal Estate to his Executors ; for it immediately follows, *I make John and Thomas my Executor* ; which could have no Relation to the Direction for Sale, unless by giving them the Surplus which should arise by Sale : That in the *Duchess of Beaufort's* Case, the Devise of the Plate, except the Use thereof, which he gave to his Executrix Lady, was an express Devise of the Plate to the Executrix Lady ; and here it was only inverting the Order of the Words, but in Effect the same as an express Devise thereof. So where one gave all his Books, except such and such, which he gave to his Executors, 'twas the same in Effect as an express Devise thereof to his Executor, only inverting the Order of the Words. And yet, in these Cases, the Executrix went away with the Surplus, and said, that in no Case, unless the Implication was violent, and such as could not be resisted, the Executors ought not to be shut out of the *Residuum*, which, by their Representation of the Testator, belonged to them : And so the legal Title being with the Executors in this Case, and no such strong and violent Implication to endure any other Construction, he could not give into so great a Change of the Law, but must decree for the Executors, and did so accordingly.

Lord BERNARD'S Case. [1715.]

[S. C. 1 Eq. Cas. Abr. 399 ; Prec. Chan. 454 ; and sub nom. *Vane v. Lord Barnard*, 2 Vern. 738. See *Powys v. Blagrove*, 1854, Kay, 502 ; *Turner v. Wright*, 1860, 2 De G. F. & J. 243 ; *Baker v. Sebright*, 1879, 13 Ch. D. 185.]

Tenant by Courtesy, &c., restrain'd from committing Waste. 2 Vern. 738, 739.

He was Tenant for Life (*i.e.* by Courtesy) without Impeachment of Waste : And this Bill was brought against him by those in Remainder for an Injunction, to stay his Committing Waste ; and by the Proofs in the Cause it appeared that he had almost totally defaced the Mansion-House, by pulling down a great Part, and destroying the other Part, and was going on intirely to ruin it. Whereupon the Court granted an Injunction, not only to stay his Committing farther Waste, but also ordered a Commission to issue to six Commissioners, whereof he to have Notice, and to appoint three on his Part, or in Default of the six Commissioners, to be named *ex parte*, to take a View, and make a Report of the Waste committed ; and that he should be obliged to rebuild and put it into the same Plight and Condition it was at the Time of his Entry thereon : And 'twas said, the like Injunction has been frequently in this Court ; and that the Clauses, without Impeachment of Waste, never were extended to allow the very Destruction of the Estate itself, but only to excuse from permissive Waste ; and so such a Clause would not give Leave to fell or cut down the Trees, which were for the Ornament or Shelter of an House, much less to demolish or destroy the House itself : And so 'twas ruled in Lord *Nottingham's* Time. See 2 Chan. Cas. 32.

[128] HUMERSTON *versus* HUMERSTON.

[See *Vanderplank v. King*, 1843, 3 Hare, 18 ; and *Lyddon v. Ellison*, 1854, 19 Beav. 573. Followed, *Parfitt v. Hember*, 1867, L. R. 4 Eq. 446. See *Juttendromohun Tagore v. Ganendromohun Tagore*, 1872, L. R. Ind. App. Supp. 78 ; and *Hampton v. Holman*, 1877, 5 Ch. D. 191.]

(See [1] Abr. Eq. C. [207] and 2 Vern. 737, and 1 P. Will. 332 [Prec. Chan. 455], S. C.) Limitations in a Will to 20 Persons *in esse* successively, in Remainder for Life (or Tail), no Perpetuity.

There were several Questions in this Case, upon a Will of one *Humerston*, one whereof was concerning his Intention to perpetuate his Name ; for which Purpose he had given a very considerable Estate to the *Drapers* Company and their Successors for ever, upon Trust to settle the same upon one of the Name of *Humerston* for Life, and after his Death to his first Son for Life, and so to the second and all other his Sons for life only ; and for Want of such Issue, then to another *Humerston* ; and so he reckoned twenty or more of that Name, to whom he gave only Estates for Life, with

the like Remainders to the first and other Sons of each of them respectively, as they should become intitled thereto; and if there were none of the Name to be found in *England*, then the Trustees and others were to chuse out the most comely young Man they could find in such a Parish, and he to take on him the Name of *Humerston*; and then the Estate to be settled on him for Life, with several Limitations over in like Manner, without limiting an Estate-Tail or in Fee to any of them, or making any Disposition of the Fee: But both Court and Counsel held that to be such an Affectation and Tendency to a Perpetuity, that nothing was said in the Support of it; but the Limitation for Life to the several Persons *in esse* were held good, and a Settlement decreed to be made accordingly, *viz.* to the first *Humerston* named in the Will for Life; Remainder to Trustees, during his Life, to support contingent Remainders, with Remainder to his first Son, and the Heirs Male of his Body, and so to the second, &c. And 'twas held clearly, that the Words, *and for Want of such Issue*, in the Will, would not raise an Estate-Tail by Implication to the first *Humerston*, so as to take against such express Limitations to him for Life only; and 1 Leon. 256, *Manning* against *Andrews* was cited.

DOLMAN *versus* SMITH & al'.

Feb. 5, 1716. J. G. in Court.

Q. If a Personal Estate should be subject to Debts, &c., when expressly charged on the Real Estate? And decreed it should. Vide ante, p. 125.

Sir *Thomas Dolman* by Will, Feb. 5, 1710, devises all his Household Goods and Furniture to the Defendant *Sarah Smith*, and £1000 to the Plaintiff *Dorothy Dolman* his Niece, payable at 25, and likewise £500 to the Plaintiff *Lewis Dolman*, payable at 25; then he devises all his Manors, Lands, Tenements and Hereditaments, to Trustees and their Heirs, in Trust for the Payment of his Debts, Legacies and Funerals, and does by his Will expressly charge them with the Payment thereof; then he directs, that the Trustees shall receive the Rents and Profits of his said Estate, till his Nephew *Thomas Humphry Dolman* should attain his Age of 25 Years, and thereout to allow him £30 *per Ann.*, and £20 *per Ann.* a-piece to the Plaintiffs *Lewis* and *Dorothy*, till they should all attain their respective Ages of 25; then he devises the Residue of the Rents and Profits, together with his said Estate, to his said Nephew *Humphry Dolman* in Tail Male, Remainder [129] to the Plaintiffs *Lewis* and *Dorothy* in Tail Male successively; Remainder in like Manner to three of the Defendants, with Remainder to the right Heirs of one of them who was a Stranger and no Relation to the Family; then he devises several Things to go along with the Estate as *Heir-Looms*, and afterwards devises all the rest and Residue of his Goods, Clothes and Personal Estate, not before bequeathed to his said Nephew *Thomas Humphry Dolman*, and makes the Trustees his Executors, and dies. *Thomas Humphry* dies without Issue at the Age of nine Years, and the Plaintiff *Mary* his Mother was Administratrix to him; and the only Question was, whether the Personal Estate in this Case belonged to the Administratrix of *Thomas Humphry Dolman* exempt from Debts and Legacies, and Funerals, or if the Personal Estate should be applied in the first Place towards Satisfaction thereof, notwithstanding this express Charge on the Real Estate for Payment thereof? But which Way soever 'twas taken, 'twas agreed the Surplus of the Personal Estate must be subject to a Distribution between the Plaintiffs *Lewis* and *Dorothy*.

'Twas urged for the Plaintiffs, that the Testator had in this Case expressly charged his Real Estate with the Payment of his Debts, Legacies and Funerals; and so the Personal Estate ought to be exempt therefrom; that he had specifically devised away a great Part of his Personal Estate, and that it was without Question no Way subject thereto (ante, p. 125); no more, as 'twas urged, could the Residue in this Case, because the devising it by such general Words was only to save the Trouble of enumerating the Particulars, which, if the Testator had done, that would have made it a specifick Devise thereof, and consequently as much exempt as the Particulars before devised; that the Devise was of the Residue before unbequeathed; so that every Thing but what was before bequeathed or devised must pass by this Clause, and no Room left to confine it to the Residue after Debts, &c., which, if the Words had been general, might be supposed the Intent of the Testator.

On the other Side 'twas urged, that the Personal Estate was the natural Fund

for Payment of Debts ; that if there was no Clause to exempt it, this Court had always subjected it in the first Place, notwithstanding any Devise of the Real Estate for Payment thereof ; that the Personal Estate had been made liable in this Court where the Real Estate had been expressly sold out and out ; that the Testator could not be supposed to have any Regard for his Heir, that the charging his Real Estate in these Cases was only in Aid of his Personal Estate, in Case that should not be sufficient ; that *Hæres factus* as well as *Hæres natus* had been always allowed the Benefit of the Personal Estate towards Satisfaction of his Debts in the first Place ; that if an Estate descend with an Incumbrance to the Heir, that he should have the Aid of the Personal Estate to disincumber it.

But to this *Vernon* said, that that could be only where there was an express Covenant for Payment of the Money which descended in *Point of Lien along with the Estate*, yet, by Reason of the Covenant, which was Personal, the Executors should be bound to discharge it out of the Personal Estate in the first Place. *But there was no Precedence in the World, that if a Man purchased an Estate subject to [130] an Incumbrance, that his Heirs should have Aid of the Personal Estate to disincumber.*

But my Lord Chancellor, upon the whole Frame of this Will, was of Opinion, that the Personal Estate was to be applied in the first Place in Ease of the Real Estate ; first, because there was no express Clause to exempt the Personal Estate, and that had been always the Distinction taken in this Court. Secondly, It appears that the Heir of this Family was not to have the Real Estate 'till the Age of 25 ; nay, not so much as the Rents and Profits, which should actually fall and become due before that Age ; that the Testator appeared throughout to carry a very frugal Intention, and so would allow his Heir no more than £30 *per Ann.* for his Maintenance, and that too is carried beyond the usual Time, *viz.* his Age of 25 ; for he was to be trusted with nothing more 'till his Age of 25. But on the other Side he must be intended indefinitely to trust him with the Personal Estate, without Limitation to any Age ; so that he may squander it all away, and waste it as soon as ever he came to it ; and that both the Real and Personal Estate in this Case were to come in the same Hand ; and so he was to have no such frugal Intention with Regard to the one, and leave it so loose as to the other ; that if the Personal Estate had been devised to a Stranger, it might have had another Consideration from the Meaning of the Words *before unbequeathed* ; but here he thought it could not ; and accordingly he decreed the Personal Estate to be subject in the first Place to the Debts and Legacies, and afterwards the Real.

ONYONS *versus* FRYERS.

Wednesday, Feb. 6, 1716. *J. G. in Court.*

[S. C. sub nom. *Onyons v. Tryers*, Prec. Chan. 459, 1 Eq. Cas. Abr. 407 ; and sub nom. *Onions v. Tyrer*, 1 P. Wms. 343, and 2 Vern. 741. Distinguished, *Tupper v. Tupper*, 1855, 1 K. & J. 669. See *Nevill v. Boddam*, 1860, 28 Beav. 558 ; *Ford v. de Pontes*, 1861, 30 Beav. 593. Doubted, *Quinn v. Butler*, 1868, L. R. 6 Eq. 227. See *Dancer v. Crabb*, 1873, L. R. 3 P. & D. 104 ; *Alexander v. Kirkpatrick*, 1874, L. R. 2 Sc. App. 404. Followed, *In re Fleetwood*, 1880, 15 Ch. D. 609.]

A second Will not duly executed no Revocation of a former Will, though cancelled.

A Man makes his Will duly executed and attested, according to the Statute of Frauds and Perjuries ; and at the same Time in the like Manner executes a Duplicate thereof. Some Time after the Testator having a Mind to change one of his Trustees, orders his Will to be wrote over again, without any Variation whatsoever from the first, save only in the Name of the Trustee so changed ; and when it was so wrote over, he executed it in the Presence of three Witnesses : and the three Witnesses subscribed their Names, but not in his Presence ; after this the Testator cancels the Duplicate by tearing off the Seal, and then dies ; and the Question was, whether the second Will not being good as a Will to pass Lands, should yet be a Revocation of the first ? And if it should not, whether the Cancelling of the other should be a Revocation thereof, within the Statute of Frauds and Perjuries ? 'Twas decreed that neither the making the second, nor the cancelling of the first, was a Revocation thereof, though in the second there was an express Clause, that he did thereby revoke all other former Wills. On the Hearing of this Cause the Chancellor took this Distinction, that the

second Will was not intended barely as a Revocation of the first, so as to signify his Intention of dying intestate, or without any Will, but doubtless was intended as an effectual Will to pass the Lands to the Persons, and in the Manner thereby devised, in the same Manner as in the former Will : And therefore seeing it was not good as a Will to [131] that Purpose, it could be no Revocation of the first ; for 'twas not intended to be a Revocation of the first, but as 'twas supposed to be valid as a Will, for passing the Lands by the second : And if a Man by his Will devises Lands to A., and after makes a second Will, and thereby devises the same Lands to B., if this second Will be not good as to the passing the Lands to B. it shall be no Revocation of the Devise in the first to A., for 'tis plain A. was to lose what B. was to gain ; and if B. gain nothing by the second, A. shall lose nothing that was given him by the first ; but if a Man executes a second Will, which appears to have no other Intention than only to revoke the first and die intestate, though the second be not in all Circumstances duly executed as a Will, whereby to pass Lands, yet it will operate as a Revocation of the first.

And as to the Cancelling and Tearing the Seal off the first Will, that is no Revocation of it in this Case, because that was no self-subsisting Independent Act, but done in Contemplation, or by Way of Affirmation of the second Will ; 'twas done from an Opinion that the second had actually revoked the first, and so he tears the first as of no Use ; but if the first was not actually revoked by the second, that Act of tearing the first will not destroy it neither ; for tho' a Man may by the Statute of Frauds and Perjuries as effectually destroy his Will, by tearing or cancelling it, as by making of a second, yet if he does make a second, and intends that as a Revocation of the first, if it be not sufficient for that Purpose, as in the principal Case, the Tearing or Cancelling of the first, being only in Consequence of his Opinion that he made a good second Will, shall not destroy the first ; but it ought to be set up again in this Court : And he said he thought this was consistent with the Resolutions that had been given in 3 Mod. 258, 1 Show. 89, *Egleton* cont. *Speck*, and a Cause cited by Serjeant *Hooper* in *C. B.*, wherein he argued, that where a Man by Will gave Lands to A. for Life, Remainder to B. in Fee ; and after, by a second Will, executed in the Presence of three Witnesses, but not sign'd by the Witnesses in the Testator's Presence, he gave the same Lands to A. again for Life, Remainder to C. in Fee ; this was held no Revocation of the Remainder to B., notwithstanding an express Clause of revoking all former Wills. And 'twas held clearly, that the effectual Cancelling or Revoking either the Duplicate or original Will is an effectual Avoiding of both, they being both but one Will, and so must stand or fall together.

BROWN *versus* BARKHAM.

Feb. 1716. *J. G. in Court.*

See before p. 116, S. C

Where there may be *Hæres Viventis*. Vide ante, 117.

The Chancellor, having taken Time to consider of this Case, did now declare his Opinion ; first he puts the Case at large, and then premises, that naturally, and according to the common Sense and Reason of Mankind, every one, at first reading the Will, would be clear of Opinion, that the Testator's Intent in this Case was to give his Estate to his Heir Male ; and none but a *Lawyer*, and one whose *Judgment is byass'd by the Learning of the Law*, could possibly understand otherwise ; but since Resolutions of Law and Decrees in Equity [132] have from Time to Time introduced and establish'd certain Rules and artificial Modes of Property, he thought it necessary to consider such of them as had been cited, and made Use of to disprove this natural Construction of the Will before he gave his own Judgment ; the first that has been cited is, that he who takes as Heir or Heir Male can't take whilst his Ancestor is living ; for the Rule is, that *nemo est Hæres Viventis*, and this is *Archer's Case*, 1 C. 66, but the Rule makes nothing in the present Case ; first, because here the Ancestor was dead at the Time when the Devise took Place ; secondly, because here the Words of the Devise are all strictly and literally verified of the Person, that is, to take as Heir Male when the Devise took Place ; and so nothing can be inferred from that Rule to influence the present Case. But now in *Archer's Case* the Words were not all true concerning him who was to take as Heir Male, for his Ancestor was living at the Time when the Will

took Effect ; and so according to the Rule beforementioned he could not take as Heir Male ; but in our Case, the Ancestor being dead long before even the making the Will, the Defendant *Barkham* may be truly and literally called his Heir Male, and consequently capable of taking by that Name if nothing else hinders. Another Case that has been cited is the Case of *Challenor* versus *Boyer*, 2 Leon. 70, but that likewise is nothing to this Purpose, because there the eldest Son was living when the Remainder should have vested in the Heir of his Body, which it could not do during his Father's Life ; for during his Life, he was no more Heir Male than he was Female ; so neither the Case in Dy. 99 is of any Force at Law in the present Question ; for there the Son who claimed the Remainder was to make himself right Heir both of the Body of the Father and Mother, which during his Father's Life he could not do ; but in that Case it's strongly implied, that if the Father had been dead, the Son should have taken as right Heir of their two Bodies.

A second Objection has been made, that he who takes as a Purchaser by the Name of Heir Male must answer the whole Description ; that is, he must be Heir and Male, which the Defendant *Barkham* is not ; but this is a Rule that has no Foundation in natural Reason, but is raised and supported by the Artifice of the Lawyers ; and under this Head we may consider the principal Case of *Counden* and *Clerk*, and *Sexhurst's* Case, cited at the End of that Case ; and also the Case of *Sterling* and *Estrick* in this Court ; in all which Cases 'tis observable, first, that the Limitations were only to the Heirs Male, not saying of the Body ; secondly, whoever observes carefully the Manner of my Lord *Hobart's* Arguments, fo. 32, will find his own Opinion to have been for the Devise, if it had been made to the Heirs Male of the Body ; and there seems to have been some Mistake crept into the Print in the transcribing that Part of the Case, which looks to have been at first otherwise ; and as to the Case of *Sterling* and *Estrick*, besides that there is no Mention of the Word *Body*, that was in the Case of a Deed, directing a Conveyance to his Heirs Male ; and so he thought the Decree in that Case extremely right, and should have given the same if it had come before him ; but now none of all these Cases do in any sort affect the present Case ; for if [133] the Reason for rejecting this Devise were good, because Part of the Description of the Person intended to take, was not true, the same will be a good Reason for allowing the Devise in the present Case, where the whole Description is strictly and literally true ; for without Question one may take as Heir Male of the Body of a Person deceas'd, who is no Heir General of the same Person ; first, because the Intent of the Testator is manifest, and appears at first View who was the Person meant to take thereby ; secondly, the Distinction between taking by Purchase and taking by Descent, where the Words are the same, though it be mentioned in Books of good Authority, yet it seems to have no good Foundation of Reason or Authority of Law to support it ; and if it should prevail in all Cases, would overthrow another Rule of Law, as certain, and as well established, which is, that a Person may take by Purchase, if he be sufficiently described, though he has neither Addition of Christian or Surname given him ; nay, though his Christian Name be false or mistaken, as appears by several Cases put to this Purpose in *C. L. 3 a*, and if so, certainly such a Description of the Person as has all the Marks and Characters whereby he may be known, and is defective in none, must be sufficient to intitle him under that Description : And that is the present Case, for the Words here are all true. Secondly, they are no more than true ; for *Edward Barkham*, in the strictest Propriety of Speech, is Heir Male of the Body of his Great Grandfather ; and the Books which are to the contrary, infer to make out their Conclusion that the Words are not true, which shews, that if they are true the Authority of those Books must fail ; now that they are not true they endeavour to prove, by urging that the Person who is to take by such a Description must be both Heir Male and Heir General ; for if he fails in either, he is not the Person described : But this surely is no good Reason ; though it be true, that the Word *Heir*, taken singly by itself, can be true of none but him who is Heir General, yet when they are joined with the Words *Male or Female of the Body*, they are true of him or her who descends from the Body, though they are not Heirs General ; and to say otherwise, is a very disingenuous and unfair Way of construing Words. For suppose a Man has Land at Common Law, and other Lands in *Burrough English*, and he devises his Lands at Common Law to his Heir in *Burrough English* ; or suppose a Man has Lands at Common Law, and other Lands in *Gavelkind* ; in these Cases, if a Man stop at the Word *Heir* or *Heirs*, 'tis certain the youngest Son in one Case, or all the Sons in the other Case, can't take, because the eldest Son is only

Heir, and so this can never be a just Construction of such a Will ; but now take all the Words together, and it is then most certainly a good Devise to the youngest Son who is Heir in *Burrough English* in the first Place, and to all the Sons who are Heirs in *Gavelkind* in the other ; so in the principal Case leave out the Words *Male of his Body*, and then no Doubt but the Heir General is to take : But as these Words were added to distinguish him from the Heir General, it would be a very unjust Way of wresting and perverting a Man's Words, to leave them out purely to let in another whom the Testator never intended should take ; and [134] the Addition of these Words was purely to distinguish him from the Heir General : Yet you say, none can take but the Heir General, tho' to give it from him those very Words were added, to distinguish the Person described to take ; which is all one as to say, though the Law allows an Heir General and Heir Special as two distinct Persons, yet none can take who is not Heir General and Heir Special in one Person, which is to confound and destroy the very Distinction itself between them : Besides, here the very Person to take is certain, and known ; *Edward Barkham*, and no other, is Heir Male of the Body of his Great Grandfather, and the Description of him by these Words is correct and perfect. Thirdly, If the Words *Heirs Male of the Body* in the Plural Number are a sufficient Description to convey Lands by Descent from the Ancestor to the Heirs Male of his Body, they are as sufficient to pass such Lands to the same Heir Male of that Body by Purchase, where the Intent of the Testator appears to be so : And this is not a Construction wrought upon the Statute, for that Statute does not determine or meddle with what are Words of Purchase and what not, or how the Heir of the Body that is to take shall be described ; nor is there any such Distinction between a Purchase and a Descent arising upon that Statute ; for the Words here made Use of in this Devise were all at the Common Law long before this Statute of *Donis*, which did not create such Heir Male of the Body, for he would have taken by such a Devise at the Common Law, as sufficiently described and known ; and the Statute only affirms the Description : And this he said was the principal Reason of the Opinion he was now to deliver, and the Authors which have been cited to the contrary do not at all come up to the Case, there being no Mention of the Word *Body* in any of them. And as to the Opinion of Hob. 32, that the Words *Heirs Male of the Body* are not sufficient Words of Purchase where another is Heir General, he said, First, that that Point was not at all necessary for the Determination of the principal Case ; Secondly, from those Expressions in the Book, it looks rather like a Mistake, than *Hobart's* own Opinion ; Thirdly, if it were his Opinion, it seems not to be Law, because a Limitation to the Heirs Male of the Heir Male of the Body of a Person dead before was sufficient to vest in them by Purchase without the Statute, and before the Statute *de Donis* ; and so is *John de Mandeville's Case*, C. L. 26, which he cited and applied, and said, the whole Difference in those Cases was between a Devise to the Heirs Male or Heirs Female of the Body ; and as to *Shelly's Case*, the principal Case there was rather a Confirmation of this Opinion, for there the Ancestor was dead at the Time when the Limitation took Place, and for my Lord *Coke's* Report of that Case, it seems only to be his own Argument, as he was of Counsel in it ; and tho' he does indeed lay down the Distinction between taking by Purchase and by Descent, yet *Wray* Chief Justice, when he comes to sum up the Reason of the Judgment, takes no manner of Notice of that Distinction ; so that it seems to be only my Lord *Coke's* own Opinion, without any Authority to support it. But then indeed this Doctrine is again transcribed into his first Institutes, 24, &c., and *Shelly's Case* cited for it, which is the only Authority to warrant that Distinction ; for as to the [135] Year-Books, referred to in the Margin, he said he had looked into every one of them with all the Care he could, that he might go to the Bottom of the Question ; and those Books are so far from warranting such an Opinion, that there is but one of them at all to the Purpose, and that is directly contrary to what it is cited to prove ; for as to the 9 H. 6, 23 and 24, and 11 H. 12, it was a Limitation only to the Heirs Male, not Heirs Male of the Body : Besides that, he was not *in esse* when the Limitation to him was to take Place, and so that Case can be no Ground for my Lord *Coke's* Opinion. Another Case cited to support this Opinion, is the 27 H. 8 ; Bro. Tit. *de Donis*, Sect. 61. But on looking into the Case, it appears to be nothing at all to the Purpose ; and Bro. Tit. 140, *Hussey's Case*, there is no judicial Resolution on this Point one Way or other ; and *Dyer*, 374, is only an imperfect Report of *Shelly's Case* : And from the Weakness of these Authorities, to prove the Doctrine contended for, he took Occasion to observe, that there was no

relying on sudden Opinions, as cited in Books ; and for the Support of his own Opinion he cited Roll. 454, and 2 Vent. 311, *Burchett* cont. *Durdant*, alias *James* against *Richardson*, which he said was a much stronger Case than this now in Question ; for there the Ancestor was living, and yet it was held such a Description of him, as to let him in during the Ancestor's Life, though that was a Dispensation with an ancient Maxim of Law, *Quod non est Hæres viventis* ; but in our Case no Maxim of Law is infringed : But *Beaumont* and *Long's* Case in the House of Lords lately is still a much stronger Case, for there was not so much as the Words of the Body, and yet the Heir was sufficiently described to take, even in the Life of his Aunt *Long* ; so that he thought those Opinions of my Lord *Coke* and *Hobart* to be very much outweigh'd by the Authority of these later Resolutions. Then he cited the Case of *Pibus* against *Mitford*, 1 Vent. 372, and said, that my Lord *Hale* did not think fit to rely on the common Point of the Father's taking an Estate-Tail by Implication, but held the Words *Heirs Male of the Body* of his second Wife a sufficient Description to vest in the Heirs Male of the Body of such Wife by Purchase : And though the Reporter of that Case introduces the Argument of my Lord *Hale*, only with his saying, that of that he was not well satisfied ; yet in the Argument of my Lord *Hale* after, he seems to have professedly set about confuting that Opinion, and takes Notice of such Heir Male of the Body, as a Special Heir at Common Law before the Statute *de Donis*, who was capable of taking by Descent from the Heir General ; and what he cites there out of Lit. Sect. 332, of performing the Condition as near the Intent as may be, he proves in the present Case that the Settlement must be made to the Person who is the Heir Special ; and said he had never met with any other Case to the contrary, but only the Opinions before mentioned of *Coke* and *Hobart*. As for the Case at the End of that of *Pibus* and *Mitford*, it is directly in Point for the Special Heir Male ; and in that Case he took Notice of his Heir General, as he does in the present, and therefore could never mean that his Heir Female should take it, when he expressly gives it to his Heir Male ; and in that Case Justice *Wild* was of the [136] same Opinion in that Particular ; so that it has the Authority of two Judges there : And the Reasoning of my Lord *Hale* there must surely convince all that hear it, and is much stronger than the before-mentioned Opinions of *Coke* and *Hobart*, the last whereof amounts to no more than that he doubted of the Law in this Point. Then he cited the Case of *Baker* cont. *Wall*, Hill. 8 W. 3, Rot. 1484, in *C. B.*, where a Man made his Will in this Manner : *I give my eldest Heir Male, and his Heirs Male for ever, all my Lands in such a Place ; and if there be a Female, she to have £12 per Ann. as long as she lives ;* and the Testator having two Sons, the eldest of which was dead in his Life-time, leaving a Daughter who was Heir General, yet the youngest Son went away with the Land : And that Case, as it appears by the Adjournment on the *Rolls*, was depending for a considerable Time, so that it seems to have been settled with great Judgment and Deliberation ; and in that Case there were several Expressions to shew that he never meant his Heir General should take. As to the Case of *Goodwright* and *Cornish*, which has been cited, he said it was nothing at all to the Purpose, and therefore he took no Notice of it. Last of all, and upon the whole, he concluded that the Words of this Will were sufficient to vest the Intail in Question in the Heirs Male of the Body of the Great Grandfather ; First, because natural Reason, common Sense, and the Intent of the Testator, allowed it ; Secondly, because the Arguments to the contrary are now brought into a very narrow Compass and Weight ; Thirdly, that the Weight of them, if any, was outweigh'd by judicial Resolutions in much stronger Cases ; and therefore the only Doubt now remaining was, how this Trust should be executed ? In considering whereof he said, that the Limitations to the Heirs Male, in the Plural Number made no manner of Difficulty, for so was *Shelly's* Case ; and when a Conveyance comes to be made, it must be to the Person who is Heir Male in the Singular Number ; and the Words are more skilful in the Plural Number than they would have been if they had been only in the Singular, as they do denote the Person who is to take, and do at the same Time describe the Quantity of the Estate he is to take ; and thereupon decreed, that the Trustees should execute a Conveyance to *Edward Barkham*, and the Heirs Male of the Body of his Great Grandfather ; for in this Case *Æquitas sequitur Legem*, and the Conveyance must be as near the Intent of the Testator as may be, according to the Rule before mentioned, Lit. Sect. 352. And a Conveyance was decreed accordingly.

NORTHY *versus* BURBAGE.*Easter Vacation, 1716. J. G. at the Rolls.*Devise to all his Children and Grandchildren intends only those *in esse*.

In this Case it was said by the Counsel, and agreed to by the Court, that a Devise to all his Children and Grandchildren extends only to those that were *in esse* at the Time of the Will made, for then the Will speaks ; and no Children born after are to be let in, unless there had been future Words in the Will, as all his Children and Grandchildren, *which should be born or living at his Death*.

[137] *Secondly*, That a Grandchild is not within the Custom of *London* to come in for his Father or Mother's Share, together with the other Child of a Freeman ; and this hath been settled by the present *Lord Chancellor*, where a Deed by Way of Provision being made by the Grandfather, after the Father's Death, in order to introduce the Grandson into the Father's Place was set aside, as made in Fraud of the Custom against the surviving Child.

Thirdly, The Testator in the principal Case being a Freeman of *London*, by his Will in Writing declared that he had given £1000 to one, £1000 to another, and so to the rest of his Children, in full of their Orphanage Part, by the Custom of *London* ; yet this Declaration let them in, bringing their Sums into *Hotchpot* to their full customary Shares of the Whole (2 Peer Will. 440, and 560) ; but whether the Sums mentioned in the Will should be taken to be the whole of what the Testator had given them, or if the Parties concerned were at Liberty to prove more paid them, was the greater Question ; and the Court seemed inclinable to let them into the Proof thereof.

Fourthly, A Devise of £500 a-piece to two of his Grandchildren by Name, and if either of them died, his Share to go to the Survivor, and if both died, then their Shares to go to their Mother ; one of them died in the Life of the Testator, yet his Share went by the express Words of this Will to the other Grandchild, and was held to be no lapsed *Legacy*. Vide ante, 76 ; Lucas's R. 98.

PIGGOT *contra* PENRICE.*Saturday, May 18, 1717. J. G. in Court.*

See [1] Eq. C. Abr. 209, S. C.

Where an Executor may be, as to Lands, and Lands liable to Debts, &c., and what Writing, &c., may revoke a Will. Vide post, 166, 167, Revocation, &c.

This was an Appeal from the Rolls, and the only two Points in Question were ; First, where one by Will devised in this Manner, *I make my Niece Gore, since married to Sir Henry Penrice, Executrix of all my Goods, Lands and Chattels*, Whether any and what Estate passed in the Land by the Devise, it appearing in the Cause, that the Testator had no Terms or Interest for Years in any of the Lands in Question ? The second was, where the Testatrix had made a Settlement with Power of Revocation by Writing, executed under Hand and Seal, in the Presence of three Witnesses, not being menial Servants ; and some Time after, being indisposed, wrote a Letter (which was read and proved in the Cause), signifying her Intention to revoke these Uses, and desiring a Deed might be prepared pursuant to the Power for Revocation thereof, and settling the same on her Niece *Gore*, Whether this should be construed to amount to a *Revocation*, she dying before any Deed was prepared, or any Revocation actually made ?

As to the first Point, 'twas argued that this Devise was sufficient to pass the Lands, and to give the Devisee an Estate of Inheritance therein. That if it were otherwise, the Word *Lands* would be useless, and must be rejected, there being no Terms nor Interests for Years in any other Lands ; that if any one says in his Will, *I make such a one universal Heir*, this will pass not only his Real, but his Personal Estate likewise ; and this has been oftentimes allowed ; and yet these Words are as improper, and as little applicable to the Personal Estate, as the Words in [138] the present Case to the Real Estate ; that by making her Niece Executrix of her Lands, she gave her a Power

to sell and dispose of her Lands, and that without Question would have passed a Fee ; and by this Devise *the Lands are made subject to the Payment of Debts and Legacies*, and under the Control and Management of the Executrix, in the same Manner as the Goods and Chattels, whereof she is made Executrix in the same Clause ; and if she should have but an Estate for Life therein, she might possibly die before she was reimbursed out of the Rents and Profits what she had paid for Debts ; which is the Reason that a Devise to one paying my Debts will pass a Fee.

As to the second Point 'twas argued from several Expressions in the Letter, that she had a manifest Intention to revoke the Settlement ; that she went as far as she could towards it ; that she expressly gave Directions to have a Deed prepared for that Purpose ; and that the Reason of its not being compleated was her dying so soon, which was the Act of God ; that if this Letter had been sealed and attested pursuant to the Power, it would without Question have been a Revocation ; and they cited the *Duke of Albemarle's Case*, where a Revocation was to be in the Presence of six Witnesses, whereof three to be Peers ; yet 'twas held in that Case, that if the Person was beyond Sea, or under any Disability of having three Peers, and pursued his Power of Revocation in all other Circumstances, that would be effectual in a Court of Equity.

But my *Lord Chancellor* was so clear of Opinion in both Points against them, that he affirmed the Decree somewhat hastily, without hearing of Counsel on the other Side. As to the first Point, he said, whatever his private Opinion might be of the Intent of the Testator to give her Niece those Lands, yet in Point of Judgment he could not decree for her ; that it was a most known and established Rule of Law, that an Heir is never to be disinherited but by express Words or necessary Implication ; that here were neither in this Case ; that the Word *Lands* was not however useless, or to be rejected ; for that in all probability there might be Rents in Arrear of the Lands, and by making her Executrix of her Lands, the Rents of those Lands would pass ; that nothing certain could be inferred from such a Devise, and therefore he must not break into the settled Rule of Law to support it. And as to the second Point, there might be good Reasons for putting herself under that Restraint, in the Manner of Revocation, to prevent Surprise or Inadvertency ; that there was no Pretence of any Obstruction from the Persons who claimed under that Settlement ; that here was nothing more than a bespeaking of a Revocation, and the Completion of it prevented by her Death ; that no Cause had ever yet gone so far ; and therefore 'twas too hard for him, and affirmed the Decree. *Note* : the Testatrix by her second Will gave Part of these Lands to charitable Uses, and they were decreed at the Rolls to be good as an *Appointment* upon the Act of Parliament, notwithstanding there was no Revocation ; but that Point was not now in Question.

Quære : If the bare Appointment of one to be an Executor conveys any Interest, for it seems to be only a mere Authority. *W. B.*

[139] FURSAKER *contra* ROBINSON.

Saturday, October 6, 1717. *J. G. in Court.*

S. C. [1] Abr. Eq. 123.

A Conveyance of Customary Lands to a Natural Daughter, without observing the Custom, void. See 2 Peer Will. 248 and 468, this Case cited.

A Man seised of Lands, which by the Custom of the Manor could not pass but by Deed, Surrender, and Admittance, and having a Natural Daughter, does by Deed, in Consideration of £300 therein mentioned to be paid by the said Daughter, grant and convey these Lands to her and her Heirs, and she was admitted accordingly ; but no Surrender was made of these Lands, as the Custom required ; and at the Foot of the Admittance was a Proviso, that her reputed Father should hold and enjoy these Lands for Life ; also in the Deed was a Covenant for further Assurance ; but for want of a Surrender according to the Custom of the Manor this was agreed to be a defective Conveyance ; so this Bill was brought against the Heir at Law to supply this Defect, and to have further Assurance according to the Covenant ; and whether this Court could supply it in Behalf of a Natural Daughter was the single Question ? It was urged for the Daughter, that she ought to be considered as a Purchaser, having paid

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£300 for it ; but 'twas said on the other Side, that tho' £300 was mentioned in the Deed as the Consideration, yet no Money was ever paid, and the Plaintiff could make no Proof of any Money paid ; 'twas also urged for the Plaintiff, that after her Birth her Father had married her Mother, and therefore, tho' she was a Bastard by our Law, yet by the Law of the Spiritual Court she was looked upon as *Mulier puisne*, tho' before Marriage she was Bastard *Eigne* ; for that, by their Law, *Matrimonium subsequens tollit peccat' precedens* ; but of this Marriage likewise with her Mother she made no Proof. 'Twas urged, that she being his Natural Daughter, he was by the Law of Nature obliged to provide for her ; and that this Court ought to supply a defective Conveyance, intended for that Purpose, as it had been done in many Instances for younger Children, and the rather, because of the express Covenant for further Assurance, which they came here to have a specifick Performance of ; and that she ought to be looked upon as a Purchasor, and to have the Benefit of that Covenant. On the other Side 'twas argued by Sir *Thomas Powis* and others, that though the reputed Father, if he thought her to be his Child, was obliged by the Law of Nature to provide for her, yet no Body else was ; that this Court was under no such Obligation ; so she was to be considered now as a meer Stranger ; and to supply a voluntary Conveyance that is defective for a Stranger against an Heir at Law, was what never was attempted before ; that she was to be considered as *nullius filia*, and could not be considered as a Child in any Court ; and that the Court was to follow the Law in such Cases ; that though her Father had a great Affection for her, yet that was not such an Affection as would raise a Use at Law ; that the Covenant for further Assurance could not at all help the Case where the original Conveyance was void ; that if a Man covenants to stand seised to the Use of a meer Stranger, and covenants to make further Assurance, this Covenant depending upon the Nature of a Convey-[140]-ance, if it were void, the Covenant which is only auxiliary, and goes along with the Estate, must be void too. And this was a Copyhold which could not be affected even by a Judgment at Law : much less by a Covenant which could not bind the Heir at Law of the Copyholder : That in a Case of *Kettle and Townsend* (Abr. Eq. C. p. 123 ; 1 Salk. 187), in the Time of my Lord *Somers*, 'twas held, That a Man was not obliged to provide for his Grandchild as he was for his Children, which were then said to be in Nature of a Debt upon him ; and as he was obliged to pay his Debts, so this was a Debt of Nature which he was likewise obliged to pay, but not to his Grandchildren, much less to a Bastard-Child. But my Lord *Chancellor* seemed not to be satisfied, and said, That by the 43 *Eliz.* a Man was obliged to provide for his Grandchildren ; but as to the Point in Question, the Court was of the same Opinion for the Reasons before given, and dismissed the Appeal from the Rolls. And as to the Proviso at the Foot of the Admittance, 'twas held repugnant and void, according to the Case in Cro. Car. or Cro. Jac. and the Disjunction taken in 4 Co. 25, *Kite contra Quainton*.

JACOBSON *versus* PEER WILLIAMS.

Saturday, Nov. 9, 1717. J. G. in Court.

See [1] Abr. Eq. C. 54, S. C. Q. 1 Peer Will. 382.

Where a Legacy given to the Wife on a Contingency, &c., vests in the Husband.
See before, 103, and 2 Peer Will. 497.

A Legacy of £1000 was given to one after the Death of her Mother, when she should attain the Age of 21 Years : The Defendant was appointed Trustee for the Raising and Payment thereof out of certain Lands : The Devisee was drawn into an improvident Match whilst she was very young, with one who soon after became a Bankrupt ; and the Plaintiffs were Assignees under the Commissioners of Bankrupts, and brought this Bill for the Portion which the Husband was intitled to in Right of his Wife : 'Twas insisted by the Defendant, that the Plaintiffs could be in no better Condition than the Husband himself would have been if he had brought this Bill for the Portion ; that if the Husband had brought such a Bill, the Court would have taken Care to have made a Provision for the Wife thereout ; and as the Portion was in the Hands of the Trustees, the Plaintiffs who stood in the Husband's Place could be in no better Condition, but must submit to make a Provision for the Wife likewise. It was likewise insisted, that this was not

vested in the Wife ; but her Mother was still living, and she herself under Age, so that it was but a double Possibility in the Wife, and consequently no more in the Husband, and then it could never pass by this Assignment to the Plaintiffs. My *Lord Chancellor* having taken Time to consider of it 'till this Day, was of Opinion that this was not a Portion vested presently in the Daughter, payable at a future Time, but was subject to a double Contingency, the Death of the Mother, and her own surviving, and attaining the Age of 21 Years ; first, that the Portion never vested, being given to her only when she should attain 21 Years after the Death of her Mother, was not presently payable at that Time ; and that tho' both the Contingencies had now lately happened, *viz.* the Death of her Mother, and that the Daughter had attained her Age of Twenty-one ; yet those being since the Assignment [141] of the Bankrupt's Estates, and since a Certificate of his having conformed himself in every Thing to the Acts, he was now by the Opinion of my *Lord Chancellor* discharged as a Bankrupt : And this Portion could not pass without a new Assignment, which the Commissioners could not make, their Commission being determined and at an End.

LEGATT *versus* SHEWELL.

Nov. 24, 1717. *J. G. at Lord Chancellor's House, before Mr. Baron Price.*

[1] Abr. Eq. C. 394, S. C. Q. 1 P. Will. 87.

Marriage-Articles to leave a Provision for the Wife. See Luc. Rep. 39 ; 2 P. Will. 342, &c.

Articles of Agreement of Marriage were made, whereby the Husband was to leave his Wife £2000 at his Death, and to settle on her a Rent-Charge of £100 *per Ann.* out of Lands to be purchased, with Clause of Distress : The Marriage takes Effect, and the Husband having made no Purchase, nor any Settlement of the £100 *per Ann.* on his Wife, makes his Will ; and therein taking Notice of the Articles, devises the £2000 to his Wife, and devises the Residue of his Personal Estate to Trustees in Trust, to lay out the same in the Purchase of Lands, to be settled in such Manner as should be devised for securing the £100 *per Ann.* to the Wife for her Life in the first Place, and subject thereto to the Use of the Plaintiff, his Nephew, and the Heirs of his Body, with several Remainders over, and dies. And now the Plaintiff brings this Bill, and prays to have an Account of the Personal Estate, and that the same might be paid to him on giving Security to answer the £100 *per Ann.* to the Wife for Life ; in Regard, as he suggested, that if such Purchase were actually made, yet he being Tenant in Tail thereof, might, by a Common Recovery, cut out those in Remainder, and make himself Tenant in Fee ; and it being about this Time held to be but reasonable to avoid the Expence and Trouble of a Common Recovery, 'twas sent to a Master to take the Account, and the Plaintiff was forthwith to enter into a Recognizance to the *Master of the Rolls* and the senior Six-Clerk, for securing of the £100 *per Ann.* to the Wife for Life ; which he did accordingly, and for some Years after paid the £100 to the Wife ; but after that he let it run in Arrear for several Years, and refus'd to pay it any longer, unless the Wife would allow him to deduct for Taxes ; and the Wife not only refusing that, but insisting likewise to have Interest for the Arrears incurring since the Recognizance, it came now before the Court upon the Master's Report of all this Matter specially : And two Questions were made, 1st, Whether this £100 was to be subject to Taxes ? 2^{dly}, Whether the Arrears should carry Interest ? As to the first, the Court was clear of Opinion that this £100 *per Ann.* not issuing out of Lands, but secur'd only on the Personal Estate, and consequently the Nephew himself being charged with no Taxes to the Crown, should not be allowed to deduct for Taxes, for that would be directly giving him so much Money out of the Annuity, without any Reason or Consideration whatsoever ; for as he himself paid no Taxes in Respect of the Personal Estate, there was no Colour to allow him any Deduction in Respect of Taxes, for by the continuing it still a Personal Estate he saved every Year so much Money, which if the Land had been purchased he must have [142] paid ; and as he had the Benefit of being free from Taxes, so ought the Annuitant too : And a Case was cited of *Green versus Green*, where one gave Bond for Payment of an Annuity for Life, and afterwards, for better securing of the Annuity, purchased several Shares in the *New-River Company*, and charged them with the Payment of this Annuity ; and though these Shares savoured of the Realty,

yet because the original Security was Personal, no Deduction was allowed for Taxes : No more ought there to be in this Case, when the Security is only Personal, and the Nephew himself never charged with Taxes ; but when Lands came to be purchased pursuant to the Articles, the Annuity must then be subject to a proportionable Deduction for Taxes. As to the second Point, it was decreed, That the Recognizance being in Nature of a Bond, the Arrears were a Debt secured thereby, and so must carry Interest from the Time they became respectively due, *ex relations magistri Stroud* ; who said, That several other Cases were cited, where an Annuity, secured only out of a Personal Estate, should not be liable to Taxes.

ANONYMUS.

Monday, Dec. 11, 1717. J. G. at Lord Chancellor's on Exceptions.

To what Time a Judgment, by the Statute of Frauds, &c., shall relate.

'Twas held by my *Lord Chancellor*, That upon the Statute of Frauds and Perjuries a Judgment shall have no Relation but from the Time of signing, not only as against Purchasers of the Lands themselves, but also against prior Judgments enter'd in the Grand Session of *Wales*, to which that Statute does not extend ; and therefore, as objected, the Judgment in the *Common Pleas*, though subsequent in Time to the other Judgment at the Grand Sessions, yet if it might relate to the first Day of the Term, it would take Place of the other Judgment : But my *Lord Chancellor* said a Man who trusted his Money on a Judgment was in some Sort a Purchaser of the Land, and he might take out Execution, and extend the Land itself ; and therefore if he found no Judgment prior to this, he thought his Security good, and that the Rule the Statute had laid down for the Safety of Purchasers of Lands themselves was a good Rule to follow in the present Case, and that Relations were not to be favoured in a Court of Equity. But Sir *Thomas Powys* insisted strongly, That the Statute extended only to Purchasers of Lands ; and therefore said a Judgment should have the same Relation still that it had at Common Law against a voluntary Settlement, or against any one who came to the Lands by any Conveyance without valuable Consideration ; and this was not denied by the Court : But in the present Case, if the subsequent Judgment in the *C. B.* should have such Relation, it would defeat real Creditors, who trusted to the Priority of their Judgments, which the *Chancellor* thought ought not to be overthrown by a Fiction of Law.

[143] MARSHALL *versus* FRANK & Ux'.

Feb. 10, 1717. J. G. in Court.

Marriage Agreements.—Leasehold settled by Lease and Release, in Trust, &c.

One having Issue a Daughter by his first Wife, who was dead, and being possessed of several Messuages for a Term of 999 Years, makes a Mortgage of them for securing the Sum of £100, and after, on his second Marriage, gives Bonds to Trustees to leave his intended Wife £200 at his Death : Then the Marriage takes Effect ; and the Wife being possessed of a Leasehold Estate, the Husband, in Consideration of his Wife's having joined with him in the Sale and Disposition of her Leasehold Estate, and also in Consideration of the Delivery up of the Bond, by Indenture of Lease and Release, grants, bargains, sells, and demises his own Leasehold Estate to Trustees and their Heirs, to the Use of himself and his Wife, for their Lives, and the Life of the Survivor of them, Remainder to the Heirs of the Wife, and covenants that he was seised in Fee : Then the Wife dies, without Issue ; but before her Death she makes a Writing in Nature of a Will, and thereby devises the Premises so settled on her to the Plaintiff and his Heirs ; and the Plaintiff got a Release from the Heir at Law of the Wife : The Husband after, on the Marriage of his Daughter with the Defendant *Frank*, enters into Articles, whereby he agrees to settle and convey the Premises on the Defendant and his Wife, and their Issue ; and the Defendant afterwards, having Notice of the first Settlement, pays off the Mortgage, and takes an Assignment of the Mortgage

Term : And this Bill is brought by the Plaintiff, as Devisee of the Defendant's Mother, to have a Redemption of the Term, and the Benefit of the Devise. The Defendant pleaded the Articles made on his Marriage ; That he was a Purchaser for valuable Consideration, and had no Notice of the said Settlement, but would not swear this Plea ; so the Plea being over-ruled, and his Title being set forth by Way of Answer as before, 'twas now insisted for the Defendant, that admitting any Thing passed by the Lease and Release to the Mother, under whom the Plaintiff claimed, yet that was only a voluntary Settlement, and therefore ought not to take Place against the Defendants, who were Purchasers for a valuable Consideration ; and as they pretended, without Notice ; though this was not sworn. That the Settlement was voluntary appeared from its being made after Marriage ; and the Consideration of the Wife's having joined with the Husband in the Sale of her Estate was nothing, for that being only Leasehold, the Husband had absolute Power to dispose of it without her ; and therefore her Concurrence or Consent was no Consideration ; and as to the Delivery up of the Bond, that was now out of the Case, she dying before her Husband. But secondly, It was insisted, That nothing at all passed by the Settlement ; for it being only a Term in Gross, no Use passed to the Trustee by the Statute of 27 H. 8, which only raises the Use when a Person is seised : That by the Lease for a Year, which was only a Bargain and Sale, no Use passed, and there was no Attornment to vest it as a Reversion : and the Release being to enure upon it by Way of Enlargement of [144] Estate, if nothing passed by the Lease, if no Possession was transferred by that, then there was no Estate whereon the Release could operate ; and whatever Consideration it might have in Equity to create a Trust, 'twould not affect the Defendants, who had both Law and Equity on their Sides ; Law, by an Assignment of the Legal Interest from the Mortgagee ; and Equity, as Purchasers for valuable Consideration : That besides, the Estate settled on the Mother, being only a Term for Years, the Limitation to her Heirs was void ; and admitting it had been good, yet she was under Coverture, and had no Power whatsoever to make a Will, and consequently the Devise to the Plaintiff thereof was void ; and then the Release of her Heir at Law could have no Operation, nor had he any Interest in him to Release ; and then the Term went to the Husband, he surviving his Wife, and consequently his Settlement must take Place : That the Husband was the only Person intitled to take out Administration to the Wife ; and therefore admitting this Settlement should pass the whole Interest in the Term, yet the Husband might at any Time take out Administration to his Wife, and thereby intitle himself to it. On the other Side it was insisted, That the Plaintiff had actually taken out Letters of Administration to the Wife ; and though he had not Letters of Administration in Court, yet it being sent to the Master, to inquire whether the Lands comprized in the Articles made on the Daughter's Marriage were the same which were mentioned in the Mother's Settlement, there being some Reason to doubt it, the Court left the Plaintiff at Liberty to produce his Letters of Administration before the Master : And my Lord Chancellor was of Opinion, That either by Virtue of such Administration, and by the Devise of the Wife's, operating as an Appointment, or by the Release of the Heir at Law of the Mother, by some or one, or all of these Ways, the Plaintiff ought to be let into a Redemption of the Term ; for though the Settlement could not operate as a Lease and Release, yet the Husband being in Possession, and not the Mortgagee, and there being the Word *Granted* in the Release, it took Effect as a Grant or Assignment of his whole Interest at Common Law ; and though it would not go to the Heirs of his Wife, yet his Intention being plain to exclude himself from the whole Interest of that Estate, he should not be afterwards admitted to derogate from it ; and therefore it should not vest in those in whom by Law it ought, which was the Administrator of the Wife ; for as the Husband intended to divest himself of the whole Fee, if it had been a Fee, there was no Reason, when it appeared to be a less Interest, that this should not pass ; and therefore he was of Opinion the Defendants ought to assign on Payment by the Plaintiff of Principal and Interest, but sent it before the Master to inquire as to the Lands.

[145] HEWETT *versus* IRELAND, &c. [1717.]

[See *Barnes v. Jennings*, 1866, L. R. 2 Eq. 451 ; *Locke v. Dunlop*, 1888, 39 Ch D. 399.]

See 1 Peer Will. 426.

A Provision for the Wife and Children out of the Wife's Estate.—Q. If *Stringer* the Husband was not also dead, and so this Claim made by his Executor or Devisee : For otherwise what Right can the Defendant *Ireland* have to either the Interest or the Principal during his Life ? For the Interest is expressly limited to be paid to *Stringer* for his Life, and not to the Daughter or Daughters, till his Death : But perhaps it was to know to whom he should hereafter pay the Principal.

One *William Stringer* being seised in Fee of an Estate, in Right of his Wife, and having Issue only one Daughter, who was about the Age of 10, *Stringer* and his Wife entered into an Agreement with the Plaintiff for the Sale of his Estate, and that out of the Purchase Money £600 should be secured as a Provision for the Wife and Children, and Conveyances were executed to the Plaintiff accordingly ; and the £600, Part of the Purchase-Money, was secured by Way of Mortgage on the purchased Estate in this Manner, *viz.* £30 a Year, the Interest thereof was to be paid to *Stringer* the Husband during his Life ; and after his Death, to the Wife for Life ; and after their Deaths, then the Interest to be paid to such Daughter or Daughters as shall be begotten between them, till they shall attain their Ages of 21 Years, or be married ; and then the said Principal Money of £600 to such Daughter or Daughters equally between them : And in Case there shall be no such Daughter or Daughters, then to the Wife in Case she shall survive the Husband ; but in Case he shall survive her, then to the Husband, his Executors and Administrators. The Defendant *Ireland* intermarried with the Daughter, which *Stringer* and his Wife had before the Settlement, and in Consideration of this £600, made a Settlement on her, the Daughter died in 1708, and in 1715 the Mother died ; *Ireland* took out Letters of Administration to his Wife, and by Virtue thereof claimed the £600. *Stringer* the Husband claimed the £600 as surviving his Wife ; and there was no other Issue, save only this Daughter, and she was born 10 Years before the Settlement. And now the Plaintiff brought his Bill, in the Nature of an Interpleading Bill, to know to which of the Defendants he might with Safety pay the Money : And it was decreed for the Defendant *Ireland* ; for 'twas said, it could never be the Intent of the Settlement to provide for a Daughter which probably might never be in *Esse* ; and to leave a Daughter who was then about 10 Years of Age, who had never done any Thing to disoblige her Parents, and was wholly unprovided for, without any Provision at all, although the Words seem to have a future Relation from the Time of the Settlement, yet the Intent was only futuramente as to those which should be begotten at the Death of the Father and Mother ; that this Daughter came in within that Construction, yet it was like a Limitation to one and his Issue *procreatis* or *procreandis* ; that if it were *procreatis*, it would take in those born after ; if *procreandis*, those born before : So here the Intention was never to exclude this Daughter ; and consequently the Defendant, as her Administrator, is intitled to it : and it was decreed accordingly with Costs.

[146] JONES *versus* NABBS.

Monday, May 19, 1718. J. G. in Court.

S. C. [1] Abr. Eq. C. 404, and Lucas's R. 404.

This Court restrains the Election, Liberty, and Discretion of Trustees and Executors.

A Daughter deposits £180 in the Hand of her Mother the Defendant, and afterwards makes her Will in Writing, and thereby devises several Legacies and makes her Mother Executrix, but takes no Manner of Notice of the £180. Afterwards, by Word of Mouth, she desires her Mother to give this £180 to the Plaintiff, if she thought fit, and then soon after dies. The Mother proved the Will, and then this Bill was brought against her to have the £180 paid. The Mother by her Answer admits she had such a Sum in her Hands, that her Daughter did make such a Request to her, but she left it to her Election whether she would give it to the Plaintiff ; and in this Case it was agreed, That this was not good as a *Nuncupative Will*, being above £30,

and not reduced into Writing within six Days after the Speaking, as that Statute requires. Secondly, That if the Defendant had insisted on the Statute of Frauds and Perjuries, the Court would not have relieved the Plaintiff as upon a Trust : But in this Case, the Defendant having by Answer confessed the Trust, there was no Danger of Perjury from the Variety of Witnesses, which was the Mischief the Statute intended to provide against ; and therefore the Court took it to be in the Nature of a Trust, and decreed for the Plaintiff ; for the Defendant expressly swore she did not think fit to give it to the Plaintiff, and that the Testator had left her at Liberty : But this Decree was against the Opinion of several at the Bar, who thought it too hard on the Election left in the Mother ; but the Court principally relied on the Case of *Kinsman contra Kinsman*, where a Man devised away an Estate of £2000 *per Ann.* and upwards from his Son and Heir to a Bargeman, and by his Will devised to his Son £20 *per Ann.* with this Clause, that if he behaved himself well, and gave no Trouble or Disturbance concerning his Will, then he might make it up £80 if he thought fit. In that Case the Court decreed the £80 *per Ann.* to the Son against the Devisee ; but it was purely upon the Circumstances and Hardship of the Case : But in the present Case 'twas said there were no Circumstances or Ingredients of Hardship on the Plaintiff. *But Query : for it seems to be a Trust in the Hands of the Mother.*

WARNER and HORN or HONE.

Wednesday, May 21, 1718. *J. G. in Court.*

See [1] *Abr. Eq. C.* 292, *S. C.*

Tenants in Common. See 2 *Peer Will.* 347.

Thomas Glauwin being possessed of several Leasehold Houses for several Terms for Years, makes his Will, and thereby devises his said Leasehold Houses to *Anne* his Wife for her Life ; and after her Death I give and devise the same to *Alice Buinion* and her three Sons, to be equally amongst them ; and it was decreed, That they took as Tenants in Common, tho' there was no Mention of any Division to be made, or equally to be divided between them : Accordingly the Plaintiff, who was Administrator of *Alice Buinion*, and had brought [147] this Bill for Account of the Profits, had a Decree for an Account of the fourth Part of the Rents and Profits for the Time to come.

BRADBURN versus WOODCOCK. *Eod. Die.*

On a Marriage-Broriage Note, &c., given to a Parson.

One *Isaac Hawkins*, an Attorney, being seised of a very considerable Real Estate, and also possessed of a considerable Personal Estate, and having only three Daughters, died about the 28th of *March* 1713, whereby about £150 *per Ann.* descended to each of his Daughters ; and their Shares of the Personal Estate came to about £1100 a-piece. One of his Daughters was married in his Life-time to one *Mr. Brown* of *Burton* upon *Trent*, a Gentleman of about £900 *per Ann.* to whom the Defendant was Curate, and had a Power of granting Licences, and such like Things, from the Chancellor of the Diocese ; the Plaintiff was Clerk to *Mr. Hawkins* at the Time of his Death, and had so far carried on a private Amour with *Mrs. Mary Hawkins*, the second Daughter, that she had some Kindness for him ; but the Plaintiff was a Man of no Fortune at all. In a Day or two after the Death of *Isaac Hawkins*, the Plaintiff applied himself to the Defendant, and acquainted him with his having Affection for *Mrs. Mary Hawkins*, and desired him to grant him a Licence for their Marriage ; whereupon the Defendant represented the Obligations he was under to *Brown*, who had married one of the Sisters ; that he was not only afraid of forfeiting his Favours by granting of such Licence without first acquainting him with it, but that he might be also in Danger of Prosecutions in the Spiritual Court, and be put to great Trouble and Expences thereby : Upon which the Plaintiff offered him to give a Note of £500 to indemnify him from any Expence he might sustain on that Account ; and accordingly the Plaintiff prevailed upon him to take his Promissory Note for Payment of £500 on Demand, for Value received ; and thereupon the Defendant told the Plaintiff, that

tho' he did not then grant the Licence, yet he'd go along with him to the young Lady, and so far secure her to him, that he should be in no Danger of losing her ; and accordingly about 10 o'Clock that Night the Plaintiff and Defendant went together to the House of the late *Hackins*, and after the Defendant had discoursed with the young Lady in private, she and the Defendant came out to the Plaintiff, and by the Influence of the Defendant she consented to join Hands with the Plaintiff, and the Defendant pronounced some Words of Contract between them, and after that was over exhorted her to continue faithful to her Engagement, and to remember the solemn Promise she had made ; but at the same Time represented the Danger and Difficulty he should be under of solemnizing the Nuptials in a publick Manner, and therefore he desired them to forbear any further Thoughts for about six Weeks, in about which Time he might have an Opportunity of breaking it to Mr. *Brown*, and obtaining his and his Lady's Consent, and seemed averse to any further Proceedings therein at that Time ; but in a few Days after, the Plaintiff repeating his Importunities to the [148] Defendant to grant him a Licence, the Defendant told him he should have Occasion for £300, and that if he would let him have it, he would let him have a Licence, and do the best Offices he could for them towards compleating the Marriage ; whereupon the Plaintiff told him he had not such a Sum of Money, nor could tell where to borrow it ; but if the Defendant would recommend him to any Person that would lend him that Sum he would be obliged to him, and give his Bond for the Re-payment of it : Thereupon the Defendant recommended him to one Mr. *Brougham*, whom he thought might furnish him with the Money, and accordingly the Plaintiff applied himself to Mr. *Brougham*, and acquainted him with the Occasion of his Desire to borrow that Money, and proposed to give his own Bond for the Repayment of it ; upon which Mr. *Brougham* told him, That as it was on so good an Occasion he might get the young Lady to be bound with him likewise, and that then he should have the Money ; and accordingly the Plaintiff acquainted the young Lady with it, and prevailed on her to become Bound with him to Mr. *Brougham* for the Re-payment of this Money ; and thereupon Mr. *Brougham* paid him down £200 and promised to let him have the other £100 next Morning ; upon which the Plaintiff went forthwith to the Defendant, and gave him the £200 and got a Licence from him presently ; and the next Morning, about 7 o'Clock, the Plaintiff, the young Lady, and the Defendant came to the Church, where they staid till about 8 o'Clock, and then the other £100 being brought in a Bag, the Defendant, without counting it, put it up, and the Marriage was thereupon solemnized the 8th of *April*, which was about ten Days after the Father's Death, and no more : The young Lady, as was proved in the Cause, was of full Age at the Time of her Father's Death ; and there was likewise a strong Proof that Mr. *Brown* was not averse to the Marriage, but only thought it too soon after the Father's Death, and was desirous, for the Sake of Decency, to have it deferred for some Time longer ; but that the Defendant, in order to have this Money, had raised Difficulties and Scruples : And now, after three Years Acquiescence, this Bill was brought to have the £500 Note delivered up, and the £300 Note repaid. The Defendant, by his Answer, confessed most of the facts before stated ; but insisted that the £300 was given him freely and voluntarily of the Plaintiff's own Accord ; but as to the £500 Note, he submitted to deliver up that ; and it was urged, That this £300 was not given for any Service he was to do, for that the young Peoples Affections were engaged before, and he was never made acquainted with it till the very Night they came to him for a Licence ; that this was not in the Nature of Marriage Brokerage, but was purely voluntary on the Plaintiff's Part. *Quere quid inde venit.*

• This Case may hint to us the Necessity there is of having the Sacrament of Marriage administred by the Civil Magistrate. W. B.

[149] TARGETT *versus* GANT or GRANT.

Saturday, May 24, 1718. J. G. in Court.

S. C. [1] Abr. Eq. Ca. 193 ; 1 P. Will. 432 ; & Luc. Rep. 403.

The Effect of the Words, *die without Issue*, &c., in a Devise of the Residue of a Term.

A Man possessed of a Farm for 31 Years devises it to his only Son *Henry*, during his Minority ; and if he attains to his Age of 21 Years, then to him during his Life, if

the Term shall so long continue, and no longer ; after his Death, to such of his Issue to whom he shall devise it for the Residue of the Term ; and if he dies without Issue, and without making any Disposition of the Residue of the Term, to A. The Testator dies ; Henry after dies without Issue, and without making any Disposition of the Residue of the Term. A. enters, and the Plaintiff was Lessee under him ; and the only Question was, Whether upon the Words of this Will the whole Interest did not vest in Henry, and consequently in the Defendant his Representative ? And 'twas decreed for the Plaintiff ; for the Words *die without Issue* have a twofold Meaning ; without Issue at the Time of his Death, or without Issue whenever that Issue fails : And in Cases of Inheritance, if Lands are devised to one, and he *die without Issue*, the Devisee takes an Estate tailed by Implication, which shall go to his Issue, and they shall take in Course of Descent to all succeeding Generations ; but to make such Construction in Case of a Term, which cannot come to the Issue by Descent, is unnecessary ; and therefore in such Case the other Construction of the Words, which is most natural and obvious, shall take Place ; and it shall be intended, if he die without Issue living at his Death ; and consequently the dying without Issue, being confined within the Compass of a Life, hinders not the Limitation over ; but it may very well take Place by way of Executory Devise, according to the former Resolutions in like Cases, and cited the Case of *Loddington and Kime*, 3 Lev. 431, and decreed that the Devise was good.

ATWOOD *versus* ATWOOD.

Monday, May 26, 1718. J. G. in Court.

No *Homine Repleg.* by a Wife against her Husband.

In this Case it was held by the Court, that a Wife can't either by herself, or *Prochein Amy*, bring a *Homine Replegiando* against her Husband, for he has by Law a Right to the Custody of her, and he may, if he thinks fit, confine her, but must not imprison her ; if he does, 'twill be good Cause for her to apply to the Spiritual Court for a Divorce *propter sevitiām*. But the Nature and Proceedings in a Writ *De Homine Replegiando* are such as cannot be maintained by a Wife against her Husband.

[150] SPENCE *versus* ALLEN.

Thursday, June 19, 1718. J. G. in Court.

[1] Abr. Eq. C. 232, S. C.

New Interrogatories ordered, on suppressing the old.

In this Case the Interrogatories, and the Depositions of a Witness taken on them, had been suppressed, for that the Interrogatories were leading, and then Publication passed. And now the Court was moved, That a new Set of Interrogatories might be drawn and settled by the Master, for the Examination of this Witness, whose Evidence was very material, and yet must be wholly lost, if the Court would not indulge them this Way : And though the Practice has been always against it, and 'twas insisted to be of dangerous Consequence, yet one Precedent being produced to this Purpose, and the Interrogatories which had been suppressed were such as might have been drawn by many other Counsel, without any Apprehension of their being leading, the Court, to let in the Party to the Benefit of this Witness's Testimony, ordered new Interrogatories to be settled by a Master, and put in for his Examination over again.

WRIGHT *versus* PILLING. [1718.]

On a Mortgage, &c., That a Judgment-Creditor may secure himself, by taking in a Prior Mortgage, as in the Case of Mortgages ; See 2 P. Will. 491 to 496.

One *Cockcroft*, being possessed of a Term for Years, determinable on the Death of his Wife, the 16th of April 1694 borrows of the Defendant the Sum of £40, and the 18th of July 1704, he borrows of the Defendant a farther Sum of £83, and gives him Bond for both, in *Hill*. 1704 the Defendant obtains a Judgment on his Bond against *Cockcroft* ;

Q. v.—4*

but before he had taken out Execution, viz. the 7th of *March* following, *Cockcroft* mortgages his Term to the Plaintiff, who was an Attorney, who had been concerned for him as such in several Causes, and had expended several Sums of Money for him therein, which are mentioned to be the Consideration of the Mortgage; and on the 10th of the said Month purchases the Equity of Redemption: On the 23rd in the same Month the Defendant takes out a *Fieri Facias* on his Judgment, and this Term was sold thereon by the Sheriff to one *Harrison*, but this was in Trust for the Defendant: After which the Defendant having Notice that there was an old Mortgage standing out, which was made the 21st of *July* 1699, he takes an Assignment of that Mortgage; and also takes an Assignment of a Judgment, which one *Sparks* had obtained some Years before against *Cockcroft*; and for the Mortgage he paid £144, and on the Judgment about £30. And the Plaintiff having brought his Bill against the Defendant had a Decree at the *Rolls*, to be let into the Redemption, on Payment only of what he had paid for the Assignment of the Mortgage; for that, as 'twas held, he could not so tack his own Judgment, and the Judgment of which he had taken an Assignment, to the Mortgage, as to withhold the Term from the Plaintiff, who had not only a Mortgage, but had now purchased the Equity of Redemption also. And the Defendant thinking himself aggrieved by this Decree did now appeal from it: And 'twas argued [151] for him, That he ought to hold this Term till both his Debts were satisfied: That 'twas like the Case of a third Mortgagee buying in the first, that he might hold out the second Mortgagee till his whole Money satisfied: That the Plaintiff was an Attorney, and the whole Consideration of his Mortgage and Purchase was made up of Bills of Costs, and for Business done: That his Deeds in Truth were ante-dated, and that there was little or nothing due to him.

On the other Side 'twas argued by Mr. *Vernon*, That the Difference had been always taken between a General Incumbrance, as by Statute or Judgment, and a Purchasor or Mortgagee; that the one was no Lien, nor any Particular Part of the Estate, but affected it only at large; whereas in case of a Mortgage or Purchase, the Party contracted for that particular Part, that if a Man had confessed twenty Judgments or Statutes, the last could not by buying in the first hold out all the intervening Judgments, &c., which the Court agreed to be so, because when the Plaintiff on the first Judgment was paid, that Security determined and expired of itself: And Mr. *Vernon* said he had always taken the Course to be, that a Judgment-Creditor could not always mend or better his Security by taking in a prior Mortgage, and cited the Case of Sir *William Basset* to that Purpose; and he likened it to the Case of a Dowress, which must take as the Law gives it; but a Jointress contracts for the very Estate itself: That this was but a Term for Years, and therefore not affected by the Judgment till the *Fieri Facias* lodged in the Sheriff's Office, which was not done till the 23d of *March*, long after the Plaintiff's Mortgage and Purchase; and this was the stronger, because *Cockcroft* had not the legal Interest of the Term in him neither; that he had only an equitable Interest in it, at the Time of this Execution taken out; and though the Sale of the Term might in Equity pass that Interest, yet it ought not to hurt the Plaintiff, or hold him out, who was a Prior Purchasor: That there was no Proof of Antedate, nor did it appear that the Consideration of the Plaintiff's Purchase was made up as the Defendant pretended. But at last, the Defendant offering to go before a Master, and to pay him all that he could prove to have really paid, or to be really due to him, together with Interest and Costs, the Plaintiff was advised to comply with it, and to turn his Purchase into a Mortgage; which he consented to, and so the Cause went off. But my Lord Chancellor, and several at the Bar, seemed not to agree to the Distinction taken by Mr. *Vernon*, but thought a Judgment-Creditor might as well secure himself, by taking in a Prior Mortgage, as a third Mortgagee, for that his Judgment was a Lien on the Land; and when he gets in a Prior Mortgage, that ought not to be taken from him till Payment of his whole Debt. And in this case one Question was, Whether, on the Appeal, the Party might be admitted to read any Thing he had not proved on the first Hearing? And my Lord Chancellor was of Opinion that he might, for that, as he said, 'twas to be inrolled as his Decree; and the Appeal was, to give him only an Opportunity of hearing what could be offered, only why he should not inroll it as his De-[152]-cree: And therefore the Cause was entirely open, and the Party at Liberty to offer what he could against his Signing and Inrolling the Decree.

ANGIER *versus* ANGIER.

Friday, June 27, 1718. J. G. in Court.

Wife sues here for separate Maintenance, &c. See *Lady Oxenden's Case*, ante, p. 1.

The Plaintiff brought this Bill by her *Prochein Amy*, against the Defendant her Husband, for a special Execution of Articles, whereby the Defendant was to allow her £52 *per Ann.* separate Maintenance. It appeared in the Cause that the Plaintiff brought £1200 Portion to the Defendant, who was a Hop-Merchant, and lived in *Southwark*, and was a Man of good Credit and Business; but soon after Marriage such Differences rose between them, that it became impossible to live any longer together. On the Plaintiff's Part 'twas proved, that the Defendant had several Times beat and abused her; that he had whipt her with a Horse-Whip, tore her Headclothes, and denied her Necessaries. On the Defendant's Part 'twas proved, that the Plaintiff was a Woman of a most perverse, morose, and malicious Temper; that she would suffer none of the Defendant's Friends or Relations to come to the House; that she had oftentimes affronted the Defendant's Father (who, as 'twas proved in the Cause, was a Man worth £20,000) and Mother; that she did all she could to vilify and expose the Defendant; that she chose to wear the dirtiest Clothes she had, though it was proved the Defendant kept a very plentiful House; that he allowed the Plaintiff even to Superfluities; that he had made her Presents of fine Clothes, a Gold Striking Watch, and several other Ornaments; that the Plaintiff was addicted to Drinking Brandy, and other strong Liquors, to Excess; that she was guilty of the most provoking and disdainful Behaviour possible towards her Husband, and that at last she left him for about two Months, after which she libell'd in the Spiritual Court for Separation and for Alimony; and whilst the Cause was there depending, the Defendant entered into the Articles in Question with one *Abel*, in Behalf of the Plaintiff, whereby the Defendant agreed to allow his Wife £52 *per Ann.* separate Maintenance, and to permit her to live where she thought fit, without any Molestation or Disturbance from him: But the Defendant, being desirous to have his Wife home again, and to come to a Reconciliation with her, had for some Time withdrawn the Payment of this Allowance, which was to be 20s. a Week; therefore to have the Arrears for the Time past, and the growing Payments during the Time of their Separation, this Bill was brought. The Defendant insisted the Plaintiff was not intitled to the Assistance of this Court, for carrying these Articles into Execution; that to decree that, was to decree a Separation, which was the Business only of the Spiritual Court; that Alimony continued no longer than till they became reconciled, and consented to cohabit: But if these Articles be decreed to be executed, no Reconciliation afterwards could set them aside; that the Wife in this Case was not at all bound; that the Articles were only signed by *Abel*, and not by her; and therefore 'tis un-[153]-reasonable the Husband should be fast and the Wife loose; but 'twas argued on the other Side, that these Articles ought to be carried into Execution; that they were intended to supply the Sentence in the Spiritual Court, and to prevent the Charge and Trouble of a solemn Litigation there; that the Husband by entering into them had given Sentence against himself to allow his Wife this Alimony; that after such Allowance the Husband could not be charged even at Law for any Debts of his Wife, that the Husband and Wife were often considered in this Court as separate Persons; that tho' this Court could not decree Alimony, yet it might decree Execution of Articles according to the Parties own Agreement; and several Precedents had been in this Court to that Purpose, as *Sir James Oxenden* and his Lady, and a Case of *Cutting and Cutting*, and several other Cases. My Lord Chancellor was of the same Opinion, and said, to decree an Execution of Performance of these Articles, was not to invade the Jurisdiction of the Spiritual Court; that the Intent of these Articles was to save the Expence of a Sentence in the Spiritual Court; that if these Articles could not be decreed here, they could be of no Force any where; that there was no Remedy upon them at Common Law, for there the Wife could not sue her Husband; that it could not be pretended the Spiritual Court had any Power to decree a Performance of them; that where a Husband makes a separate Provision for the Wife, he is not chargeable at Law for her Debts; but though that were so, yet to avoid the Expence he might be put to in defending such Suits, he sent it to a Master to settle a Security to indemnify him against the Wife's Debts, and decreed the Arrears and growing

Payments of the £52 *per Ann.* to be paid to the Wife, and said, this was not a Decree for Alimony, or to decree a Separation between them ; for that they might, whenever they thought fit, come together again, and then the Articles would be no further binding.

WALSAM *against* SKINNER.

Tuesday, July 1, 1718. *J. G. in Court.*

[1] Abr. Eq. C. 154, S. C.

Custom of London Orphanage.

In this Case it was agreed by the Counsel on both Sides, that an after-born Child should come in with the rest as to their Customary Shares of a Freeman of London's Personal Estate. Secondly, 'Twas agreed as an undoubted Rule, That where a Freeman died intestate, leaving a Wife and Children, that one Third of his Personal Estate and the Widow's Chamber, was to go to the Wife, and one Third to the Children, and the dead Man's Third to go according to the Statute of Distribution, *viz.* two Thirds to the Children, and the other one Third to the Wife ; and that this dead Man's Third was not at all under the Control of the Custom. *Quod Nota.*

Note : *The Author of these Reports was in Ireland during the 5th, 6th and 7th of George I. [1718–1721]. See the additional Cases at the End hereof.*

[154] BROWN *versus* MARSH. [1721.]

Whether on the Statute 3 & 4 *Annæ*, c. 9, the want of Consideration of a Promissory Note can be given in Evidence.

This was a Motion for an Injunction, and the Case was, A Note was given by the Defendant as Trustee for the Executrix of *Fowler*, for some Share in the *Assiento* Brass and Copper Mines to the Plaintiff *Brown*, who was an original Undertaker in setting on Foot that Bubble. And here it was very much disputed, whether the Plaintiff should be left to Law upon this Note ; for that these Mines were a meer Bubble, and had no Existence in *Rerum Natura* ; and *Fowler* was an innocent Person, that only sold the Shares that he had bought, and the Plaintiff was the Original Undertaker of the Project. In this Case it was very much disputed, whether the Defendant could give any Thing in Evidence to shew that the Note wanted a Consideration : The Court was equally divided, and two Judges were of Opinion, that upon Promissory Notes, the want of a Consideration could not be given in Evidence ; for the Words of the Statute of 3 & 4 *Annæ*, cap. 9, touching Promissory Notes are, " That all Notes in Writing, " that after the first Day of *May*, *Anno Dom.* 1705, shall be made and signed by any " Person or Persons, Bodies Politick or Corporate, or by the Servant or Agent of any " Corporation, Banker, Goldsmith, Merchant or Trader, who is actually intrusted by " him, her, or them, to sign such Promissory Notes for her, or him, or them, whereby " such Person or Persons, Bodies Politick or Corporate, his or their Servant or Agent " as aforesaid, doth or shall promise to pay to any other Person or Persons, Bodies " Politick or Corporate, his or their Order or Bearer, any Sum or Sums of Money, mentioned in such Note, shall be taken and construed to be by Virtue thereof due and " payable to any such Person or Persons, Bodies Politick or Corporate, to whom the " same is made payable." The two Puisne Judges were therefore of Opinion, that since the Statute made it payable by Virtue of the Note, that the Consideration of the Note was not inquirable, no more than the Consideration of a Bond ; and on a Bond the Defendant can only plead *Non est factum* in a Court of Law, and if it were sealed and delivered, which were the only Solemnities of contracting, appointed by the Law, nothing could be given in Evidence touching the Consideration.

The other two Judges thought there was a great Difference between a Note and a Bond notwithstanding the Statute ; for in the Case of a Bond, where there were Solemnities of contracting, *viz.* the Sealing and Delivery, if there was no Consideration, yet if there was no Fraud in obtaining the Bond, the Money was a Gift in Law to the Obligee ; but the Note was no more than a Simple Contract, and notwithstanding the Statute says, that the Money shall be due and payable by Virtue of the Note, that

only makes the Note itself Evidence of the Consideration, which it was not before the Statute, as appears by the Case of *Clerk versus Martin*, and *Potter versus Pearson*, 1 Salk. 129. But tho' the Note itself be Evidence of a Consideration, yet it is not conclusive Evidence, but turns the Proof upon the Defendant to shew that there [155] was no Consideration given for such a Note; and so he can shew that it is still but a Simple Contract, and therefore but a *Nudum pactum unde non oritur actio*, and of this Opinion was my Lord Chancellor King, and moved to rule it so at *Nisi prius*.

But in this Case an Injunction was granted on Terms, the Defendant agreeing to give Judgment, with a Release of Errors subject to Order on the Hearing.

Note: This Matter was very much disputed in the Hall, and this Case was put, That if A. forged a Bank Note, and gave it as a Consideration to B. for B.'s Note; or if A. should have given Brass Money for his Note, could not this want of Consideration be given in Evidence? If not, A. might recover against B. where there was no Debt; and certainly the Statute did not design that a Man should recover where there was no Debt at all; for the Statute only makes Promissory Notes as Bills of Exchange; and tho' the Acceptor and Indorsor were bound to pay those Bills, whether they had received any Consideration or no, because the Acceptor accepts it for the Honour of the Drawer. and the Indorsor negotiates it; yet the Drawer of the Bill was not obliged to pay it to the Person, in whose Behalf the Bill was drawn, unless he had paid him a Consideration; but the owning a *Value received* was Evidence *prima facie*, that a Consideration was paid to the Drawer of the Bill. Vid. 1 Salk. 125; 4 Mod. 242, 244.

KEEN *versus* STUCKELY. In *Dom. Procer*'. [1721.]

A specifick Performance of an extravagant Agreement for a Purchase decreed.—Proofs not read, because the Title was admitted.

This was an Appeal from the Decree of the Court of Exchequer, and the Case was, That the Respondent being seised in Fee of a Messuage, 24 Acres, and three Roods of Meadow and Pasture in *Holbeck* in the Fens of *Lincolnshire*, did by Articles of Agreement, dated the 20th of *July* 1720, bargain and sell the same to the Defendant, and did truly agree, that he would on or before the 29th of *September* then next ensuing, at the proper Costs and Charges of the Appellant, make to him, his Heirs and Assigns for ever, a good Estate in Fee-Simple, to the Satisfaction of the Appellant and his Counsel; and the Appellant did by the said Articles promise and agree, that on such Assurance and Conveyance made and executed, he would pay to the Respondent £800, being 40 Years Purchase. A Bill was exhibited in the Exchequer by the Respondent, for a specifick Performance of this Agreement; which was decreed.

It being proved in the Cause, that the Respondent had left his Deed with the Appellant, and that there was no just Objection to his Title, this was admitted below in the Court of Exchequer; and therefore the Proofs were not read there, nor were they marked as read.

Two Points were argued in this Case before the House of Peers.

First, Whether an exorbitant Bargain for 40 Years Purchase should be carried by the Decree of a Court of Equity into Execution, or whether they should be only left to their Damages at Law.

This was a very doubtful Point among the Lords; for on the one Side 'twas argued, that if a Bargain and Sale was unconscionable, the [156] Person who had got such a Bargain was not to demand a Performance of it in a Court of Equity, but he could only demand Damages for not performing the Bargain; for the Court of Equity was only to assist to carry conscionable Bargains into Execution, and where they did not find them fit to be carried into Execution, the Court of Equity was to leave them to Law.

On the other Side 'twas said, that a Man was obliged in Conscience to perform a Bargain, though it was a hard one; and where he was obliged in Conscience, it was no Hardship upon him to be compelled thereto; that nothing in the World was more uncertain than the Price of Land; for Land may be worth 40 Years Purchase to one Man, that was worth but 20 to another: But this Point was left doubtful.

But they all agreed in the second Point, *viz.* that since the Title was not made out by the 29th of *September*, as the Respondent undertook by his Covenant, there was no Occasion to determine the other great Point; for the Respondent not having proved that he had made out the Title by the Time covenanted, could not intitle himself to the

Purchase Money ; and the Proofs for this could not be read because they were not read in the Exchequer, and the Appellants Admittance of that Matter was not entered.

BUTLER *versus* GASTRILL. [1721.]

N.B. This Case seems to be before the Delegates. Prohibition to the Spiritual Court, in the Case of an incestuous Marriage, &c. A Marriage with the first Wife's Mother's Sister is incestuous.—Where a Prohibition lies, and why.

John Butler and *Elizabeth* his Wife obtained a Prohibition to *Peregrine Gastrill*, Judge of the Ecclesiastical Court at *Chester*, where they libelled against the Plaintiff for an incestuous Marriage ; for that the said *John Butler* had married the Plaintiff *Elizabeth*, formerly *Elizabeth Lowndes*, who was Sister to the Mother of *Hannah Lowndes*, his first Wife ; and upon this Prohibition the Defendant put in a Demurrer, and the Defendant now argued for a Consultation ; and here the only Question was, whether the Marriage with the Wife's Mother's Sister was incestuous or not ? And it was resolved by the whole Court that this Marriage was incestuous ; and here in the first Place,

This Position was agreed to be plain, that by the Statute of the 38 *Hen.* 8, cap. 13. if a Spiritual Court proceeds to impeach or dissolve a Marriage out of the *Levitical* Degrees, that then the Temporal Courts are to prohibit them ; for by that Statute, all Marriages that are out of those Degrees are declared to be good and lawful ; and therefore if the Spiritual Court molest Persons, in doing that which is declared lawful to be done by the Statutes of the Realm, they are by the Temporal Courts to be prohibited, because they exceed their Jurisdiction thus bounded by the Temporal Law ; but where the Law has not bounded them, their Jurisdiction still continues ; and therefore, within the *Levitical* Degrees, they are still Judges of Incest.

[157] The Incest within the *Levitical* Degrees is twofold, *viz.* either such as is contrary to the Law of Nature, or such as is forbidden by the Divine positive Law.

First, The Incest against the Law of Nature : And that is any Marriage between the ascending and descending Line, *in Infinitum*. This is contrary to the Law of Nature, because it tends to the Destruction of the natural Will of the Creator, which designed the Preservation and Continuance of such Inhabitants of the World as he originally created ; and all Acts of Men that tend to the Destruction of such Species, as Murder of an innocent Person, is said to be against the Law of Nature : And therefore Incest, between the ascending and descending Line, is contrary to the Law of Nature ; for the Mother would never have preserved and educated the Female Issue, if it had been admitted to the Father to have had Access to them ; and Fathers would never have educated and preserved their Male Issue, if they might have ascended the Bed of the Mother : And therefore this Horror of Incest has been propagated, not only in all Civil Societies, where Nature is trained up and cultivated, but also in the Clans of the *Scythians* and *Nomades*, and all the wild People of the Earth, where Men have lived in Troops by Spoil and Rapine, without any regular or settled Government. There is another Reason likewise why this is called unnatural, and that is, because it destroys the natural Duties between Parents and Children ; for the Parent could never preserve or maintain that Authority that is necessary for the Education and Government of his Child, nor the Child that Reverence that is due to the Parent, in Order to be educated and governed, if such indecent Familiarities were admitted or set up upon a Foot of Equality one with the other.

Secondly, Of Incest among Collaterals : And this is not, strictly speaking, contrary to the Law of Nature ; for then Mankind could not have been propagated from one Common Stock, without a Breach of the Law of Nature. Besides that, this very Usage of marrying Sisters was practised by the Patriarchs and good Men of Old, without any Note of Blame, as *Jacob* married *Rachel* and *Leah* : Nay, there is one Case wherein 'tis expressly commanded, and that is where the elder Brother dies without Issue, that the younger Brother must marry the deceased Brother's Wife, to raise up Seed unto his Brother ; the Meaning of which is, that the Children begotten by such second Marriage were to bear the Brother's Name, and take his Inheritance. But though Incest among Collaterals is not contrary to the Law of Nature, yet 'tis contrary to the positive Law of God ; which is likewise established upon very strong Reasons : For if a Concourse

between Brothers and Sisters might be allowed, or their Marriages be tolerated, the Necessity that there is that they should be educated together, and the frequent Opportunities they have with each other, would fill every Family with Lewdness, and create Heart-burnings and unextinguishable Jealousies between Brothers and Sisters, where the Family was numerous ; and 'twould confine every Family to itself, and hinder the propagating of common Love and Charity among Mankind, because there would be a Danger of taking a Wife out of any Family, [158] if Women were liable to be corrupted by such vicious Freedoms. They have likewise found among Brute Creatures, *that it is necessary to cross the Strain, in order to continue the Species.* It may be that there being the same Tone and Figure in the Blood, and a similar Conformation of Vessels, the Circulation of it becomes torpid and unactive ; whereas a new Mixture of others of the same Kind, where there is a different Figure and Motion of the Blood and Spirits, may add a new Vigour and Ability to the animal Oeconomy ; which may be likewise a natural Reason against such Sort of Incest.

This Prohibition is likewise carried into the third Degree in the Collateral Line, and is to Uncles and Aunts, Nephews and Nieces ; because, upon the Death of the Father and Mother, they come into the Education of the Children, *loco Parentum* ; and by Consequence it was necessary to propagate the same Reverence of Blood, in such near Degrees, that the Uncle might have the same Regard and Command as a Father, and a Niece the same Duty as a Daughter. It was also necessary, in order to perfect the Union of Marriage, that the Husband should take the Wife's Relations, in the same Degree, to be the same as his own, without Distinction, and so *vice versa* : For if they are to be the same Person as was intended by the Law of God, they can have no Difference in Relations, and by Consequence the Prohibition touching *Affinity* must be carried as far as the Prohibition touching *Consanguinity* ; for what was found convenient to extinguish Jealousies amongst near Relations, and to govern Families and educate Children amongst People of the same Consanguinity, would likewise have the same Operation amongst those of the same Affinity.

And when we consider who are prohibited to marry by the *Levitical* Law, we must not only consider the mere Words of the Law itself, but what, from a just and fair Interpretation, may be deduced from it ; for the Law, in *Leviticus*, Chap. xviii. Ver. 6, begins, *That none of you shall approach to any that is near of Kin, to uncover their Nakedness* : Now who are next of Kin must be understood by the Examples from the 6th to the 20th Verse.

And there are Examples of many Prohibitions to Collaterals in the third Degree, both in Affinity and Consanguinity ; but there is no Example of Collaterals in the fourth Degree, either in Affinity or Consanguinity ; and therefore the Law of Marriage opens to Relations in the fourth Degree : And the *Jewish* Lawyers, in computing their Degrees, computed them according to the Natural Order of Things ; that is, from the *Propositus* up to the Common Stock, and so down to the other Relations, which is the fair and natural Order of computing Proximity. And in this Manner of Computation all Marriages of Collaterals, in the third Degree, are unlawful, and all Marriages in the fourth Degree are lawful.

This perfectly agrees with the Resolutions of our own Law. Thus the Marriage with the Wife's Sister's Daughter is incestuous, which is the same Degree with this Marriage. Moor, 907 ; Cro. Eliz. 228 ; 4 Leon. 16, *Man's Case*. So the Marriage with the Sister's Daughter is declared incestuous, which is likewise in the third Degree : The Case of *Watkins* and *Margatton*, Raym. 464. And 'twas likewise resolved in the Case of *Wortley* against *Watkinson*, that the Marriage [159] with the Wife's Sister's Daughter was incestuous, 2 Lev. 254. So 3 Kebl. 660. So resolved in the Case of *Sir Edward Whitpool*, quoted in Hob. 181. So the Marriage of the Wife's Sister's Daughter was resolved to be incestuous, in the Case of *Snowling* versus *Nursey*, 2 Lutw. 1075. So the Marriage of two Sisters, one after the other, was held incestuous, in the Case of *Hill* and *Good*, being in the second Degree, Vaugh. 302.

But the Marriage with the Wife of the Plaintiff's Great Uncle was allowed to be good, because that was in the fourth Degree ; and by the Words of the Statute 32 H. 8, cap. 38, Cousin Germans are declared of the fourth Degree to have Liberty to marry (2 Vent. 9, 10, &c. ; Vaugh. 206).

This likewise was the ancient Sense of the Christian Church, and even of the Church of *Rome* in the Time of Pope *Gregory* : For in writing to *Austin*, Bishop of *Canterbury* he says, *In quarta Generatione Contracta Matrimonia minime solverentur.* And this

appears in the Decretals, Cans. 33, Quest. 4, Cap. 20. But afterwards, when they found that Dispensations for Incestuous Marriages brought great Profit to the Church of *Rome*, and knowing it had obtained universally in the Christian Church, that it was lawful to marry in the fourth Degree, Pope *Alexander II.* began a new Computation of Degrees, and he said that the secular Computation, which was the Computation of the Civil Law, was not properly adapted to the Decisions touching Incestuous Marriages ; but they ought to compute up to the Common Stock, where the Relation joined, because there the Blood was connected ; and therefore they computed the Degrees according to the Distance of the Person remotest from the Common Stock : For according as the remotest was distant from the Common Stock, so they computed the Relations between the Parties. This plainly appears by the Decretal, Lex. 33, 1, No. 3, 4, 5, 6. And in the 6th the whole *Arbor Consanguinitatis* is set forth : So that the first Cousins that are in the fourth Degree, by this former Computation of Degrees, which was the received Computation in the *Mosaick Law* and in the *Roman Government*, were now by the Canonical Computation thrown into the second Degree ; and by this Alteration of Computation of Degrees, they forbid not only first Cousins, but second Cousins and third Cousins to marry, unless they obtained Dispensations.

The Intention of our Statute was to restore every Thing according to the Prohibition expressed in the Law of God ; and plainly the *Levitical* Computation of Degrees was in the Manner they computed in the Civil Law, which was from the *Propositus* up to the Common Stock, and so down again to the other Relations. And by the Canons confirmed by Jac. 1, in 1603, the 99th Canon expressly saith thus : *No Person shall marry within the Degrees prohibited by the Laws of God, and expressed in a Table set forth by Authority in the Year of our Lord 1563, and all Marriages so made and contracted, shall be adjudged incestuous and unlawful, and consequently shall be dissolved, as void from the beginning ; and the Parties so married shall, by the Course of Law, be separated ; and the aforesaid Table shall be in every Church publickly set up, and fixed at the Charge of the Parish.* And it appears by that Table, that to marry the Wife's Mother's Sister is incestuous. Indeed it has been duly objected to this Manner of Argumentation, that [160] the Canons bind only Ecclesiastical Persons, and don't bind the Laity, because they are made only by the Clergy in Convocation, and so they only are bound by these Rules ; and Laymen are not bound, because such Canons have not the Assent of the Commons and Temporal Lords, and so such Canons cannot bind the Laity as a Law. But to this I answer, That these Tables do shew the Sense of the Church of *England*, and so are a proper Exposition of the Law of God, and by Consequence ought to have great Weight with the Judges when they expound the *Levitical Law* ; and they are plainly the Decision of this Reformed Church touching the Crime of Incest ; and they do retrench the exorbitant and unwarrantable Constructions of the Church of *Rome*, who made the Law of God of none Effect by their Traditions ; and yet they expound the Law of God in its full Latitude, and forbid Marriage only to such Persons as are in equal Degree to those mentioned in the xviith of *Leviticus*. And so a Consultation was awarded.

Countess of COVENTRY versus Earl of COVENTRY & al'. [1721.]

Lord Chancellor, Jekyll, Price, Gilbert.

S. C. Lucas's Rep. 463, &c., and 2 P. Will. 222, 171, &c.

Marriage-Articles, in Consideration of a Portion paid, deemed a Purchase, and a Conveyance decreed. S. C. Max. Equity ; Equity Abr. 348 ; Cases in Law and Equity, 12. See 2 P. Will. 244.

Thomas late Earl of *Coventry*, being seised in Fee of several Manors, Lands and Hereditaments, in several Counties of *England*, some in Possession, and some other Part in Reversion, expectant on the Death of *Thomas Lord Deerhurst*, his eldest Son, of the Lady *Anne* his Wife, and of Earl *Gilbert* his second Son (the Plaintiff's late Husband), without Issue Male, by his Will, dated the 24th of *March* 1698, gave several Parts of his Estate therein particularly mentioned to his Wife *Elizabeth* for Life, and after her Decease to Trustees and their Heirs, to the Use of his first and other Sons, by his then Wife in Tail Male ; Remainder, as to Part, to the Use of his Son *Gilbert* for

Life, and his first and other Sons in Tail Male ; Remainder to his Son the Lord *Deerhurst* for Life, with like Remainder to his first and other Sons in Tail Male ; Remainder to *Francis Coventry* for Life, with like Remainder to his first and other Sons ; Remainder to the Defendant, the present Earl of *Coventry*, for Life, and to his first and other Sons, with other Remainders over ; and as to the other Parts of his Estate, so devised to his Wife for her Life, to the Use of his Son the Lord *Deerhurst* for Life, with Remainders to his first and other Sons in Tail Male, with the like Remainders to Earl *Gilbert* and *Francis Coventry*, and the now Earl, for their Lives, and their Sons in Tail Male, with Remainders over ; Remainder to his own right Heirs.

He also devised to his said Trustees, and their Heirs, divers other Manors and Estates, which he had in Possession and Reversion to the Uses following, viz.

As to *Woolston, Sinfild, Edgware, Griffie, Cotten and Woolvey*, to the Use of his first and other Sons by his first Wife in Tail Male, Remainder to his Son, Lord *Deerhurst*, for Life, with Remainder to his first and other Sons in Tail Male, with Remainder as to *Woolston, Sinfild* and *Beaully*, to the Use of *Gilbert Coventry* for Life, with Remainder to his first and other Sons in Tail Male, with Remainder to his own right Heirs, &c. And as concerning the said Manors of *Edgware, Griffie* and *Woolvey*, to the Use of *Francis Coventry* for Life ; [161] Remainder to his first and other Sons in Tail Male, with Remainder to the Defendant, the present Earl of *Coventry* for Life, and to his first and other Sons in Tail Male, with Remainders over ; Remainder to his own right Heirs ; and as to his Manors of *North-Littleton, South-Littleton, Offenham, Berlingham* and *Defford*, other Parts thereof, in Possession, to the Lord *Deerhurst* for Life, with Remainder to his first and other Sons in Tail Male ; Remainder to the Use of his Son *Gilbert*, and his Sons in Tail Male ; Remainder to the first and other Sons of the said Earl *Thomas*, by his then Wife ; Remainder to the Use of the said *Francis* for Life, and his Sons in Tail Male ; Remainder to the Defendant, the now Earl, for Life, and his Sons in Tail Male, with several Remainders over, with Remainder to his own right Heirs.

In which Will it is provided, that it should be lawful for any Person or Persons, who should at any Time then after, by Virtue of the said Will, or any Codicils to be annexed thereto, be seised of any the Testator's Manors or Lordships, Lands, Tenements or Hereditaments, by any Writing or Writings, under his or their Hands and Seals, to limit and appoint any such Manors or Lordships (except those of *Great and Little Milton*, and all other such Manors, where there are any Copyhold Estates), and any of the said Messuages, Lands and Hereditaments, not exceeding the yearly Value of £500, to any Wife or Wives, such Person or Persons should happen to marry, for her or their respective Life or Lives, for her or their Jointure or Jointures, so as such Person or Persons should have with such Wife or Wives, upon such Marriage, a Portion equivalent for such Jointure ; and after making other Provisions in his said Will, the Testator appointed his Wife Executrix, and died without Issue by her, who afterwards married *Thomas Savage*, Esq. and is still living.

Thomas Lord Deerhurst, afterwards Earl of *Coventry*, died, leaving the Lady *Anne* his Widow, and two Sons, who both died without Issue, and Earl *Gilbert* became seised thereupon of several Manors and Lordships, devised by the said Will, and upon a Treaty of Marriage between Earl *Gilbert* and the Plaintiff his second Wife, Articles of Agreement, dated the 23d of June 1715, were made between Earl *Gilbert* of the first Part, the Defendant *Sir Strensham Masters* and the Plaintiff his only Daughter of the second Part, and the Defendants Mr. *Leigh* and Mr. *Williams* of the third Part ; whereby in Consideration of such Marriage, and of £10,000, the Plaintiff's Marriage Portion, paid down by *Sir Strensham Masters* to the said Earl *Gilbert*, he the said Earl *Gilbert*, for himself, his Heirs, Executors and Administrators, did covenant, promise and agree to and with the said *Sir Strensham Masters*, his Heirs, Executors and Administrators, and to and with every of them, by the said Articles, in Manner and Form following, that is to say, that he the said *Gilbert*, Earl of *Coventry*, or his Heirs, should and would at any Time, after the Solemnization of the said intended Marriage, at the Request of the said *Sir Strensham Masters*, his Heirs, Executors or Administrators, but at the proper Costs and Charges of the said *Gilbert*, Earl of *Coventry*, his Executors or Administrators, according to the Power given to him, the said Earl of *Coventry*, for that Purpose, by [162] the last Will and Testament of the Right Hon. the late Earl of *Coventry*, bearing Date on or about the 24th Day of March in the Year of our Lord 1658, or otherwise, by good and sufficient Conveyances and Assurances in the Law, well and sufficiently convey, settle, limit and appoint, or cause,

or procure to be conveyed, settled, limited, or appointed, Manors, Messuages, Lands, Tenements and Hereditaments of the full and clear Value of £500 *per Ann.* unto or upon the said *Anne Masters*, for and during her natural Life, for her Jointure, to commence and take Effect in Possession immediately from and after the Death of the said *Gilbert*, Earl of *Coventry*, in Case the said *Anne Masters* shall him survive, as by the said *Sir Strensham Masters*, his Heirs, Executors or Administrators, or by his or their, or any of their Counsel, learned in the Law, shall be reasonably devised, advised or required; and also that his Heirs, Executors or Administrators, should, after his Death, pay her £250 *per Ann.* during her Life, as an Addition to her Jointure half-yearly, free from Taxes.

And 'twas further agreed, that *Earl Gilbert* should deposite £5000 Part of the £10,000 in the Bank of *England*, or invest it in Exchequer Notes, carrying Interest, and deposite them in a Box or Trunk, to be locked up with three Locks, upon Trust that the Defendants *Leigh* and *Williams* should lay out the £5000 in the Purchase of Lands, and to settle them to the Use of the said Earl for Life, with Remainder to Trustees, to preserve contingent Remainders; and after his Death, to the Use of the Plaintiff for Life, to be, with the Manors and Lands of £500 *per Ann.* aforesaid, and the said Annuity of £250 *per Ann.* in full for her Jointure, and in Bar of her Dower, with other Limitation to the Use of younger Children of their Marriage, and in Default of such Issue, to the Use of the said *Earl Gilbert*, his Heirs and Assigns, as therein is mentioned, with a Power in the Trustees, until a Purchase made, to put out the £5000 at Interest, to be applied as is therein directed.

The Marriage took Effect, and the £10,000 Marriage-Portion was paid, and £5000 Part thereof was vested in Bank-Bills, and after lent on a Mortgage, pursuant to the said Articles; and *Earl Gilbert*, soon after his Marriage, gave Direction to his Steward to find out proper Lands for a Jointure, and the Steward, according to Order, perused the Family Settlement, and could find no other Estate than the Manor of *Woolrey*, which was free from Incumbrances, or which was within the said Earl's Power to settle, and the said Manor being of little more Value than £400 *per Ann.*, the said Earl paid off a Mortgage upon Lands in *Woolston*, and agreed to make up the £500 *per Ann.* out of those Lands, and accordingly, at the Request of *Sir Strensham Masters*, caused a Settlement by Way of Lease and Release, dated the 5th and 6th of *July* 1719, to be prepared, which was agreed to by all Parties, and approved of by *Sir Strensham*, and actually ingrossed; wherein, after Recital of *Earl Gilbert's* Power by the said Will, and of the Articles, the said *Earl Gilbert* is therein mentioned to limit and confirm unto *Sir Strensham* and *Mr. Leigh*, their Heirs and Assigns, the said Manor of *Woolrey*, and several Lands in *Woolston*, therein particularly mentioned, of the Value of £500 *per Ann.*, and the said Earl after expressed his In-[163]-tention to execute the said Settlement, but by his sudden Illness, whereof he died, and the Absence of the Steward, in whose Custody the said intended Settlement was at the Time, and many other unforeseen Accidents, set forth in the Pleadings, the same was not executed before his Death.

Earl Gilbert died without Issue Male, leaving by *Dorothy* his first Wife, the Lady *Anne*, now the Wife of *Sir William Carew*, his only Daughter and Heir; but before his Death made his last Will in Writing, dated the 27th of *October* 1719, and thereby *inter alia*, gave the Defendant (besides what was agreed to be settled on her by the Marriage-Articles) £3000 and several specifick Legacies, and made his said Daughter, the Lady *Anne Carew*, his sole Executrix, who has since proved the Will, and taken upon her the Execution thereof.

The said *Francis Coventry* also died without Issue Male, so that upon the Death of *Earl Gilbert*, the Defendant, the present *Earl of Coventry*, became possessed of divers Manors and Estates, under and by Virtue of the Limitations in the said Will, subject not only to the £5000 Mortgages, but as the Plaintiff insists to the £500 *per Ann.* agreed to be limited to the Plaintiff for her Jointure, and the Plaintiff's Bill is to compel the Trustees in the Mortgage to call in the £5000 in order to lay it out in a Purchase, and to compel *Sir William Carew* to give Real Security for the £250 *per Ann.* and to pay the £8000 Legacy.

And as against the *Earl of Coventry*, that she may hold and enjoy the Lands contained in the Settlement, intended to be executed, for her Life; but in Case the Indenture so ingrossed should prove defective, and not amount in Equity to a sufficient Appoint-

ment, pursuant to the Power, then that she may have a Satisfaction out of the Earl's Real and Personal Estate.

That on the Hearing of the Cause the 18th of April 1722, and several Cases being then cited, the Court was pleased to refer it to Mr. *Conway*, one of the Masters of this Court, to take an Account of the Real and Personal Estate of Earl *Gilbert*, and how much came to the Hands of any of the Parties who were to be examined on Interrogatories ; and the said Master was also to take an Account of the Debts of Earl *Gilbert*, unsatisfied at his Death, and also of his Legacies, and to state the Real and Personal Assets, and also of his Debts and Legacies, and any other Matter he should find difficult, to report especially to the Court ; and when the Master should have made his Report, this Cause was to come on again to be heard thereupon, and also as to the £500 *per Ann.* claimed by the Plaintiff upon the said Marriage-Articles, at which Time (the Court being before attended with the Cases therein cited) would desire the Assistance of some of the Lords the Judges and the *Master of the Rolls* ; and all farther Directions were reserved, until the Case should come to be heard on the Master's Report.

That the Master had made his Report, and thereby certified, that the Real and Personal Estate of the said Earl *Gilbert* amounts to £13,467, 0s. 9d. over and besides the £1200 and Interest due on the said Mortgage of *Woolston*, and £3792, 9s. 7d. paid, and to be paid by the said Sir *William Carew*, in Discharge of Debts, Legacies and Funer[al] Expences, besides the Sum of £392, 13s. 7d. desperate Debts ; and the Plaintiff's Demands out of the said £13,467, 0s. 9d. are as follow, *viz.* £250 Annuity clear of Taxes, Jewels, Furniture, and other specifick Legacies, amounting to £1448, 1s. 7d. $\frac{3}{4}$ th and the Demand of £500 *per Ann.* now in Question, with the Arrears thereof, from Earl *Gilbert's* Death, being four Years and upwards.

In this Case 'twas argued for the Defendant, that here was no Execution of the Power limited in Earl *Thomas's* Will, because the Covenant with Sir *Strensham Masters* was, that Earl *Gilbert* or his Heirs should and would, at the proper Costs and Charges of the Earl, his Executors or Administrators, according to the Power in the Will of Earl *Thomas*, or otherwise, by good and sufficient Conveyances in the Law, sufficiently convey Lands to the Value of £500 *per Annum*, and that though they could not come to a Court of Equity for a specifick Performance, because there was nothing specifically mentioned in the Covenant, to be set forth as a Jointure, and that the Covenant was to be interpreted as a Personal Covenant, because it was made with *Masters*, his Heirs, Executors and Administrators, either to settle in Pursuance of the Power or otherwise, so that Earl *Gilbert* had his Election to satisfy the Covenant, either by settling of the Lands under the Power by Appointment, or by limiting any other Lands to the same Purpose ; and according to the Circumstances of this Case, he could not be said to have made his Election, because from 1715 to 1719 there was nothing done, nor any Request by Sir *Strensham*, to set out any Parcel of Lands in Pursuance of the Power ; and tho' about July 1719, a Draught was prepared to be ingrossed, yet that continued to lie by till October 1719, and was never executed ; and he had an *Animus deliberandi* continuing, and had not taken hold of the Power, by appointing the Lands of *Woolvey* and *Woolston* in Performance of the Covenant, since the Indentures were only ingrossed, and never executed ; and in all Conveyances of this Nature, the *Animus deliberandi* must be supposed to continue till the Act be completely executed ; and the Power not being executed, 'twas compared to the Case of *Sangon* and *Williams*, where Tenant in Tail for valuable Consideration, covenants to sell the Estate-Tail and dies ; a Court of Equity would not compel the Heir in Tail to execute such a Conveyance, though there had been a Decree against the Tenant in Tail to levy a Fine, and suffer a Recovery ; and so 'twas urged, that since the Remainder was vested before the legal Estate was executed by Earl *Gilbert*, the Court would not compel the Remainder-Man in this Case to execute Conveyances in Pursuance of this Covenant ; and here they quoted those Cases of Law, that say the Powers that go in Derogation of the Remainders vested, are to be taken strictly, because 'twas looked upon as dangerous for a Court of Equity to overthrow, by their Decrees, the Interest that was originally vested in the Parties, by legal Conveyances, and the rather in this Case, because there was a Personal and some Real Estate to satisfy the Covenant ; and this Covenant is to be considered as a Debt due from Earl *Gilbert*, on receiving his Marriage-Portion, and whenever there is any Debt, the Personal Estate shall go in Exoneration of the Real, which is to support the [165] Honour and Dignity of the Family ; and 'twas farther urged, that the Heir being expressly bound in the Covenant, the Estate descended to

the Heir should be first liable : But 'twas answered and resolved by the Court, that after the Statute 27 Hen. VIII. for transferring Uses into Possession, the Courts of Common Law held, that Powers of Revocation of Estates executed were to be taken strictly, and so if not pursued, they would not impeach or destroy an Estate already executed by legal Conveyances ; but in the Courts of Equity they soon found that the Construction was too artificial, and not according to natural Equity, and so they construed those Powers as a Reservation of so much of the ancient Dominion of the Estate, to be under the Control of the Tenant for Life, & *cujus est dare, illius est disponere* ; and as often as any such Dominion is reserved, the Tenant for Life may contract about it ; and when a Marriage Contract is made, as this was, in Contemplation of the Execution of such a Power, 'twas a Real Lien upon the Estate ; for both the Marriage was had, and the Portion paid in Contemplation, that the Charge should be laid upon the Estate, pursuant to the Power ; and so a Court of Equity may decree against the Remainder-Man, because he claims under the Devise of Earl Thomas, whose Intention 'twas, that such a Charge should be induced on the Land ; and the present Earl taking the Estate under the Will, takes it *sub Onere*, so that a Court of Equity may decree the Charge to be made good by the Remainder-Man, because 'tis decreeing a Charge in Pursuance of the Intent of the Testator ; and Equity, in such Case, was obliged to make such Decree, because the first Provision was made both for the Honour and Advantage of the Family, since they could not marry according to their Quality, without having a Power to make such a Jointure ; and the present Earl takes the Benefit of that Power, by having such a Dominion over the Estate, for his own Advantage, and so is obliged in Conscience to discharge the Intention of the Testator, in the Behalf of Earl Gilbert : And this is not like the Case of Tenant in Tail, for there the Tenant sells, and dies before Docketing the Intail ; so that Equity can't relieve, because the Statute binds a Court of Equity, as it does a Court of Law ; but if the Vendee creeps out of the Statute by a Recovery, the Courts of Equity have never permitted such a fictitious Suit to overthrow the Title of the Heir in Tail (Ch. Ca. 294 ; 2 Vent. 350) ; nay, farther, if there was a Trust in Tail, and the *Cestuy que Trust* should covenant to convey for valuable Consideration, there the Court of Equity would oblige the Heir in Tail to convey, because this is a Creature of Equity, and out of the Statute ; and wherever an Agreement is made, and Money paid, Equity does not consider the Form of Conveyance, but takes it, as it was actually intended, in the best Manner that could be construed at Law ; for the substantial Part of the Agreement is the Price, and for that the Right is transferred, *and what ought to be done, is in Equity looked upon as done* : And so if a Man articted for the Purchase of Land, and after devised all his Estate, it would not pass the Lands in the Articles ; and this Distinction was taken, that if it had been a mere voluntary Conveyance, the *Animus deliberandi* should have continued till the Conveyance was executed ; but here being a [166] Contract to settle in Pursuance of that Power, when an Estate is afterwards set out, it shall be presumed to be an Execution of that Contract, which in Conscience he was obliged to perform, especially in a Case so circumstanced, since nothing can be objected to the Value of the Lands ; and in this Case, what the Persons contracting had in Contemplation, was an Estate to be executed in Pursuance of the Power ; and the Words or otherwise are to be looked upon as Auxiliary, and to aid the Estate to be conveyed : So that if the Earl had settled or purchased other Lands, in order to be settled according to the Contract, he might have exonerated the Lands subjected to the Power by Earl Thomas's Will ; and since the Real Estate now in Question was mortgaged, 'twas necessary the Covenant should be large enough to bring in all the Real and Personal Estate of Earl Gilbert, in Aid of the settled Estate, in Case of Deficiency ; and so the Covenant is not to be construed on the one Hand so strictly as to subject the Heir in the first Place, nor so loosely as if the Word *Heir* was only Matter of Form, and merely the Words of the Conveyancer ; but the Intention was, that he at his Election should have a Power out of any other Estate to satisfy the Covenant ; and after his Death, in Case the Lands contained in the Power should not be sufficient, that all other his Estate should be subject thereto ; but since Earl Gilbert did not settle any other Estate, as he might have done, to discharge the Contract, it remains as a Real Lien on the settled Estate, in the first Place, to bind the same, as what the Parties had in Contemplation to bind the Contract : And this is not like the Cases where Equity decrees that the Personal Estate shall go in Exoneration of the Real, for the Reason of that is, that the Personal Estate is the natural Fund for the

Payment of Debts and Legacies, and so far as that is not specifically devised, it shall exonerate ; but the Articles of Earl *Gilbert* must not be considered as a Debt, but a Conveyance of so much of the Estate, over which he had a Power, because his primary Intention was to convey ; and if it be considered in this Light, there can be no Application of the Personal Estate, since there is no Debt of which the Real Estate was to be exonerated : And that this was the Construction of Powers in Equity, the following Cases were quoted.

“ Doctor Sarth or Garth *versus* Lady Blanford.

“ *Per Lord Sommers.* 1695.

“ A Provision for younger Children is chargeable on the Real Estate. Vid. ante, 137.

“ *Henry Blanford* settles Lands to the Use of himself for Life, and then as to Part, to his Wife for her Life, for her Jointure ; then to the Issue Male of his own Body, with several Remainders over ; with a Proviso, that if he should have any younger Children, it should be lawful for him by Deed or Will, executed in the Presence of two or more Witnesses, to limit and appoint any of the said Lands (except those of Jointure) to such Person, and for such Estate as he should think fit, for raising £500 a-piece for such younger Children, to be paid at such Times, and in such Manner, as he by such Deed or Will should declare, and covenanted to do so accordingly. *Henry* died, leaving several younger Children, but did not make any Ap[167]-pointment. Decreed this was a Charge upon the Land, and bound the Issue in Tail, and ordered the £500 a-piece to be raised for the younger Children immediately.

“ *Note* : The Covenant in this Case was looked upon as an Execution of the Appointment in Pursuance of the Power.

“ Lady Clifford *versus* Bullington.

“ 2 Vern. 379. *Per Lord Keeper Wright.*

“ Lord Clifford had a Power to settle a Jointure, not exceeding £1200 *per Ann.*, on his Marriage with the Plaintiff : He covenants to settle on her £1000 *per Ann.* He sends to his Steward to be informed of a Part of his Lands to that Value, and settles according to the Particular.

“ After his Death it appeared that the Lands so settled were but £300 *per Ann.* The Bill was against the Remainder-Man to have these Lands made up £1000 *per Ann.*, and 'twas decreed against the Remainder-Man.

“ Hollingshead *versus* Hollingshead.

“ June 14, 1708. *Per Cowper, Chancellor.*

“ A Man devises his Estate to A. with several Remainders over, with a Power to the Person in Possession to limit any Part of the Premises for a Jointure, not exceeding one Moiety ; the first Devisee for Life, whilst an Infant, marries the Plaintiff, and with his Mother enters into Articles to settle Lands of £100 *per Ann.* on the Plaintiff for her Jointure, but in the Articles no Notice was taken of the Power ; and before any Settlement made pursuant to this Power, the Tenant for Life dies. (Ante, 137.)

“ The Bill was brought against the Remainder-Man, to have the Jointure made good, and decreed accordingly.

“ Allford *versus* Allford.

“ At the Rolls. Dec. 5, 1709.

“ *Gregory Allford*, Tenant for Life, Remainder to his first and other Sons in Tail ; Remainder to *Francis* for Life, Remainder to his first and other Sons in Tail ; Remainder to the Defendant, with a Power for *Francis*, after the Death of *Gregory* without Issue, to make a Jointure.

“ *Francis* marries in the Life-time of *Gregory*, and before Marriage covenants to

"make a Jointure on the Plaintiff, and to execute this Power when he should come into Possession.

"*Gregory* dies without Issue Male, and *Francis* survives him, but dies without making a Jointure, or executing this Power.

"A Bill against the Remainder-Man to have a Jointure made, because *Francis* surviving *Gregory* might have executed this Power, and had covenanted to do so : And 'twas decreed accordingly.

[168] "*Parker versus Parker*.

"June 13, 1714.

"Vide ante, 160, &c. And Note 2 P. Will. 489 & 490.

"Mr. *Parker* had a Power to raise £7000 for younger Children by Deed or Will, "executed in the Presence of three Witnesses ; afterwards by Will, executed in the Presence of two Witnesses, he charged the Premises with £8000 for his younger Children, and 'twas decreed good for the £7000."

So that in the principal Case 'twas decreed, that the Plaintiff should settle the Lands of *Woolvey* and *Woolston*, in Pursuance of the Power ; and that the Plaintiffs and the Defendants, the Heir and the Lord *Coventry*, should have their Costs out of the Personal Estate ; because Earl *Gilbert* ought to have settled during his Life, and the present Earl had only by his Answer laid his Estate before the Court, and had joined in the Examination of Witnesses ; but the Plaintiff only had examined, viz., to prove the Allegations of the Bill.

WHITCHURCH versus WHITCHURCH. [1721.]

S. C. 2 P. Will. 236.

Jekyll, Raymond, C. J. ; Gilbert, C. B. ; Lords Commissioners of the Great Seal.

The Construction of the Statute of Frauds, &c., touching Wills, &c., and the disposing of a mortgag'd Term, attending the Inheritance.

Edward Strobe, Esq., being possessed of a certain House and Lands, called *Batecomb-Lodge*, in the Parish of *Batecombe* in the County of *Somerset*, for the Remainder of a Term of 500 Years, in Trust for one *James Bisse*, who was seised of the Reversion of the Premises in Fee-Simple, and *Bisse* having borrowed £350 of *Edward Whitchurch*, since deceased, the said *Strobe* and *Bisse* by Indenture, dated the 20th of March 1694, assigned the said Term to the said *Edward Whitchurch*, to secure the Repayment of the said £350 and Interest, by the said *Bisse* unto the said *Edward Whitchurch* ; after which the said *Bisse* borrowed of the said *Edward Whitchurch* the further Sums of £100 and £103, which together with the former Money due on the Premises, and the Interest due for the same, amounted to £600, and which were all charged upon the Premises.

By Indenture dated the 1st of July 1697, reciting £627 to be then due, *Bisse* in Consideration thereof, and of a farther Sum of £173 lent to him by the said *Edward Whitchurch*, ratified the said Term to the said *Edward Whitchurch*, redeemable on the Payment of £824, and by Indenture of the same Date granted and demised the Premises to the Defendant *Jonathan Whitchurch* for 200 Years from thenceforth, in Trust for the said *Edward Whitchurch*, as a collateral Security for the said £824.

Bisse by Indenture of Lease and Release, dated the 21st and 22d of December 1703, conveys the Inheritance of the Premises to *Seaman*, in Consideration of the Sum of £1356, 14s. 6d.

Seaman by Indenture of Lease and Release, dated the 3d and 4th of June 1706, conveys the Inheritance of the Premises to *Edward Whitchurch*, in Consideration of the Sum of £1510, 15s.

[169] And afterwards *Edward Whitchurch*, by a Will of his own Hand-Writing, but not published in the Presence of Witnesses, gave unto *Edward Whitchurch*, sen. all these Lands and Premises, called *Batecomb-Lodge*, to him for Life ; Remainder to the Defendant *Edward Whitchurch*, jun. in Tail Male, and made *Joseph Whitchurch* Executor

of his Will, and died without Issue, leaving the Plaintiffs his Heirs at Law, being Daughters of his Brother *James Whitchurch*.

The Question is, Whether this Will, that has conveyed the Lands in this Form, (that is) to *Edward Whitchurch*, sen. for Life; Remainder to *Edward Whitchurch*, jun. in Tail, be a good Conveyance to pass the same.

The Words of the Statute of Frauds and Perjuries are, *That all Devises and Bequests of any Lands or Tenements, deviseable either by Force of the Statute of Wills, or by this Statute, or by Force of the Custom of Kent, or the Custom of any Borough, or any other particular Custom, shall be in Writing, and signed by the Party so devising the same, or by some other Person in his Presence, and by his express Directions, and shall be attested and subscribed in the Presence of the said Devisor, by three or four credible Witnesses, or else they shall be utterly void and of no Effect.*

This Devise is within the Letter of the Law; 'tis a Devise of an Estate of Freehold and Inheritance, and so made void by the Statute.

A Devise of a Term is within the Letter, but not within the Meaning of the Law; the Reason is, because Terms would go to the Executors, and a Will without these Solemnities would constitute Executors, in whom a Term for Years would vest, and so such Wills might dispose of such Terms for Years away from the Executors.

It was not the Intent of the Statute to alter the Course of Personal Estates;

But whenever Lands would descend to the Heir, the Statute has constituted that the Will, which is to have the Intendment to disinherit the Heir, should be made with the Solemnities of Subscription and of three Witnesses.

Now this Will is designed to disinherit the Heir, and alters the Course of Descent, since there is a Devise for Life, with a Remainder in Tail to other Persons.

If there had been no Devise, the Estate must have descended to the Heir, and the Descent of the Inheritance would have carried the Term along with it, and it would be drawn down by the Descent to the Heir at Law, as an Appendix to the Inheritance.

Can a Will made void by the Statute alter the Descent of the Inheritance, or cut off the Term from the Inheritance, so that he who has a Property in the Inheritance shall not have a Property in this Term?

A void Will is as no Will at all, and if there had been no Will, the Inheritance had descended to the Heir, and the Term along with it.

But 'tis said that the Term not being merged, and that the Person having the Inheritance and Term both in him, tho' the Will will not be good to pass the Inheritance, yet 'twill be good to pass the Term at Law, since the Term was not merged in the Inheritance, and he that had the Dominion over both, has by this Instrument in Writing [170] shewed his Intention to dispose of it. And so such Intention, according to natural Justice, ought to take Place, especially against his Heir, who is to be considered only as a Volunteer.

The true Distinction is what has been already laid down, that a Will without the Solemnities of Subscriptions or Witnesses will alter the Condition of the Executors; but it can't alter the Condition of the Heir, because the Heir is not constituted by the Will, but disinherited by it.

So that till the Solemnities are compleated, the Will *quoad* the Heir is only in *feri*; and if in *feri*, still remains under Deliberation till those Solemnities are compleated.

And that is the Construction of all solemn Instruments, that till they are compleated by their proper Solemnities, they remain under the Deliberation of the Parties.

And so 'twould be a strange Construction, that this Will, which was only a Preparation, and was still under Deliberation, whether he should disinherit his Heir or not, should be construed actually to disinherit him by taking away the Term, which would have gone along with the Inheritance.

Nobody will say, that though this Mortgage Term was merged, that yet it would have gone to the Executors; for when a Mortgagee purchases the Equity of Redemption, the Land ought to be governed by the Rules of the Real Estate, it becomes a Real and inheritable Property, it is no longer a Personal Property, nor to be governed by Rules belonging to Chattels only.

If it should be considered sometimes as Real Estate, and sometimes as Personal, be sometimes governed by one Set of Rules, and sometimes by another, and the Courts of Equity might despotically, or for various Motives, change it from one Channel to the other; I am afraid it would make Things too arbitrary, and Properties would be brought into Confusion.

But however that be, 'tis plain in this Case that the Term was connected to the Inheritance at the Time of the Devise, and had there been no such Devise, a Court of Equity would have carried the Term along to the Heir, and not have suffered it to go to the Executor.

Shall not the Court so act by the same Rules when the Statute has made it void ? The Court of Equity that is bound by the Statute must surely look upon it as no Devise in Prejudice to the Heir, since it has not the legal Solemnities required by the Statute.

But 'tis said, that *Edward Whitchurch* having the Dominion of this Estate, he has shewed his Intention to pass it to his younger Brother and Nephew, and it would be against natural Justice not to make such a Construction as would comply with his Intention.

I think this Reason is against the Policy of all Civil Laws, which provide against Constructions of this Kind.

For all Solemnities in Conveyancing are appointed to hinder the Parties from Surprise, and so, tho' the Party's Intention is never so strong, yet till he has perfected the Instrument according to the Solemnities required by the Law, the Intention goes for nothing.

[171] All such Laws as have been appointed to restrain the natural Dominion have been very restrictively construed, because Solemnities that are appointed are to hinder Frauds and Perjuries, in the Proof of improper Instruments, and hindering the Party himself from Surprise.

Indeed a Feoffment without the Solemnity of Livery would antiently amount to a Covenant to stand seised, but that was where a Price was paid, and so the Party was under an Obligation of Conscience specifically to perform the Contract, and to transfer with Solemnity ; but it is not so in the Case of a Will, where the Conveyance is merely gratuitous, nothing passes by the meer Intention till the Party has conveyed it with the legal Solemnity of Subscription and Attestation.

There was no Will of Lands at Common Law ; Wills came in by the Invention of Uses, which is a Creature of this Court, and when these Uses had supplanted the Tenures, then by 27 *Hen. VIII.* they thought to abolish them, and to turn the Use into Possession.

Yet they thought it convenient to leave a Liberty of devising ; and so by the 32d of *H. 8.* cap. 8, they gave them leave to devise their Socage-Lands, and two Thirds of their Knight-Service Lands ; but no particular Solemnities were appointed but by writing only.

This created a great Inconvenience, for there was much Perjury in setting up of Wills ; and so they thought it necessary to constitute legal Solemnities, by the Subscription and Attestation of Witnesses ; and Sir *Matthew Hale* and Sir *Lionel Jenkins*, who prepared this Statute, chose to take the Plan from the *Roman Law* : For tho' the old Civil Law required seven Witnesses, yet after that the Constitution of the Emperor *Leo*, Tit. 41, reduced it to five, and in all Country Villages to three ; and so they took the Constitution of the Civil Law, as it stood relaxed by those Constitutions.

The Court of Equity has always construed Trusts to be within the Statute.

And in the Case of *Tiffen and Tiffen*, 2 Ch. Cas. 49, 50, and in the Case of *Langhton*, 156, they would not divide the attending Terms from the Inheritance.

'Tis said that these Terms will pass at Law ; but they won't pass unless the Testator designed to sever them from the Inheritance, which is not the Case here.

They won't pass when the Testator plainly intended to pass the Inheritance and not the Term.

They won't pass where they would not go to the Executor ; but must go to the Heir if they were undevise.

The breaking of these Terms from the Inheritance by a Will, without Solemnities, would actually be of dangerous Consequence, especially where the Intention is not manifest to do it, and where there is no Necessity for it, either for Payment of Debts, or Portions for younger Children, &c.

This Devise for Life with a Remainder in Tail was only in *fieri*, and the *Animus Deliberandi* continued till the Subscription, and till it was published in the Presence of Witnesses ; and so the Statute operates upon it to make it void.

[172] Earl of SHAFTSBURY versus SHAFTSBURY.

May 15, 1725. *Jekyl, Gilbert, and Raymond, Commissioners.*

[S. G. with full notes, 1 Wh. & T. L. G. 7th ed. 473.]

S. C. 2 Peer Will. 102.

Chancery, its Jurisdiction as to Guardians, &c.

The late Earl of *Shaftsbury*, the Plaintiff's Father, by his Will, dated *December 10, 1710*, appoints *Sir Robert Eyre*, *Sir John Croply*, and *Jasper Stanhope, Esq.*, afterwards *Lord Stanhope*, Guardians of the present Earl, till his Age of 21 Years. *Sir Robert Eyre* preferred his Bill in this Court, and proved the Will, and the Court ordered the same to be performed. *Sir John Croply* and *Lord Stanhope* died; and there happening a Dispute between the Countess of *Shaftsbury* and my Lord Chief Baron *Eyre* concerning the Guardianship, on the 28th of *February* in the 9th of the King, the Court declared the Right of Guardianship to be in my Lord Chief Baron, and that nothing should be done in Relation to the Care and Education of the said Earl, without the Direction of my Lord Chief Baron. My Lord Chief Baron, the 22d of *March* last, preferred his Petition to this Court, setting forth that the Earl of *Shaftsbury* was married to the Lady *Susanna Noel*, Daughter to the Earl of *Gainsborough*, without his Privy or Consent; upon which, and the Affidavits thereunto annexed, the Countess of *Gainsborough* and Lady *Shaftsbury*, as likewise the Earl, were ordered to attend; and the Countess of *Shaftsbury* likewise preferred her Petition to discharge the Order of the 28th of *February* in the 9th of the King; and in this Case there have been four Questions made.

1. Whether the Court has Jurisdiction to declare the Right of Guardianship in this Case?

2. Whether the Court could declare it by Petition, or whether it must be by Bill?

3. Whether this be a legal Declaration of the Right of Guardianship; (that is) whether it will survive or not?

4. Whether these Ladies, or either of them, are in Contempt of the Court?

First, Whether the Court has Jurisdiction?

Now touching the Wardship at Law, there was a two-fold Jurisdiction.

The first was, When the Tenures were in Being; and there till the Court of *Wards* was erected, the whole Jurisdiction of the King's Wards, where the Lands were held in Chivalry, was under the Jurisdiction of this Court.

So likewise, in Relation to Subjects, this Court determined, touching the Wardships of the Body, who was the prior, and who was the posterior Lord.

For the Wardship of the Body of the Heir went to the Lord who had the prior Homage, and that was determined in the Court of Chancery, where several Lords applied for the Writ of Ravishment, which was an original Writ.

But this Sort of Guardianship was a Sort of Dominion of Masters over Servants and Vassals, and was introduced among the *Gothick* Na-[173]-tions to breed them to Arms; and it was a great Burthen upon the People, and is fallen now with the Tenures.

But the Crown has another Jurisdiction, and that is as *Pater Patriæ*, as a Father over his Children.

The King has a Right to take Care of Infants, Lunaticks, and Ideots, that cannot take Care of themselves; and this Care cannot be exercised otherwise than by appointing them proper Curators or Committees.

So *Fleta*, cap. 9, fol. 4, *de Tutelis*, speaking of Infants, *Quidam sub Custodia Parentum & proximorum Consanguineorum, & illis dantur Custodes de Jure Gentium.*

So *Bracton*, treating of this Matter, lib. 2, cap. 38, fol. 86. *Nunc autem dicendum, &c., de illis qui Minores sunt & infra Etatem, & quos oportet esse sub Tutela & Cura aliorum, eo quod se ipsos regere non norunt, & quorum quidam debent esse sub Custodia Domini cum Terris & Tenementis, quæ sunt de Feodo, & quorum quidam sub Custodia Parentum, & proximorum Consanguineorum, ut prædict' est, & quibus dantur Custodes aliquando de Jure, de antiquo Feoffamento, & aliquando Curatores ab Homine.*

Thus *Stamford*, in Page 37. The King has the Protection of all his Subjects, and of all their Goods, Lands and Tenements; and so of such as cannot govern themselves, nor order their Lands and Tenements, his Grace as a Father must take upon him to provide for them, that they themselves and their Things may be preserved: And

he quotes Fitzherbert, 232. That the King is bound of Right to defend his Subjects, their Goods and Chattels, Lands and Tenements ; and that every one is in the Protection of the King, who has not forfeited it by some Offence. Now how can the Infants be protected by the Crown, but by assigning them proper Guardians where it is disputable ?

Lord *Coke* says, in *Beverley's Case*, 4 Rep. 126, that the King shall have the Protection of their Goods and Chattels, as well as of their Lands, and compares it to the Case of an Ideot.

No Body has ever doubted the Jurisdiction of this Court, in the Case of Ideots and Lunaticks ; and indeed I should have thought this Point had been at Peace as to the Infants, when it was settled by Lord *Somers*, in the Case of *Bertie and Falkland*.

There are since innumerable Precedents, wherein this Court has determined touching the Guardianship of Infants ; as in the Case of *Freeman* and the *Bishop of Oxford*, the 5th of July 1719, where the Bishop of *Exeter*, surviving Guardian to the Father's will, applies to the Court, and the Infant is sent from *Oxford* to *Cambridge*.

And in *Vernon and Vernon's Case*, 10 Geo. 1 [1723-24], several Orders were made upon Petition ; and among the rest one upon Petition, that the Infant was conversant with the Daughter of the Guardian, that he should be immediately sent for, and ordered forthwith to *Eaton School*.

And in *Anesley and Anesley's Case* 'twas ordered to take the Infant from the Mother, and a Sequestration against the Duke of *Buckingham* and the Mother, for not producing the Infant.

Now as the King has the Protection of Infants, I don't see any other Protection can be, than by assigning them their Guardians ; and where [174] should that Protection be exercised, but in that Court where Care is taken of all Persons under natural Disabilities ?

The very Notion of natural Allegiance seems to be founded on this Protection that is due from one born here, though he goes into a foreign Country, and lives under and takes Oaths to another Prince.

And why ? Because it is a Debt of Gratitude, due for the Protection which the Infant receives at his first breathing vital Air, since Care is supposed to be taken of him, by appointing proper Guardians to manage him and his Affairs.

And I presume that the Law, That the next of Kin to whom the Inheritance should not descend should be Guardian, was taken up originally as a Rule of Reason in this Court, and by Usage came to be the Law of the Land ; for I have look'd into the Books of the Civil Law, and all the foreign Feudists, and their Rule is, that he that has the Right of Succession has the Guardianship ; *ubi Successionis Emolumentum, ibi & tutelæ onus esse debet*, 28 *Edu.* 1, cap. 1, seems to be only an Affirmance of the Common Law.

There are often Disputes who are the next of Kin, or who is the proper Guardian ? That must be determined somewhere : And where can it be determined but in this Court, where all Persons under Disability are protected ?

The second Question is, Whether the Court can declare the Right of Guardianship by Petition, or whether it must be by Bill ?

'Tis said, That if the Right of Guardianship could be determined by Petition, it must be determined by Affidavits, where the contrary Party has not the Liberty to cross-examine.

'Tis agreed, That in all Cases where 'tis necessary for the Crown immediately to interpose, it must be determined upon Order ; for otherwise there can be no Provision for the Infant, during the Time of the Dispute.

So there is a Necessity, in some Cases, that it should be determined upon Petition.

But in this Case, who in Fact are Guardians, has been determined already in a Cause instituted by Bill and Answer ; and so there can be no Dispute touching the Fact ; and so the Right is properly determined upon Petition.

The third Question is, Whether this be a legal Declaration of the Right of Guardianship ; that is to say, whether it will survive or not ? And here it has been argued, that the Guardianship is a naked Authority, and so cannot survive. But

'Tis agreed, That if it be an Authority coupled with an Interest, it will survive.

Indeed in the Civil Law they looked upon it to be a naked Authority ; but yet where there were several Guardians, and one only gave security, 'twas executed by him alone. See *Vinius*, Tit. 24, *de Satisfactione Tutor & Curator*'.

But if it were an Authority, 'tis not like an Authority to do a single Act, where it

must be done by them all ; because 'tis the Will of the Party that authorizes them all, and so one alone can't execute it.

[175] But in this Case the Authority must, from the Nature of the Thing, be joint and several ; for one alone must receive the Money of the Infant, and not meet altogether for that Purpose.

And were it an Authority, or were it not, 'tis to be construed joint and several ; else the more Guardians were appointed for the Security of the Infant, he would be the less secure, because upon the Death of any one of them the Guardianship would be at an End.

But no Doubt, with us, it must be reckoned an Interest.

For the Law has appointed Remedies, both Droitoral and Possessory, to recover the Guardianship.

First, Droitoral. And that was the Writ *de Custodia Terræ & Hæredis* : And Fitzherbert has compared the Droitoral and Possessory Action, in the Title *de Custodia Terris & Hæredis*, fol. 133.

The Statute Merton, cap. 6, provideth, That in the Writ of Right of Ward, the Plaintiff shall recover the Value of the Marriage.

Secondly. Possessory. And that, at Common Law, was the Action of Trespass ; and in this, at Common Law, he could only recover Damages for his Ward, and not the Ward itself.

The Statute of Westm. 2, c. 35, gives a Writ of Ravishment of Ward, in which the Plaintiff recovered the Body of the Heir, and not Damages only.

And by the Equity of West. 2, c. 24, a Writ of Ravishment lay for the Guardian in Socage, as a Writ in *Consimili Casu*.

Every Body will allow the Guardian in Chivalry had an Interest ; and if the Guardian in Socage would have the Writ in *Consimili Casu*, he must have an Interest also.

And a Man may as well have an Interest of Honour, which every Person has in Relation to his Family, as an Interest of Profit.

And it appears in 3 Co. 37, *Ratcliffe's Case*, that the Father had an Action of Trespass for taking away his Son and Heir, *quare Filium & Hæredem rapuit*, tho' he was not, in Propriety of Speech, counted the Guardian : For the Heir was look'd upon as Part of the Family ; but the Father, however, had an Interest in the Son, and so it was Trespass to take him away.

But the Father had not a Writ *de Custodia Terræ & Hæredis*, because the Father was no Guardian ; nor was there any Need of a droitoral Action, because he was always in Possession of his Son : And so an Action of Trespass lies for the marrying his Heir apparent, *whether he be within Age, or of full Age* ? because 'tis an Injury to marry, and destroy the Hopes of his Family by an improvident Marriage. Fitz. Abr. Tit. *Garde*, 32.

And this lies even against the Lord, for the Father had the Custody against the Lord : for the Father being Tenant in Chivalry, could breed his Son to Arms ; but no collateral Ancestor had the Custody against the Lord.

And therefore this makes the Difference that is mentioned in *Ratcliffe's Case*, that a collateral Ancestor may have a Writ of Ravishment against any Person that ravishes *Consanguineam & Hæredem*, (that is) his Heir apparent, because that is an Injury to himself.

[176] But the Action does not lie against the feudal Lord, because he had a Right to marry him.

And every Man may be said to have an Interest in his Heir apparent, because nothing imports him more than to continue his Name in proper Representatives.

But the Father, at Common Law, could not appoint a Guardian, because the Law had appointed a Guardian, whether the Father was Tenant in Chivalry or in Socage.

The first Law that gave the Father a Power of appointing, was 4 & 5 W. & M. cap. [8]. The Words of the Statute are, "That Nobody shall take away any Maid or Woman-Child unmarried, being within the Age of 16 Years, out or from the Possession, Custody or Governance, and against the Will of the Father of such Maid or Woman-Child, or of such Person or Persons to whom the Father of such Maid or Woman-Child, by his Last Will and Testament, or by any other Act in his Life-time, hath or shall appoint, assign, bequeath, give or grant the Order, Keeping, Education and Governance of such Maid or Woman-Child."

This gives an Authority to appoint the Custody of a Female Child for a special

Purpose. He that takes away the Female Child, and marries her or deflowers her, is an Offender within that Statute.

So this being a Custody for a special Purpose, it was properly enough construed to be a naked Authority.

Therefore I take the Case in Poph. 204 to be good Law ; That when two Persons are appointed Guardians, by Authority of this Statute, and one of them dies, it will not survive, because that Statute gives an Authority to a special Purpose, to make the Ravisher criminal within that Law.

But the 12 *Car.* 2, cap. 14, gave the Father a Power, by Deed executed in Writing, or by Act executed in his Life-time, or by his Last Will and Testament, to appoint the Custody and Tuition of his Child or Children, till the Age of 21 Years, and such Disposition of the Custody to be as good and effectual against all and every Person claiming the Custody of such Child or Children as Guardians in Socage, or otherwise ; and the Persons to whom such Custody shall be disposed, to have a Writ of Ravishment of Ward, or Trespass.

This Statute was formed by Sir *Matthew Hale*, and, when Wardships were taken away, introduced the Testamentary Guardians ; and this Testamentary Guardian, by the Rules of the Civil Law, was to take Place before all others.

But our Testamentary Guardian is not a naked Authority, but is made after the Model of a Guardian in Socage, and by Consequence an Interest passes to the Guardian.

And the Act (Rights) given to the Guardian in Socage, are given by this Law.

But 'tis said, that every Interest is assignable, transferrable or deviseable, and that the Guardianship is not ; and therefore it is a naked Authority, and not an Interest.

[177] Every Interest of Profit is assignable, because it is the Nature of Property, that the Person who is the Owner should have Dominion over it, so as to assign or transfer it.

But the Guardian in Socage has no Interest of Profit ; it is an Interest of Honour, and for the Honour of the Family committed to his next of Kin, and therefore is inherent to the Blood, and can't be assignable.

Because a Stranger could not have that Interest to take Care of the Ward, nor have it at Heart.

The Guardian in Socage was accountable to the Infant when he came to the Age of 14, and he could not transfer that Account to another.

The Testamentary Guardian, as is said, is formed after the Manner of *Guardian in Socage*, and comes instead of him, and is *in Loco Parentis*.

Therefore, though it be not assignable nor transferable, yet it is such an Interest as shall survive.

The fourth Question is, Whether the Ladies, or either of them, are in Contempt of the Court ?

And 'tis very plainly sworn upon the Lady *Shaftsbury*, that she has owned that she has seen him married and bedded.

The Mother's being present in this Case, is a plain Evidence of Assent.

And the Mother can't marry her Child without the Consent of the Testamentary Guardian.

For the Father who had the Power over his Child by Law, has placed it under the Power of the Testamentary Guardian.

Therefore it is taken out of the Power of the Mother.

But 'tis objected, that this Lord *Shaftsbury* has married the Lady *Susanna Noel*, a Lady of Birth, Quality and Fortune, and therefore is married without Disparagement, and that this will be no Contempt of the Court.

When the Ward is put under the Protection of this Court by the Testamentary Guardian, it is a Contempt of the Court to marry him without the Consent of the Guardian.

It is a Breach of Filial Duty for Children to marry without the Consent of the Parent.

The Testamentary Guardian is *in Loco Parentis*, and he having put the Ward under the Protection of the Court, 'tis then a Contempt to marry him without the Guardian's Consent ; and the Contempt being in marrying him without the Consent of the Guardian, an improvident Marriage is only an Aggravation of the Offence, if that had been the Case.

There is nothing in the Objection, that the Mother has the natural Power over her Son, and that *Jura Sanguinis nulla Lege Civili possunt dirimi*.

For the Father whilst living was the Head of the Family; he had Power over his Child, and he might dispose of him by Law. And 'tis the Duty even of the Mother to pay that Respect to the Memory of her deceased Husband, as not to marry her Son without the Consent of the Guardian appointed by the Father.

[178] And when the Child is by the Guardian put under the Protection of this Court, it will be a Contempt even of the Mother to marry him without the Consent of the Guardian.

As to the Lady *Gainsborough*, this Contempt is not sworn upon her.

For an Order for Sequestration in the Case of a Peer, or a Commitment in the Case of a common Person, is a Judicial Act of the Court, and therefore must be founded on a proper Affidavit, as I apprehend.

The Order is the Judgment of the Court, the Sequestration or Commitment is but the Execution of it.

And therefore the Judgment is to be founded upon Truth, and not upon Conjecture only.

For if she be examined upon subsequent Interrogatories, this will not make good the Determination of the Court by a Matter *ex post facto*.

Coram King, Chancellor.

The Case of BIRMINGHAM School. [1726.]

See 2 Peer Will. 325, *Eden* versus *Foster*, S. C.

Eyre, Cap. Justic. de Banco, & Gilbert, Cap. Bar. Assisten'.

Of the King's Visitatorial Power, and of Commissions to execute it. See Abr. Eq. C. 100 and 101.

King *Edward* the VIth intending to erect a Free School at *Birmingham*, by Letters Patent bearing Date the 2d of *January* in the 5th Year of his Reign, grants and ordains, that from henceforth there shall be a Free Grammar-School in *Birmingham*, that shall be called the Free School of King *Edward* the VIth, for the Education of poor Youth in Grammar, and did erect and ordain, that the School should continue for ever, under a Head-Master and Usher; and that his Intention might take the better Effect, he incorporates 20 of the Inhabitants of *Birmingham*, who were to be, and to be called the Governors of the Possessions, Revenues and Goods belonging to the School, and appoints by Name twenty Men to be the first Governors thereof, who were incorporated by the Name of the Governors of the Possessions, Revenues and Goods of the Free School in *Birmingham*; and if any one of them died, or removed from *Birmingham*, others were to be elected in their Places; and he grants to this Corporation several Lands mentioned in the Charter, to hold of him and his Heirs, of the Castle of *Warwick*, in Socage, by the Rent of 20s., and he grants to them a common Seal, and that they should answer before all Judges, by the Name of the Governors of the Possessions, Revenues and Goods of the Free School of *Birmingham*; he gives them Power to appoint the Master and Usher, and that they, with the Consent and Advice of the Bishop of the Diocese, should make fit, and hold some Statutes and Ordinances, for and concerning the Order and Government of the Master and Usher and Scholars of the same School for the Time being, and concerning the Stipends and Salaries of the said Master and Usher, and all Things concerning the said School, and the Revenues and Profits thereof, with a Licence to purchase in *Mortmain*, &c.

[179] His present Majesty, by a Commission dated the 28th of *November* in the 9th Year of his Reign, directed to the Bishop of *Litchfield* and *Coventry* and others, reciting the said Charter, and reciting, that the Election of the present Governors of the Possessions and Revenues of the Free School, and of the Master and Usher, were not made according to the Form of the said Letters Patent, gives Power and Authority to the Commissioners, or any four of them, *tam per Sacramentum probor' & Legal' Homin' quam per Deposition' & eorum Test.*, to examine with Effect concerning the Lands and Tenements, and Rents belonging to the said School, and how they were disposed, and what remains in their Hands, and of what Value, and if any Accounts were taken of

such Rents, and if such Accounts were just, and to appoint and prescribe such Orders and Statutes, for the good Government of the said Free School, as they or any four of them should think expedient ; and if upon the Inquisition or Examination there were found any Abuses or Misapplication of the Charity, they should attend diligently concerning the Premises, and execute all Things relating thereto, with Effect, *circa Premissa diligent' intendatis, eaq; omnia & singula faciat & exequimini cum effectu in forma predict'*, and that they should return what was done upon the Commission into the Court of Chancery.

There have been two Questions principally made in this Case.

First, Whether the King has a Visitatorial Power over this Corporation ?

Secondly, Whether this Commission be a legal Commission ?

First, Whether the King has a Visitatorial Power over this Corporation ? 'Tis plain that the Visitatorial Power came over to us from the Civil and Canon Law ; and they had in the Civil Law, after the Empire became Christian, Spiritual Houses, which were subject to Rule and Order, and they were expressly visitable by the Bishop of the Diocese ; this is to be seen in the Code, lib. 1, tit. 3, c. 40, *Monasteria degunt seu Censentur sub Episcopis Territoriorum suorum, & Abbatum quidam curam gerunt Episcopi, Monachorum vero Abbates*.

By this Law the Bishops were obliged to see that the Monasteries should keep to the Rules of the Order ; and if they did not, they had by their Episcopal Jurisdiction a Power to deprive them ; and so it stood till the Popes, by their Encroachments, pretended to visit them by their own Legates.

Secondly, As to Lay Incorporations, as Lazars Houses, Infirmaries, and Colleges for the Education of poor Scholars, they likewise by the Civil Law were subject to the Visitation of the Subject or Christian *Episcopus Archidiaconus*. This may be seen in the Code, lib. 1, tit. 3, cap. 35. And likewise Code, tit. *Laus*, 42, sect. 6, 7, 8, 9 ; but this by the Canon Law grew into Disuse ; for the Popes had no Power to meddle with these Foundations, because they were not Spiritual ; and another Reason was, because there was nothing to be got by such Visitation ; for they could not pay any Procuration-Money, nor entertain the Visitor ; for it would be shameful to take it away from the Poor to support their Luxury ; and therefore the Canonists say, that the Founders shall be Visitors, and the Reason they give is, because they [180] are proper Curators of their own Beneficences ; and for this you may see *Lapis de Costel de Hospitalitate*, No. 13 and No. 29, and *Johannes Franciscus Parennus de Visitationibus*, Quest. 3 & 4.

By the Clementines, lib. 3, tit. 11, cap. 2, *Quia contigit*, which recites the Abuses in Hospitals, there is a Division made by the Canon, that where the Founder don't visit the Bishop shall ; this was made about the Year of our Lord 1305 or 1306, and was the standing Canon of the Church in the Time of *Henry V*.

We find it enacted by 2 *Hen. V. c. 1*, that Hospitals which are of the King's Foundation shall be visited by the Ordinaries, by Virtue of the King's Commission to them directed, and that other Hospitals shall be visited by the Ordinaries, who shall inquire of the Manner of the Foundation, Estate and Government of the same, and of all other Matters and Things necessary in that Behalf ; and upon that make thereof Correction and Reformation, according to the Law of the Holy Church, as to them belongeth.

Since the Words of the Act of Parliament are, that they shall make Correction, as by the Law of the Holy Church to them belongeth ; it seems it does not destroy the Power of the Founder, and devolve it totally upon the Bishop, because by the Law of the Church the Bishop could not visit, but in Default of the Founder.

Besides, Free Schools are out of this Statute.

By the 39 *Eliz. c. 5*, where Persons are allowed to incorporate Work-Houses for the Poor, by Deed inrolled, the Founders are expressly appointed to be Visitors ; and therefore I take the Law to be, that whenever any Poor are incorporated, the Founder has the Visitatorial Power, unless he parts with it by express Words ; but if he parts with it by express Words, then he has lost his Visitatorial Power, having assigned and delegated it to others ; and therefore that Case as put, 2 *Ro. Abr. 241*, may be good Law, if properly understood ; that where an Hospital is erected, and Governors appointed, the Governors are Visitors ; the Meaning of which must be, that when an Hospital is incorporated as a distinct Corporate Body, and Governors appointed, that, in Point of Construction, is then a parting with the Visitatorial Power ; for there can be no End in erecting the Governors but to make them Visitors, where the Poor are the Corporation, and the Revenues are lodged in them as a Corporate Body.

But if the Governors are incorporated, and not the Poor, and the Revenues are lodged in the Governors; if in that Case there were no Visitatorial Power over such Corporations, that Corporation would be uncontrollable, and then 'twere to no Purpose to give Rules and Orders to the Foundation of such a Charity, if there was Nobody to see them put in Use and obeyed.

The very giving of Rules and Orders in the Foundation of Charities supposes that there must be Somebody to superintend, and to see those Rules and Orders obeyed; and therefore the giving of Orders and Rules in the Foundation of any Charity, does of consequence infer a Visitatorial Power.

[181] But the Case of *Sutton's Hospital*, 10 Co. 13, 30, 31, has been greatly insisted on, where the Governors were incorporated, and not the School-Master and Scholars; and the Freehold of the Charity was likewise lodged in the Governors, and yet the Governors were allowed to be Visitors, and there was no Visitatorial Power given them.

But to this there is a plain Answer:

First, That that was an Incorporation by Act of Parliament; and in that Act of Parliament the Visitatorial Power is limited and appointed by express Words; for in fo. 2 & 3 the Act of Parliament is set forth, whereby *Thomas Sutton, &c.* (naming them), the Governors, are incorporated with Power to continue the Corporation by Election, and the Lands are vested in them: And then fo. 5, comes the Clause of the Visitatorial Power in these Words; "And that the Supplicant, during his Life, and the said Governors and their Successors for the Time being, or the most Part of them, and such of them as the Supplicant shall thereto appoint and nominate, shall and may, after the Death of the Supplicant, have Power and Authority to visit the said Hospital."

Now here the Visitatorial Power is limited by express Words to the Founder, during his Life; and indeed it is to be presumed, that a Founder, who had given such large Endowments to an Hospital, would keep that Hospital to Rule and Order, and employ the Revenues to that Purpose.

And there being some of the most Honourable Persons in the Kingdom Governors, after his Death the Visitatorial Power is lodged in them upon the same Presumption.

But because an Act of Parliament lodges the Visitatorial Power in the Governors, who have the Revenue, and expressly thereby makes them unaccountable; this will be no Rule to expound the King's Grant by that which appoints Governors of an Hospital, and makes them a Corporation, and lodges the Revenue in them.

For Visitation is nothing else but the Supervising the Corporation, and seeing that they keep to the Rules and Orders of the Founders; and therefore it is the Corporation that is visitable to whom these Rules are given, unless it were erected as *Sutton's Hospital*, where the Corporation gives Rules and Orders to the Charity, and are expressly discharged of all Visitation themselves by Act of Parliament.

Secondly, I think in this Case, where the King erects a School, appoints Governors, and gives them Land, and a Power of making By-Laws, that they are subject to the Royal Visitation.

For because the Lands and Revenues may be liable to Abuse, and the King being Curator of his own Charities, will not be construed to part with the Power which the Law lodges in him, unless there were express Words for that Purpose.

Thirdly, It seems to be a foreign Interpretation, that committing the Government of the School to this Corporation should make them, if they are in Default themselves, not to be subject to a Visitation.

Fourthly, The King's Grant can't be taken to a double Intent, to appoint them as Governors, and at the same Time to exempt them from Visitation.

[182] Fifthly, The Visitatorial Power is ultimate, as is resolved in the Case of *Philips and Berry*; and 'twould be very strange, and not easily conceivable, that the King should part with such an ultimate Power to correct the Abuses in his own Foundation.

Sixthly, This is a Sacred Trust in the Crown to superintend the Orders and Rules that have been given by the King, or any of his Royal Predecessors, touching their Charities. This appears by the Reg. 40, 41. And that if this Right be invaded, a Prohibition lies. This appears likewise to be the Privilege of a Commissioner Founder, upon the General Rule of Reason, *Cujus est dare & ejus est disponere*: And this is mentioned in the Case of *Philips and Berry*, Show. Parl. Cases, 51; 4 Mod. 112, and *Stillingfleet's Cases*, 413. And therefore the Visitatorial Power is that Jurisdiction

from whence there is no Appeal to the Law from the Judicature, that the Party has erected by his own Disposition.

Nor can any Body imagine that this Corporation, being erected by the Word *Governors*, and because that they are to place and displace the School-Master, that thereby they should not be visited in Case of Abuse.

Seventhly, It were a vain Thing to give Rules and Orders touching the Charity in their Foundation, if there were Nobody to see them performed ; for though this Body were to make wholesome Statutes and Ordinances of the Master and Usher, and Scholars, by the Advice and Consent of the Bishop of the Diocese, yet when these Statutes are made, there must be some Power to see them kept to, and without a Visitatorial Power there will be no Way to put them in Execution.

Eighthly, The Precedents are so in *Winbourn School*, *Basingstoke School*, *Plymouth School*, and *Bethlem Hospital*, where the Corporations are after this Form, and yet they were all subject to the Visitatorial Power.

Secondly, They object to this Commission,

First, That there is a Power given by Commission to make By-Laws, and that could not be, for that it is to alter the old Foundation.

Answer. This Power of making By-Laws is good, for though the Crown can't alter the old Foundation, unless it appears to be a superstitious Use, yet By-Laws may be made, and new Rules and Orders given in Support of the Charity, and to answer the Intent of the Royal Founder ; and we may suppose that the By-Laws are so made, unless any Thing appear to the contrary.

Secondly, If the Commissioners were to abrogate any of the old Orders, and to make new ones that would alter the Intent of the Charity, this Court would correct them ; for though the Visitatorial Power in the Case of a common Founder is ultimate, and can't be corrected by Law ;

Yet where the Visitation is of the King's Foundation, and issues by Commission out of this Court, if there be any Abuse of that Authority, this Court will correct it.

Thirdly, This Power of making By-Laws in this Commission I think to be good ; but if it were null and void, yet that makes the Com-[183]-mission not void *in toto* but only *in tanto* ; and these Powers are several and distinct in the Commission.

The second Objection made against the Commission is, that it gives no Visitatorial Power to place or displace any of the Governors, or any of the Persons concerned in the Corporation.

Answer. Surely there are Words sufficient to give the Visitatorial Power, for the Words are, *To inquire into all Abuses* ; and then, that *Circa Præmissa diligenter intendatis, eaq; omnia & singul' faciatis & exequamini cum Effect' in Forma prædict'*.

By which Words, if any Abuse were found, they were to do whatsoever was proper to be done, for the correcting such Abuses.

Secondly, If it were only a Commission of Inquiry, yet that would be a proper Foundation and Foot for this Court to correct these Abuses, that were found upon such Commission, in a proper Manner ; for that were a proper Foundation, on which a Superstructure must be raised, for correcting the Abuse of the Charity.

And if it could not be made below, by Virtue of the Commission, it ought to be made here. But I take it, that since by Virtue of the Commission they are to proceed with Effect, they are to make effectual Orders for correcting the Abuse, which comprehends the whole Exercise of the Visitatorial Power, and therefore they may place or displace by Virtue of the Commission ; and if they have done nothing to the Detriment of the Charity, as there is nothing of that Kind objected to the Commissioners, I think all their Act and Orders seem to be well founded.

And therefore I am humbly of Opinion they are good.

Rules on Motion by KING, Chancellor. [1726.]

A Bill was brought to quiet Possession of a Right of Commonage, in a common Part of the Manor of *Moreton* in *Surrey*, and to prevent Distresses.

An Answer and Demurrer were put in, and then Plaintiffs amend their Bill, and obtain an Injunction till Answer and farther Order : The Defendants now moved to dissolve it, and the Plaintiffs produced Affidavits of above 50 Years quiet Possession, and Evidence of their Right of Commonage, in the Time of Queen *Elizabeth* : Yet the

Court refused to interpose, till one or more Verdicts at Law, and dissolved the Injunction, that it may be tried immediately.

A Plaintiff here may either make a general Election to proceed here or at Law, or a Special Election, as to proceed for Part here, and the other Part at Law ; but the Court will judge of the Reasonableness of that Special Election.

One Defendant can't move to strike another out of the Bill, who has never been served with Process, in order to make him a Witness, but the Plaintiff may ; and a Defendant may have an Order to examine such Defendant, saving just Exceptions.

A Bond for Performance of Articles, tho' cancelled, was made an *Exhibit*, and allowed as Evidence, to prove the Execution of the Articles, the Limitation being inserted and recited in the Condition of the Bond.

[184] Though a Plea in Bar be allowed, yet the Plaintiff may reply to the Truth of it, and put the Defendant on proving it, and may except to any other Part of the Answer.

Bills of Review are allowed only on Errors apparent in the Record, or on new Matter discovered since the Decree : So if an original Bill be brought for Matters, Part of which are contained in a former Bill and Decree, and Part new or by way of Supplemental Bill, the Court will, on a Demurrer to so much as was contained in the former Decree, send it to a Master, to see what was and what was not in the first Bill, and allow the Demurrer accordingly.

ROBINSON and HAYNES. [1726.]

Purchase under an Outlawry pleaded.

A Bill was to be relieved against a Judgment in Ejectment, which was obtained by Virtue of a Purchase under a *Venditioni exponas* of a Term for Years, upon an Outlawry of the Plaintiff, who insisted that his Title to the Lands was a Fee, and not a Term for Years ; upon which an Injunction was granted : But the Defendant pleaded the Purchase under the Outlawry, and it was allowed, and the Injunction dissolved.

WATERS and GLANVILLE. [1726.]

Release subsequent to a Decree pleaded.

Waters had made a Contract with one *Elson* for Land, which he assigned to *Glanville* ; *Elson* had afterwards a Decree for Performance against *Waters*, he being the Party to the Contract, but decreed that *Glanville* should stand in his Place, and indemnify him against that and all Decrees : *Waters* and *Glanville* come to an Account, and mutual General Releases are given, in which the Words *all Orders and Decrees of the Court of Chancery* are inserted ; afterwards *Elson*, upon Petition, has an Order for Interest, from the Time of *Waters's* taking Possession, amounting to £700, founded upon the Decree made before the Releases given, who thereupon brings his Bill to compel *Glanville* to pay it, he being by the Decree to stand in *Waters's* Place : *Glanville* pleaded this Release subsequent to the Decree, and allowed *per Cur'*, though it was not taken Notice of at the Time of stating and settling the Accounts.

KNEWELL and GARDINER. [1726.]

Residuum undevised, to be distributed.

A Will was begun, and by it several Legacies given to the next of Kin, and likewise to the Executors, and then at the Beginning of the next Sentence the Will stopped, and was left unfinished.

Lord *King*. The Testator having given the Executors a Legacy, it is most likely he would have given away the Residue from them ; and therefore decreed the undisposed Residue to be distributed according to the Statute of Distributions.

[185] FLOYD and MANSELL. [1726.]

Bills to redeem by Infants limited, &c.

In 1697 the Plaintiff's Father mortgaged the Lands in Question to the Defendant, being about £28 a Year, for securing £300, in 1698, the Mortgage being forfeited, the Defendant recovered Possession by Ejectment, and brought a Bill to redeem or be foreclosed, and had a Decree accordingly, which Decree was signed and inrolled in 1701; in 1702 the Plaintiff's Father died, and the Plaintiff continued an Infant till 1709, when he came of Age; in 1721, and not before, he brought an Original Bill to set aside this Decree, and be let into a Redemption, on Payment of Principal, Interest and Costs, suggesting that the Defendant was much over paid, and the Lands were of greater Value, and that all the Proceedings in the Decree were *ex parte*, and that the Service of the *Subpoena* to hear Judgment was only on the Clerk in Court, on Affidavit that the Plaintiff was out of *England*, which Affidavit was false, and that there had been no Service at all of the Order, for making the Decree absolute, and other Irregularities. The Defendant answered to Part, and pleaded the Decree of Foreclosure and Inrollment, and insisted it would be against Practice to set aside a Decree signed and inrolled, by an Original Bill.

Lord Chancellor dismissed the Bill, but without Costs; and laid great Stress on the Length of Time, the Plaintiff being of Age 12 Years before the Filing his Bill, and seemed to think it reasonable, that Bills for Redemption against Mortgagees ought not to be brought after 20 Years Possession, but should be barred by the Statute of Limitation of *Jac. 1*, as Entries are at Common Law; that in this Case Infancy of the Plaintiff would not help him, the Right to redeem not beginning in his Time, but in his Ancestor's; and in all such Cases the Party was barred, and had not 10 Years after the Impediment was removed.

MEDER and BIRT. [1726.]

Plea of a Purchase over-ruled for not answering to the Mortgage.

A Bill was brought to redeem some Lands, conveyed in 1694 to the Defendant's Grandfather, by the Plaintiff's Father for 500 Years, to be void on Payment of £126 and Interest.

The Defendant pleads, that he is a Devisee of those Lands under the Will of his Grandfather, who in 1692 purchased them for a 200 Years Term, without Condition of Redemption, and had enjoyed 15 Years quiet Possession. *Cur'* over-ruled the Plea of the Defendant, for not answering sufficiently as to the Mortgage, and the Plea of the Purchase may be true, for it may be only a Term for Years to attend the Inheritance.

[186] BIRCH. [1726.]

After a Bill to redeem, and a Cross Bill, &c., decreed, a Bill of Revivor and Supplemental Bill.

In 1717 a Bill was brought to redeem or to be foreclosed, and likewise a Cross Bill to redeem, on which was a Decree for Payment of Principal, Interest and Costs, or else to be foreclosed, and on payment to be let in; the Mortgagor died, and the Account being taken, and the Plaintiff finding the Estate insufficient, now brings a new Bill of Revivor, and partly a Supplemental Bill, both to review the former Decree and Proceedings, and likewise to have an Account of the Assets of the Defendant the Mortgagor, and thereout to have Satisfaction for a Bond which was given as a collateral Security with the Mortgage.

The Defendant who was the Executor of the Mortgagor pleads the former Decree in Bar, that the Plaintiff elected his Satisfaction, and had not so much as insisted or suggested that Satisfaction deficient, so that it does not appear but that he may receive double Satisfaction for his Debt, and that it was plain he had not waved the Mortgage by his Bill of Revivor.

The Plaintiff insisted that it was the Practice of the Court, that taking out of Process, or making Use of any Counter-Security, was in itself a Waiver of the Foreclosure,

and a Mortgagee had always his Election to wave and open the Foreclosure, and have Recourse to his Bond and Covenant if he thought proper.

Cur': The Plaintiff by his Revivor has not waved the Mortgage, or so much as suggested a Deficiency, so the Plea must stand for an Answer, without Liberty to except.

GASCOYNE *versus* SIDWELL and others. [1726.]

Though no Bill of Discovery is to be on penal Statutes without waving the Penalty.

The Bill was brought by the Plaintiff, who was the Executor and Devisee of Sir *Robert Nightingale*, against several Defendants to have an Account of great Quantities of *Bullion*, Goods and Effects to £9000 Value, put into Partnership with, and sent by the Defendants to several Parts beyond Sea in *Asia* and *Africa*, and to have an Account of the Profits of the said Trade, which had been very considerable.

The Defendants, instead of answering, set forth and pleaded the several Acts of King *William* for establishing the *East-India* Company, and the Privileges granted to the said Company of trading to the several Places mentioned in the Bill, exclusive of all other Person or Persons, and likewise the Forfeitures and Penalties which any other Person or Persons trading thither should incur, which was the Forfeiture of the Ship, Cargo, &c., and double the Value, unless such Ship traded with the Licence of the said Company.

And likewise pleaded the 6th of Queen *Anne*, for granting further Privileges to the said Companies.

[187] And so, for that if the Facts charged in the Bill are true, the Defendants would be liable to great Forfeitures and Penalties; they plead the said Act and Forfeitures in Bar of any Discovery.

And for the Defendants it was insisted, that no Person is obliged to discover what may subject him to a Penalty, to any Person that has no Power, and does not offer to remit such Penalty; that this is the constant Rule in Cases of *Tenant for Life*, committing Waste or levying a Fine, &c., or any other Forfeiture, unless the Forfeiture is remitted, for no Man is obliged to accuse himself.

In this Case Half the Forfeiture is given to the King, and Half to the Informer, and the Party injured is the *India* Company, and they are not Plaintiffs; but yet the Defendant's Answer may be Evidence against him, upon an Information by the *India* Company, whereby they will have the Benefit of the Discovery without waving the Penalty, which they could not have, if they were Plaintiffs; and compared it to the Bill lately in the Exchequer of one Highwayman against another.

On the other Side for the Plaintiff, they allowed the general Rule of not discovering what would subject to a Forfeiture, but insisted that this might not be such a Case, for other Persons besides the Company may trade to these Parts by the express Words of the Acts, provided they have a License or give Security; and it does not appear, nor is averred, that Sir *Robert Nightingale* had not such a Licence, or that they believe he had not; nor have they denied that any one of the Partners were not licenced, nor had not given Security, for that might justify the Trade of the other Partners; but instead of denying this, which must lie in their own Knowledge, they only say they are advised and insist, &c., not to answer; that here was no Danger of Informations from the Company, which must be brought in three Years after the Fact by the Crown, and in two Years by any other Person, and it appears that more than three Years was expired before filing this Bill.

That Plaintiffs are at least intitled to an Account of the Partnership Effects, whatsoever they are, of the Trade, whereas the Plea extends to all.

Cur': Though there was no Pretence to have a Discovery, yet such Plea must have the greatest Strictness and Exactness, which tends to support wrong doing, and they don't say that either Sir *Robert Nightingale* or themselves had not a Licence.

That where two go on an unlawful Trade, they seemed to have intirely waved that Unlawfulness as between themselves, so disallowed the Plea and ordered them to answer.

Note: Sir *Robert Nightingale* at the Time of this Trade was a Director of the *East-India* Company.

[188] POWELL and PILLETT. [1726.]

Bill for Performance of a Marriage Contract, depending on a Condition precedent, dismissed.

Defendant agreed by his Note under Hand to pay the Plaintiff £200 within two Years, and gave him a *Reek* of Wheat on Condition he married his Daughter, and settled £600 upon her for a jointure, &c. The Marriage took Effect, and there was Issue a Daughter, but both Mother and Daughter died before the two Years expired.

The Plaintiff insisted it was an Agreement proper for a Court of Equity to execute : that he had married the Defendant's Daughter, and had been looking out for several Purchases to lay out the £600, and was only prevented by the Act of God.

Defendant insisted it was a Condition precedent, and to be performed at all Adventures before the Plaintiff could be intitled to the £200, and if any Damage, he might have his Action at Law ; that the Plaintiff was not bound to lay out the £600, and therefore there were no mutual Remedies.

Cur' said it was in his Power to have intitled himself to the £200 when he pleased, by laying out the £600, which not being done the Bill was dismiss'd, but without Costs.

SAYLE and REEVES and others. [1726.]

Bill to perform an Agreement for Sale of Copyhold Lands, &c., the Title doubtful.

The Bill was brought to have an Execution of Articles of Agreement for the Sale of some Copyhold to the Plaintiff, on his Payment of £538, 13s. to the Defendant *Thomas Reeves*, one Guinea being paid in Part, and to compel the Lord of the Manor to admit him in Fee, according to the Agreement. The Case was,

That one *Thomas Reeves* in 1685 surrendered these Lands to the Use of himself for Life, then to *Mary Reeves* his Daughter for her Life, then to *John Reeves*, and the *Heirs Male* of the said *John Reeves procreat' seu procreand'*, and for Default of such Issue, to the Use of *William Reeves*, Brother of the said *John*, and the *Heirs Male* of his Body *procreat' seu procreand'*, and for Default of such Issue, then to *John Reeves*, and his *Heirs Male procreat' seu procreand'* ; Remainder to the right *Heirs* of the said *Mary Reeves*.

The first Remainder-Man *John* was the Father of the Defendant *Thomas Reeves* of *Wanstead*, who entered into the Articles, and was admitted to him and his *Heirs Male*, with the above Remainders over.

William Reeves the next Remainder-Man was the Father of *Thomas Reeves* of *St. James's* (another Defendant to the Bill), and only submitted his Interest to be taken Care of by the Court.

The Defendant *Thomas Reeves* of *Wanstead*, and the Lord, both insisted, that there was a Custom in the said Manor, that no Tenant in Tail could bar the Remainder by a Recovery, but the Custom was by Surrender after Issue had, and not before, agreeable to the Case of Intails before the Statute *de Donis*.

[189] The Plaintiff would have insisted, that *Thomas Reeves* of *Wanstead* was Tenant in Fee, and not in Tail ; and that if he was Tenant in Tail, the Custom was bad, and tended to a perpetuity : That the said *Thomas* was not the Donee, but the Issue of the Donee ; in which Case, at Common Law, the Land would not go to any collateral Heir, but revert ; and cited, That the like Case was in *B. R. Idle* and *Coke*, in 1705.

Curia : As to the Remainder-Man, *Thomas Reeves* of *St. James's*, there was no Pretence to make him a Party ; therefore, as to him, the Bill was dismissed with Costs. And as to *Thomas Reeves* of *Wanstead*, the Court said, It seemed to be a Bill to know the Opinion of the Court, whether the Plaintiff had bought a good Title ? But it did not belong to the Court, nor would my Lord Chancellor give any Opinion as to the Title or Custom ; but decreed in general a specifick Performance of Articles of the 24th of *December* 1724, and decreed the Lord to admit the Plaintiff accordingly. But there being no Tender of a Surrender in this Case to the Lord, and consequently no Refusal, he was to have his Costs.

KEILWAY and KEILWAY. [1726.]

S. C. 2 P. Will. 344.

Statute of Distributions.

The Plaintiff was the Widow and Administratrix of one that died Intestate, possessed of a considerable Personal Estate, leaving the Widow, but no Children, and a Mother, a Brother and Sister, and two Nieces, the Children of another Brother; and the Question for the Opinion of the Court was between the Mother and the Brother and Sister, viz. Whether the last were intitled to any Distribution with the Mother, upon the Words of the Statute of 1 Jac. 2, cap. 17, which enacts, *That if after the Death of the Father any of his Children should die Intestate, without Wife or Children, in the Life of the Mother, every Brother and Sister, and the Representatives of them, shall have an equal Share with the Mother.*

It was agreed the Widow was to have one Half, and 'twas urged that the Mother was intitled to the other Half. It was said that the Mother was next of Kin; and upon the Statute of Distributions of 22 Car. 2, took all, when there was no Wife or Child, as the Father did. And before this Statute, if a Man-Child died without a Wife, leaving Children, they would have the whole, under the Statute of Distributions: So if such Child died without Children, leaving a Wife, if that Case does not continue as it was before the Statute of King James, and the only Case provided for by that Statute to let in Collaterals with the Mother, was when such Child died without either Wife or Children; but here is one of them, viz. the Wife.

Cur': Before the Statute of 22 Car 2, they distributed first among the Lineal descending Line, as Children; then they took the Lineal Line ascending, as Father and Mother; and then the Collateral Line, as Brothers and Sisters.

[190] The Intent of this Statute of King James was plainly to put the Mother in the same State and Condition with the Collaterals, who before stood on the same Foot with the Father; So that whenever she is intitled, they shall have an equal share with her.

If one die without a Wife, leaving Children, they have the Whole; if without Children or Wife, leaving a Father, that Father has the Whole; if no Father, then to the Mother, and the next of Kin; if without Child, but a Wife and Father, it goes in Moieties between the Wife and the Father; if no Father, but a Mother (as this Case is), then that Moiety between her and the next of Kin, in equal Degree, which is here the Brothers and Sisters, and the two Nieces, the Representatives of the deceased Brother.

BEATNIFF *versus* GARDINER. [1726.]

Execution, &c., pleaded by an Executor.

Bill against an Executrix to have an Account of Assets, and Satisfaction of a Debt of £660 secured by Judgment against the Testator, alledging a *Devastavit*, &c. The Defendant, by Schedule, sets forth the Assets, and denied by her Answer any Waste: And for Plea to any Relief said, That her Testator was in Execution on the said Judgment in his Life-time, and was discharged from thence by the express Order of the Plaintiff; and therefore pleaded such Discharge in Bar, such Discharge being a Release of the Debt in Law and Equity; and the Plea allowed.

[191] EQUITY CASES HEARD AND DECREED IN THE EXCHEQUER IN ENGLAND, TEMPORE GEORGH I. [1714-1727.]

BENNET *versus* TRESPASS, BOCKET and WHITEHALL. [1726.][See *Payne v. Esdaile*, 1888, 13 App. Cas. 627.]

The Custom of paying Tithes in London.

The Case is, That the Plaintiff having been Vicar of the Parish-Church of St. Giles's without Cripplegate, London, ever since the 4th of April 1717, did in Trinity Term 5 Geo. 1 [1718], exhibit his Bill in this Court against the Defendant for Tithes in

London, after the Rate of 2s. 9d. per Pound, according to the yearly Rent of their Houses, by Virtue of the Statute and Decree 37 H. 8.

The Defendant *Trespas* was, on the said 4th of April, and has ever since continued, an Occupier of an House within that Part of the said Parish which lies within *London*, or the Liberties thereof, of the yearly Value of £12. *Bockett* of another, of £16 per Annum; and *Whitehall* of two Houses, from April the 4th aforesaid till Midsummer 1715, at £22 per Annum.

There was no Proof in this Case whether these Houses were, or any of them was in Lease, at the Time of making the Act or not; nor that the Sum of 2s. 9d. in the Pound was at any Time paid according to the Value of the Houses, according to the Statute and Decree of H. 8. But,

It is proved by some of the Plaintiff's Witnesses, in their cross Examinations, on the Part of the Defendants, that till the Time of the present Vicar they never heard of any such Demand as 2s. 9d. per Pound for Tithes within the said Parish.

That in two ancient Tithe-Books there appears charged for Tithes, against the Names of the then Occupiers of *Trespas's* House, the several Sums of 5s. and 4s. 4d. and 2s. 6d. so charged; which said Sums of 4s. 4d. and 2s. 6d. are proved to be the Collector's Hand-Writing, but the 5s. is of another Hand-Writing; and in another Book the several Sums of 4s. 4d. and 2s. 6d. so charged, and proved to be the Collector's Hand-Writing; but no customary Sum, *Modus*, [192] or other certain Sum, was proved to have been ever paid than as aforesaid.

That in a Book commencing in 1708, and ending in the Year 1713, *Bockett's* House is charged 1s. 6d. and *Whitehall's* Houses 1s. each.

It is proved by one *Sureties*, that for nine Years, during the Time of Bishop *Fowler*, he lived in *Trespas's* House, and during that Time he never paid more to the Vicar than 10s. per Annum, viz. 2s. 6d. per Quarter.

The Question is, If 2s. 9d. per Pound, of the yearly Value of the said Defendants respective Houses, be due for Tithes, by Virtue of the said Statute and Decree of 37 H. 8, or not?

For the Plaintiff it was argued, That the Sum of 2s. 9d. in the Pound ought to be paid, by the Decree on the Statute of 37 H. 8, cap. 12, and they looked upon that Statute to be the General Law of Tithing in the City; and that if the Defendants could not set up a *Modus* or Composition, whereby it appeared that they paid less, that this Rule of Tithing ought to take Place. And they made several Objections to this *Modus* set up by the Defendants; as,

First, That it was not proved to be Time out of Mind: And nothing less than an immemorial Custom ought to be a Bar against a *Common Right*.

Secondly, It was not set out that the *Modus* was paid Annually, or Half-yearly; and if the particular Time of the Payment of a *Modus* be not set out, that *Modus* is not well pleaded, nor is it a good Bar: And the Reason is, because the original Agreement must be certain, that the Person may know when and what to demand. But here there was no Time set forth in this *Modus*, and therefore it could be no good Bar; nor was the *Modus* tendered to the Plaintiff.

In this Case they quoted for the Plaintiff a Decree in the 16 Jac. 1 [1618-19], wherein the Court had decreed 2s. 9d. in the Pound; and likewise the Case of *Sheffield and Serjeant*, in Mich. 1657; and likewise the Case of *Humfrevill and Plumstead*, Trin. 26 Car. 2 [1684-85]; *Grant and Cannon*, Mich. 5 W. & M. [1693]; *Sir Patience Ward and others versus Kidder*, 5 W. & M. [1693-94]; *Sayer versus Munford*, Mich. 6 W. & M. [1694]; and the Case of *Townly and Wilson*, 7 Julii 1705, in all which Cases the Court had decreed the Sum of 2s. 9d. per Pound, according to the said Statute and Decree.

And Mr. Baron *Price*, who was of Opinion for the Plaintiff, said, The Statute was thought to be in Derogation of the Rights of the Clergy; for it appears by Linwood, 201, and by Stow, that the Laity used to pay $\frac{1}{2}$ d. in the Pound to the Clergy, upon every Sunday and Holiday, which came to a greater Sum than 2s. 9d. viz. 3s. 5d. per Pound.

But it was resolved by the other three Judges, That the Case upon this Statute was not like a *Modus*: For the Decree in the Statute is, That all Houses within the City of *London* and Liberties shall pay 2s. 9d. for every 20s. Rent; and then comes the Provision in the 18th Section.

[193] *Provided also, and 'tis Agreed*, That where any less Sum than 2s. 9d. in 20s.

Rent has been accustomed to be paid for Tithes, that then in such Places the said Citizens and Inhabitants shall pay only after such Rate as has been accustomed.

Now they said it was plain by the Statute itself, and by the Citation before mentioned in Linwood, that in many Places in the City there had been a Custom to pay Tithes according to the Pound Rate; and these the Statute never intended to alter or enlarge, but to establish: For the Statute was not designed in Destruction of any settled Right; nay, they took it farther, That if there had been a Payment of lesser Sums by Agreement between the Parson and Parishioners, they were confirmed by the Statute, because it was the Design of the Statute to settle such Customary Payments: And it was their Design that they should not be unravelled on either Side; and accordingly such Customary Payments and Agreements have been complied with ever since the Statute. And,

That lesser Sums have been paid by almost every Parishioner to the Parson, and therewith they have been content. And although several Decrees have been made in this Court for Payment of 2s. 9d. in the Pound, yet no Customary Payments, in any Parish, have been set aside or broke through; but these Matters have been compounded between the Parties, and the Manner of Tithing has continued the same in each Parish, except in such Parishes as are otherwise regulated by the Statute 22 *Car.* 2. c. 15.

They said, That the 18th Proviso was a perfect Exception of all those that had paid lesser Sums out of the Decree; and therefore this could not be urged as a *Modus*, or set up in Bar of Tithes: For Tithes were originally due, and therefore the Bar must be compleat; but there are no Tithes of Houses due of common Right; for they are none of those Things that *renovare in Annum*; and therefore the Common Law (which followed the *Levitical* Pattern) did not make them Tithable; and therefore they are Tithable only by Custom or Agreement, where there have been such Customs and Agreements.

The new Rate of 2s. 9d. *per* Pound was super-induced by the Decree; and it is a strange Thing to say that the Decree was in Prejudice of the Clergy, when it appears that less Sums are now constantly paid for Houses in the City, than what would be paid if they were rated under the Decree. And *Note*: It appears the antient Payments, in lieu of Tithes of Houses in *London*, were somewhat less than 2s. 6d. *per* Pound.

But it plainly appears, that before the Dissolution of Monastries, a great deal of Service in *London* was performed by the regular Priests, who not only said their Masses, but visited the Sick, and performed Offices of Devotion in many Parts of the City. And when they were extirpated this Duty fell upon the Parochial Clergy; and then it was necessary that their Maintenance should be increased, and therefore this Decree was made, that all Persons should pay the received Rents from Houses, (that is) where there had been accustomed Payments, the Tithes were to continue payable according to that [194] Custom; and where there was no immemorial Custom, yet if there had been by Agreement, &c., a Payment for 8 Years past, this, according to the Frame of the Statute, is to be looked upon as a Customary Payment; for the Divisions and Severances of the Houses, Wharfs and Warehouses, were to be as they had been for 8 Years past. So that the Construction seems to be, That if there had been an Agreement to pay Tithes for 8 Years past, they were accustomed Payments within the Statute: And this will form an uniform Notion, that if there were Tithes, by Custom or by Agreement, for 8 Years past, they are within the 18 Proviso of that Statute.

But where there were no such accustomed Payments, there the Statute is introductive of a new Law, and lays the Charge upon all others to pay 2s. 9d. in the Pound.

As to the Objection, That there was no particular Time of Payment alledged, Baron *Page* said, That the Statute, by the 11th Proviso, had appointed the Payment of Tithes quarterly, and therefore it need not be set out in the Bill as the authorized Payment.

But it seems doubtful whether that Proviso extends any farther than to the 2s. 9d. mentioned in the Decree, and not to the accustomed Payments mentioned in the 18th Section of the Act.

But in this all the three Judges agreed, That they were not obliged to set up these Customary Payments as *Modus's* in Bar of Tithes; for these Customary Payments are Exemptions out of the Decree; and therefore in what Manner soever they have been paid, if there has been a Customary Payment since the Statute of a lesser Sum, they cannot be bound by the Decree to pay 2s. 9d. *per* Pound.

Now if all that pay less Sums be exempt from Payment under the Decree, and are not within the Decree, nor within the Obligation of the Statute, we ought to try whether there be such accustomed Payments or not; especially since in this Case it appeared by the Books of the Parson, that less Sums were collected; and it could not have been presumed that they would have collected in that Manner if they had not been the old accustomed Payments. For how could those Sums have come into the Parson's Books, if they had not been the old accustomed Dues.

And the Difference of the Payments in the Books may be reconciled, by supposing some of them to be quarterly, some half-yearly Payments.

This Case relates to the Inheritance, and the Inheritance is to be bound by our Decree. And where the Inheritance is charged merely by Custom, 'tis usual and just, if the Parties desire it, to try such Custom at Law.

Therefore the Court directed an Issue at Law, to try whether any less Sum, than after the Rate of 2s. 9d. in the 20s. Rent, had been accustomed to be paid by the Defendants for Tithes, and what such Sum was.

In this Case were quoted 2 Inst. 660; Noy, 130; Hard 116; Watson, 387 to 399; Cro. Car. 596; Yelv. 31; Moor, 912; 11 Co. 15, *Grant's Case*.

From this Decree the Plaintiff appealed to the House of Lords, where the Decree was (*Dissentiente Clero*) justly affirmed.

[195] REEVES versus BUTTLER. [1726].

Gilbert, C. B. ; Price, Page, Hale. The Lord Chief Baron Gilbert's Argument.

Of Costs and Damages, &c.

This is an Action of Trespass, wherein the Plaintiff declares, 1st, For breaking and entering his Close. And then there is a Count, that the Defendant, *Richard Buttlar, infra Tempus predict'*, viz. 10 Die Januarii Anno Reg' dict' Dom' Regis nunc 10, Vi & Armis, &c., un' Dom' & un' al' horreum ipsius Thomæ Reeves apud Iscoy predict' in Com' predict' fregit ac ostia Domus & horrei predict' observavit & Bona & Catalla, viz. Centum Carect' Tritici Cent' Carectat' Seisigir' Centum Carect' Hordei Cent' Carect' Tabap' Cent' Carect' Fœni ipsius Thomæ Reeves ibid. Invent' cepit ac ead' Bona & Catalla per quatuor Septimanas tunc prox' Sequen' de eod' Thoma Reeves in Domo & Horreo illo detinuit; and the Jury find two Pence Damages; and the Question is, Whether there shall be full Costs or not?

And I think there should not be full Costs.

The Case depends upon the Interpretation of several Statutes compared one with the other.

To understand it rightly we must go back as far as the Statute of *Gloucester*, which says, That whereas, before Time, Damages were not taxed but to the Value of the Issues of the Lands, it is provided, That the Demandant may recover against the Tenant the Costs of his Writ purchased, together with the Damages aforesaid: And this Act shall hold Place in all Cases where the Party is to recover Damages.

That Statute was that which gave Costs *de Incremento*: For at Common Law, if the Defendant prevailed, the Plaintiff was only amerced *pro falso Clamore*; but this Statute gave the Costs of the Writ, which by a benign Interpretation they extended to all legal Proceedings, as being founded upon that Writ.

And the Interpretation was, that though the Jury were to settle the Damages for the Wrong done, yet the Court were to settle the Costs of the legal Proceedings, because these were Matters of Law to which the Jury could not answer.

Thus it stood till the 43 *Eliz.* cap. 6, which enacts, That in all Personal Actions, to be brought in any of her Majesty's Courts at *Westminster*, not being for any Title or Interest of Lands, nor for any Battery, if it shall appear to the Judges of the same Courts, and is so signified or set down by the Justices, before whom the same shall be tried, that the Debt or Damage shall not amount to 40s. or above, then there shall be no more Costs than Damages.

This Statute is pretty darkly penn'd, and therefore I believe had very little or no Effect.

The Intention of it, no Doubt, was to bring back these small Actions into the Country Courts; but by the Words of the Law, the Judge that tried it was to signify

the Damages not to be above 40s., which is making the Judge that tried the Cause, Judge of the Fact, and to certify in Approbation of the Verdict.

[196] And it was very hard, that when a Man pursued his Remedy for a Debt or Damage, which happened within the Compass of 40s., that he should be punished for bringing his Action; and therefore I suppose, unless the Action appeared exceeding frivolous, the Judge seldom certified to cut off the Plaintiff's Costs.

By 21 Jac. 1, c. 16, in all Actions of Slander to be sued in any Courts of Westminster, or in any other Court whatsoever, if the Jury upon Trial of the Issue find the Damages under 40s. the Plaintiff shall recover no more Costs than Damages, without any further Increase of the same. This is a direct Repeal of the Statute of the Gloucester, quoad these Actions of Slander, where there were no more Costs than Damages; and it takes away these Costs *de Incremento*, by express and positive Words.

We come now to 22 & 23 Car. 2, c. 9, s. 149, which says, That to make the Statute of Eliz. more Effectual, it was enacted, That in all Actions of Trespass, Assault and Battery, and other Personal Actions, if the Judge did not certify, that the Title of the Land was in Question, or that the Battery was sufficiently proved, if the Damages were found under 40s. the Plaintiff should recover no more Costs than Damages. (Salk. 208, Ven. Philips.)

The Construction upon this Statute was, That in all Actions of Battery, and in all Actions of Trespass where Freehold could come in Question, if the Damages were under 40s. the Plaintiff must procure a Certificate from the Judge in order to obtain his Costs; but in all other Personal Actions, the Law stood as it did before the Statute of Eliz., that the Judge must certify the Action as frivolous, to strip the Plaintiff of his Costs: The plain Consequence of which is, That if there be several Counts in Trespass, and one relates to the Freehold, in which the Title may come in Question, and another relates to Chattels *de Bonis asportat'*, in which no Title of Land can come in Question, and intire Damages be found under 40s., the Plaintiff must have Costs, by the Statute of Gloucester, because the Costs are not remitted by the Statute of Eliz. without a Certificate from the Judge.

And this is not within the Statute of K. Charles 2, wherein there is a Necessity there should be a Certificate of the Judge to intitle to Costs.

And therefore when intire Damages are found, there must be some Damage proportioned to that Count.

And if there be any Damage proportioned to the Count, relating to the Goods, that the Statute of Gloucester carries Costs of Course.

This, I say, to vindicate the Resolutions of the Law; for Men have thought that some of the Resolutions, on the Statute of King Charles, have oppugned the Statute, in Order to enlarge the Jurisdiction of Westminster-Hall. God forbid that Judges upon their Oath should make Resolutions to enlarge Jurisdiction. These are just and genuine Resolutions, according to the plain Intention and Meaning of these Statutes, considered one with another.

And all Resolutions, both antient and modern, have turned upon this Reasoning. I'll only mention some of the modern ones, because they come close to the present Case.

The first is—

[197] “Keen *versus* Whistler.

“9 Geo. 1, Mich. [1722], in C. B.

“Trespass for chasing his Cow and his Domestick Fowls, viz. Hens, Geese, &c., with Dogs; which Dogs were used to bite tame Fowl, by whose Biting they were killed. On Not guilty, Verdict for the Plaintiff; and he had his full Costs, because this is not a Trespass wherein the Right of Freehold may come in Question.”

The next is—

“Thompson *versus* Berry.

“9 Geo. 1, Pasch. [1723], in C. B.

“Trespass for breaking his Close, and chasing his Bull. Verdict for the Plaintiff, and *Id.* Damages: And the Question was, If he should have any more Costs than Damages? And held by the Court, That he should have his full Costs, because the 22 & 23 Car. 2, cap. 9, extends only to such Actions of Trespass where the Freehold may C. v.—5*

"come in Question. Raym. 487; 3 Mod. 39. And how could the Freehold come in Question, on chasing a Bull?"

"Beck *versus* Nicholls.

"10 Geo. 1, Mich. [1723], in C. B.

"Trespass of Assault, Battery, Wounding, and Imprisonment, as also for entering and breaking his House, and opening the Doors of the said House, and breaking three Locks and three Bars belonging to the said Doors. The Defendant pleaded Not guilty to all, except the Imprisonment; and for that he justifies; and on the Trial the Justification was found for the Defendant, and the Not guilty for the Plaintiff, and the Damages 2s. 6d., and held by the Court, That the Damages being under 40s. he could not have full Costs for the Battery, because the Judge had not certified the Battery to be well proved; neither could he have full Costs for breaking the House, &c., because this is a Trespass relating to the Freehold; the Construction of 22 & 23 Car. 2, cap. 9, sect. 149, having been, that it extends to Trespass relating to the Freehold and Inheritance, and to such Trespasses only; which is collected from the Exception, where the Judge certifies that the Title came in Question, which shews that the Act extends only to such Trespasses where the Freehold might come in question, and not to Trespasses of Chattels."

"Blunt *versus* Miller.

"12 Geo. 1, Mich. [1725], in C. B.

"Trespass for breaking and entering, and breaking the Plaintiff's House, and keeping the Plaintiff out of Possession and Use of the said House, with a *Continuando* for a Month, whereby [198] the Plaintiff was put to great Expences to gain the Possession of his House, and in the mean Time lost the Profit and Use of his House. Verdict for the Plaintiff, and 2s. 6d. Damages. And upon Motion for full Costs, it was denied by the Court; for this is a plain Trespass *quare Clausum fregit*, and the *per quod* is only an Aggravation: And in this Case the Title of the Freehold might have come in Question; and if so, there should have been a Certificate of the Judge, which not being in this Case, the Plaintiff can have no more Costs than Damages."

"(11 Geo. 1, Trin. [1725], in C. B.) Trespass *quare Clausum fregit, & quendum Taurum Personæ ignotæ fugavit, per quod* the Plaintiff's Goosberry-Bushes, *necnon quinque particas (Angl' Poles) in eod' Claus' erect' officient' & existent' fregit laceravit & spoliavit.* Verdict for the Plaintiff, and 1d. Damages: And on Motion for full Costs the Court held, That these Words in this Declaration did not import an actual Asportation, which must be an intire Carrying away; and that the Taking and Pulling up the Poles, was not such an Asportation: That this was a Case in which a Certificate might have been made, because the Freehold might have come in Question; and though the Trespass begun by chasing the Bull, yet Damages is laid to be done to the Freehold, and so the Title of the Freehold might there have come in Question."

My Brother *Denton*, who gave me this Report, says that the Court doubted of the Case in 2 Vent. 215, which was Trespass *quare Clausum fregit*, for digging up and carrying away his Trees; and it was found upon Evidence that they were Roots of Trees, and carried from one Part of the Ground to the other. The Court there doubted whether this was finding an Asportation: For if the Jury only found that which was Evidence of an Asportation, and not an actual Asportation, it would not carry Costs.

But they agreed in the principal Case, that if any Thing were carried off from the Grounds, though of never so little Value, 'twould be an *Asportavit*; for the Words *Abcariavit* and *Asportavit*, in Declarations, mean such a Carrying as amounts to a Conversion to the Defendant's Use.

So where the Declaration in a *Clausum fregit*, for breaking of Hedges, an *Asportavit* is laid by Way of Aggravation, that will not carry Costs.

But in *Smith* and *Batterton*, Raym. 487, Trespass for breaking Stalls in a Market, they gave full Costs, because 'tis a Damage to a Chattel; for the Freehold of the Market could never come in Question in that Action. (2 Show. 258.) And it appears by 2 Jones, 232, that the Trespass was *quoad* the Goods only.

And yet in the Case of *Barns and Edgar*, 3 Mod. 39, 40., where the Trespass is only for Impounding, the Court would not allow full Costs, because the Freehold would not be in Question.

But in the Case of *Asser and Finch*, 2 Lev., where the Question was touching the Right of a Way, and that appeared by the Defendant's [199] Justification, though the Plaintiff replies, That it was done *extra Viam*, yet the Defendant had full Costs. But this, though it was a Case quoted at the Bar, is not to our present Purpose because, there the Matter of Title appeared on the Record itself.

We come therefore now, upon the Foundations and Principles before mentioned, to consider the Case before us. Though I doubted somewhat of it at the first, yet I am now clearly of Opinion with my Brothers, that there can be no more Costs than Damages.

In the present Case there is no Count, but where the Freehold might possibly come in Question : For this Count is for breaking the Barn, and locking up the Door of the House and Barn, and detaining several of the Plaintiff's Goods, mentioned in the Declaration, in that House and Barn.

Now here is no substantive and independant Count, *quoad* the Goods and Chattels, because 'tis connected with the breaking and locking up of the Barn : And in that Case the Freehold of the Barn might come in Question; and then locking up the Goods in the Barn is but mere Aggravation in that Count.

If a Man will put his Goods into my Barn, without my Leave, he can't enter and break my Barn, in order to come at his own Goods ; and therefore upon this Count the Property of the Goods might not be in Question, but merely the Barn that was thus broken.

Another, and still a stronger Reason, in my Opinion, is, That it is laid by Way of *Detinuit*, and not by Way of *Asportavit* : For where 'tis laid by Way of *Detinuit*, he may detain it as a Distress, and *contra Vadios & Plegios*, and not by Way of Asportation and Conversion. And then, even on the Face of the Count, touching the Goods and Chattels, the Freehold might come in Question, and whether such Distress were lawful.

So that taking this as an Aggravation of the breaking of the Barn, as indeed it ought to be, the Freehold might come in Question in this Count.

Or if it had been put into an independent Count in the *Detinet* only, and not by Way of Asportation and Conversion, such Count would not be good in Trespass, and therefore no Damages could have been recovered for it ; and therefore there could be no Costs *de Incremento*, and consequently there can be no Costs in that Case.

I think it very proper to be considered by all Practisers, That if there be a Trespass upon the Freehold, and likewise a Count laid *de Bonis asportat'*, in order to put in for the Costs merely, if there be no Evidence of the carrying away of the Goods, and converting them, to take a Verdict of Not guilty upon that Count : For then where the Jury bring in the Damages under 40s. the Plaintiff can't have Costs upon the other Count of the *Clausum fregit*, without the Certificate of the Judge.

I am exceeding clear, that in this Case there ought to be only ordinary Costs.

This was the opinion of the whole Court, delivered by the Lord Chief Baron Gilbert.

[200] The Case of MARY SHELMER's Will, and the Award of Baron Gilbert made thereupon.

[Dec. 18, 1725.]

Mary Shelmer, Widow, by her Will, dated the 27th of August 1722, gives to her own Nieces *Gwyn*, &c., £50 a-piece ; and after several other Legacies to her Husband's Relations, and also to her own more distant Relations, and particularly £100 to her Husband's Nephew, *Philip Gibbons*, Esq., whom she made sole Executor, she gives a Direction in the following Words, concerning a House she held by a long Lease from the Town of *Bedford*, at a small Ground-Rent, *viz. Also I will that my House in Bedford-Buildings, with the Marbles and Cisterns thereto belonging, be sold by my Executor hereafter named, with all convenient Speed ; and out of the Purchase-Money thereby arising, I give to my Cousin John Loyd of Westminster £100, and if he should die in my Life-time, I give the said £100 to his Child or Children, equally to be divided between them* (but says nothing farther touching the Money to arise by Sale of this House). Then she proceeds and gives her own Niece *Elizabeth Bernard*, her Executors and Assigns, her Tenement in *Fleet-street*, for the Remainder of the Term therein to come,

chargeable with £20 a-piece to her three Sons : To her own nephew *Owen Brigstock*, Esq., she devises an Estate of Inheritance in *Wales*, subject to pay his Brother *William* £100, and after some other Legacies, she bequeaths to her Man and Maid-servant, in the following Words :

Item, *I give to my Servant Philip How* £200.

Item, *I give to my Servant Elizabeth Pilgrim* £100 and all my wearing Apparel.

Item, *I farther give to the said Philip How and Elizabeth Pilgrim all my Household Goods, Money and Plate, that I shall leave behind me at the Time of my Death undisposed of, and not bequeathed to others, my Funeral Expences, Debts, and Legacies, being first paid.*

Item, *To Mary her Servant* £20, and to *James her Servant* £10, provided they respectively dwell with her at the Time of her Decease.

And after these Bequests to her Servants she gives several Legacies in Money, several specifick Legacies out of her Household Goods, and Plate to other Legatees ; and particularly to her Niece *Bernard*, and to the Wives of her Nephews *Brigstock*, several Pieces of Plate ; and to *Mr. Gibbons* her Executor, and his Lady, each a Diamond Ring ; and to him a Pearl Necklace, and some Moveables ; and to his Daughters, each a specifick Legacy.

The Testatrix gives about 70 specifick Legacies by her Will, 28 whereof preceded the said Bequest to her Servants *Philip How* and *Elizabeth Pilgrim*, and about 30 followed ; and in the last Clause of her Will directed, that whatever Money she owed any of her Servants at her Death, either for Wages, or Notes under her Hand, should be paid them over and above their respective Legacies therein left them, and that her Servants living with her at her Decease should be permitted to [201] continue in her House one Month next after her Decease, being the House in *Bedford Buildings* directed to be sold, and of her Will appointed the said *Mr. Gibbons* sole Executor, without devising or taking any other or further notice of the Residuum of her Estate, except what is mentioned in the above recited Bequest to her Man and Maid, *Philip How* and *Elizabeth Pilgrim*, in the Middle of her Will.

The Testatrix owed none of her Servants any Money, besides a Trifle for Wages (except to *Philip How*, to whom she owed £100 by Note, given to him for the Debt of another Person), and also the Ballance of an Account for Money laid out, besides what she owed him for Wages.

Her said Man *Philip How* had lived with her Husband and herself 26 Years, and her Maid had lived with her about 10 Years.

The Testatrix had three Sisters, who died before her, but left Children living at the Testatrix's Death, viz. *Mr. Gwyn's* Mother, *Mr. Bernard's* Mother, and the Mother of the two *Brigstocks* ; and these Nephews and Nieces are the next of Kin to the Testatrix, according to due Course of Law, and were most of them in good Esteem with the Testatrix.

The Testatrix during Life was seised of an Estate of about £800 a Year, Part by Jointure, and Part by her Husband's Will, which she enjoyed from the Time of his Death, which happened about 26 Years before her own.

She died the 7th of *September* 1724, about two Years after making her Will, aged 77 Years or thereabouts ; and 'tis thought she had at the Time of making her Will computed specifically, giving away as much as she was worth, and therefore did not close her Will with any Devise or Direction, concerning the Residue of her Estate.

The House in *Bedford Buildings* has been sold for £400, whereas she has but specifically given away £100 of that Money.

And she died possessed of five or six hundred Pounds *South-Sea* Stock, and Annuities, of a considerable Sum due in Arrear for the Rent of her Freehold Estate, which she held for Life ; and also for considerable Sums due to her upon Bonds and Mortgages.

She likewise left a considerable Quantity of Plate, undisposed of by her Will, and also 100 Guineas in ready Money in her House at the Time of her Death, so that the specifick Devise to her Servants *Philip How* and *Elizabeth Pilgrim* (without taking in the Residuum of her Estate) will amount to near £400 a-piece, which is much more than she has given to any other Legatee or Person of her Family, or her nearest Relations.

And 'tis thought the Testatrix intended her said Servants nothing beyond their specifick Money Legacies, than Household Goods, Plate, and such ready Money, as should be in her Dwelling-House at the Time of her Death, she usually having £100 or £200

in ready Money by her ; and not even those till her Debts and all her other Legacies were paid ; because as by her Will she has given several particular Legacies out of her Household Goods and Plate to other Persons, it was for that Reason she added in the Devise to her Servants [202] *Philip How* and *Elizabeth Pilgrim*, the Words (*undisposed, and not bequeathed to others*) and not with an Intent to give them the whole Residue of her Estate in general.

And this is the rather to be supposed from the last Clause in her Will, which declares that her Servants should be paid their Legacies over and above what she owed them for Wages, or by Note, and that they should live in her House a Month after her Death, which Clause was in a Manner useless, if she had intended the Residuum of her Estate to *Philip How* and *Elizabeth Pilgrim* ; the Testatrix having but four Servants at the Time of her Death, of whom they were two, and being little or nothing indebted to any of them, except to *Philip How*, in which Case *Philip How* would have had the Control over her Dwelling-House in *Bedford Buildings*, as well as an absolute Power to himself, to secure his specifick Legacies.

The Residuum of the Testatrix's Estate, after Payment of her Debts and Legacies, will amount to 4 or £500.

Whether the Testatrix's Servants *Philip How* and *Elizabeth Pilgrim*, or the Testatrix's next of Kin, are intitled to the Residue of the Money arising by the Sale of the House in *Bedford Buildings*, and the remaining Part of the Residuum of her Personal Estate, or either, and which of them, is the Question ?

I have considered of the Matter referred to me, between Mrs. *Shelmer's* Relations and Servants, touching her Will ; and I am of Opinion, that the Word (*Money*) mentioned in the Bequest to the Servants in her Will, is a general Word, but yet not so large and comprehensive as the Word *Pecunia* in the *Roman* Tongue ; for such Word in that Language, *All the Testatrix's Substance, both Real and Personal, that can be converted into Money* ; but the Word *Money* in our Language answers to the *Barbarians Latin* Word *Moneta*, and is a Genus that comprehends two Species, viz. ready Money and Money due, that is to say, the Money in her own Hands, or her Money in the Hands of any Body else ; and therefore in this Case the Bequests to her Servants will comprehend Mr. *Wood's* Mortgage, and the Arrears of Rent, since these must be looked upon by all the Rules of Construction to be Mrs. *Shelmer's* Money at the Time of her Death ; but the Word *Money* will not comprehend *South-Sea* Stock or *Annuity* Stock, because that is an Interest arising out of Funds, settled by publick Laws ; and though it be redeemable by Money, or saleable for Money, yet it can be no more looked upon as Money at the Time of Mrs. *Shelmer's* Decease than a Term of Years, a Coach and Horses, or any other Real or Personal Chattel whatsoever can. And therefore I am clearly of Opinion it can't be comprehended in the Word (*Money*). I am likewise of Opinion, that the Money arising by the Sale of the House in *Bedford Buildings* will not be comprised by this Bequest, because that was not Money left behind her at the Time of her Decease, for then it was a Chattel Real, and it could not by the Frame of the Will be sold till a Month after her Decease, since the Servants are by an express Clause in the Will to remain there during that Time. I am therefore of Opinion that the blended and liquidated Residuum, that is composed of [203] all these Species that remain in the Hands of Mr. *Gibbons* the Executor, is to be divided in the Proportion, that the Relations Residuary Part bears to the Residuary Part of the Servants. The Residuary Part of the Relations consists of the *Annuity* Stock, and this Money arising by the Sale of the House in *Bedford Buildings*, which is the first Proportion, by which the ultimate Residuum in Mr. *Gibbons's* Hands, is to be divided. The Residuary Part of the Servants consists of Mr. *Wood's* Mortgage, and the Arrears of Rent, and likewise the ready Money, which is not to be considered specifically, as a Part and Share due to the Servants at all Events, but as one of the *Items* that is to make a Part of the Computation of their Proportion, so that the second proportional to divide this blended Residuum, is the Residuary Part or Share of the Servants, and the Apportionment stands thus ; as the Relations Part is to the Part of the Servants, so the Residuary Part in Mr. *Gibbons's* Hands is a fourth Proportional.

Note : This is to be computed by the Rule of Three, either Direct or Inverse ; and accordingly the Shares of the Relations and Servants will come out by the aforementioned Additions.

Therefore I do award, order, and determine, that the respective Shares be paid to the Servants, according to their Proportion, and that likewise the Residuary Part or Share

of the Relations be paid to them, according to this Proportion, but to be subdivided among them, according to the Statute of Distributions of Intestates Estates ; and I do likewise order and determine, that the said Relations and Servants, upon receiving such their Shares and Proportions, shall give to the said *Philip Gibbons, Esq.*, the Executor, proper Releases ; and I likewise do order, that these Proportions be forthwith calculated, settled, and adjusted, and the Award drawn up in Form, with all convenient Speed. Witness my Hand, this present 18th Day of *December* in the 12th Year of the Reign of our Sovereign Lord King *George I.* in the Year of our Lord God 1725.—*Jeff. Gilbert.*

MARRIOT *versus* MARRIOT.

[S. C. 1 Strange, 666.]

The Argument of Lord Chief Baron Gilbert.

The Case of Mr. *Marriot's* Will as to the Point of Ecclesiastical Jurisdiction.

In this Case is observable, Mr. *Marriot*, Master of the Exchequer of Pleas, made his Will, and left his Wife Executrix and Residuary Legatee ; his Sons were Plaintiffs in this Cause, and contended, that this Devise was gotten by fraudulent Means and by Surprize ; the Wife produced the Probate of the Will : And Counsel, in Behalf of the Wife, the Defendant, contended, *that the Probate of the Will was* conclusive Evidence touching this Disposition of the Residuum ; and that a Court of Equity could not look into the same, but that it was merely of Ecclesiastical Jurisdiction, and to be determined there.

And in this Question four Things are considered.

First, How the Jurisdiction of the Testamentary Matters stood by the Civil Law ?

Secondly, How it stood by the Canon Law ?

[204] *Thirdly*, Upon what Foot it stood by the Law of *England* ?

Fourthly, What have been the several Distinctions in our Law touching this Jurisdiction ?

First, How the Jurisdiction of the Testamentary Matters stood by the Civil Law ?

The Way of authenticating Wills in the Civil Law was first before the *Prætor*, and afterwards before the *Magister Census* ; for they reckoned Wills to be in the Nature of Judgments in the Divisions or Distributions that a Man himself made touching his Estate, and therefore they were shut up with the Magistrate, during the Life of the Person, for the Quiet and Repose of the Family, but were opened after his Decease ; they were signed by the Testator, and sealed by him, and by the Witnesses upon a Thread, and carried in to the *Prætor* ; after the Death of the Party the Witnesses were called, if living, to acknowledge their Seals ; if they were not living, then the Seals were broke, and the Will opened in the Presence of other sufficient Witnesses, and the Will was read and registered, and a Copy of it delivered over to any Person that would ask for the same ; for it was reckoned as a Matter of Record, and therefore any Person might have Access to it. Of this *vid. Digest. lib. 9, tit. 3, de Testamentis quemadmodum Aperiantur, &c.* In the *Code, lib. 6, tit. 32*. And when any Legacy was disposed of to pious Uses, for the Use of the Church, or for Monasteries, or for the Poor, the Bishops were to sue for the same, and see to the Administration thereof ; this appears by the *Code, lib. 1, tit. 3, Law, 42, § 6, Vid. Necessarium § 7, Amplius § 8, Si autem contigerit § 9, Præterea Sancimus.*

Upon this the Bishops began to intermeddle with the Probate of Wills, which was a meer Temporal Authority ; but this Invasion of the Prelates *Justinian* would not endure, and therefore in his *Code*, he puts the Law against the Bishops Probate of Wills, before the Laws herein beforementioned ; and in this *Code, lib. 1, tit. 3. Repetita promulgatione, non solum Judices quorumlibet Tribunalium, verum etiam defensores Ecclesiarum hujus Almæ Urbis, quos turpissimum insinuandi ultimas deficientium voluntates genus irrepererat, præmonendos esse censemus ne Rem attingant, quæ nemini promus omnium, secundum Constitutionum præcepta, præterquam Magistro Census, competit: absurdum etenim Clericis est, immo etiam opprobriosum, si peritos se velint (ostendere) disceplationum esse forensium: Temerariis hujus Sanctionis pœna quinquaginta Librarum Auri feriendis. Datum XIII. Kal' Dec' C. P. Justiniano A. 11, & Apiliano Conss. 524.* Thus Things stood by the Civil Law.

Secondly, We come now in the second Place to see how Things stood by the Canon Law.

The Popes, as their Power increased, endeavoured to get the Jurisdiction over Testaments, &c. This appears by the *Decret' lib. 3, tit. 26, c. 26, Si Hæredes Jussa Testamentoris non adimpleverant, ab Episcopo loci illius omnis Res quæ eis Relicta est Canonice interdicatur, cum fructibus & cæteris Emolumentis, ut vota Defuncti adimpleantur*; and likewise *Decret' lib. 3, tit. 36, de Testamentis, c. 17, Tua nobis fraternitas intimavit quod nonnulli tam Religiosi quam Clerici Seculares, & Laici, Pecuniam & alia Bona, quæ per Manus eorum ex Testamentis dece[205]-dentium debent in Usus pios expendi, non dubitant aliis Usibus applicare: Cum igitur in omnibus piis voluntatibus sit per locorum Episcopos providendum, ut secundum defuncti voluntatem universa procedant, licet etiam a Testatoribus id contigerit interdici, Mandamus quatenus Exe- cutores Testament' hujusmodi ut Bona ipsa fideliter & plenarie in Usus prædict' expendant monitione præmissa compellas*. Pope Innocent IV. upon this Law. fo. 152, says, that the Bishop may dispense this Charity, if there be no Executor appointed by the Will; and if there be an Executor, and he don't fulfil the Will, that then he may take it to himself. *Decret' lib. 3, de Testament' tit. 26, c. 19, Johannes Clericus & P. Laicus Exeutores ultimæ voluntatis. O Clerici Sanctæ Crucis, qui venerabilibus Episcopis locis de Bonis suis in ultima voluntate legavit, mandans inde supersatisfieri Creditoribus per eosdam, post mandatum susceptum per Diocesanum Cogi debent Testatoris explere ultimam voluntatem*. See Innocentius in *Legem*, 153. *Panormitan (Panorm. tit. 4, fo. 157)*, upon the Law of *Si Hæredes* says, That this Matter of Wills, even where the Devise is to pious Uses, is *mixti fori*, and that the Heir or Executor is to have a Year's Time to fulfil the Will, before he can be compelled to do it by Ecclesiastical Censure.

Upon the same Law *Tua nobis*, *Panormitan* says, that the Bishop is to compel by Ecclesiastical Censure the Executor to the Performance of a Will to pious Uses, although the Will itself says that the Bishop was not to intermeddle; for they look upon that as an irrational Part of the Devise, which is in itself void.

The last Chapter *verbo Johannes*. The Case, as *Panormitan* states it, was, where after Debts paid, the Residue was left to pious Uses, and then the Bishop was to compel the Payment of Debts, and afterwards to see the Disposition of the *Residuum*. I don't find that any of the Canonists pretend that Wills are of Ecclesiastical Consuance *sua natura*, but only such Wills as were made for pious Uses. And

Lynwood, fo. 174, *verbo Approbatis*, says, that the Jurisdiction of the Ecclesiastical Courts, touching Testamentary Matters, is by the Custom of *England*, and not by the Ecclesiastical Law.

We are, Thirdly, to consider upon what Foot the Ecclesiastical Jurisdiction stood by the Law of *England*.

In *England* the Bishop and Sheriff sat together in the County-Court, as it appears by the Laws of King *Edgar*, cap. 5, *de Comitibus* (*Wilkins*, 78; *Lamb. Saxon Laws*, 64). *Centuriæ Comitibus quisq. (ut ante præscribitur), Interesse; Oppidana ter quotannis habentur Comitibus; celeberrimus autem ex omni Satrapia bis quotannis Conventus agitur, cui quidem ill' Diocesis Episcopus & Senator intersunt, quorum alter Jura divina alter humana populo edoceat. Leges Canuti, c. 17, de Comitibus Municipalibus: Ter in Anno habeantur Comitibus Municipalia, & duo Conventus (aut plures etiam) ex omni Provincia, & illis intersint Ep'us & Senator, & ibi ubique doceatur tam Jus diuinum quam humanum* (*Ibid.* 136; *Lamb. Saxon Laws*, 111). From these Laws it plainly appears that the Probate of Testaments was in the County-Courts.

William the Conqueror was the first that separated the Ecclesiastical Court from the Civil. *Selden*, in his Notes upon *Eadmerus* 167, gives us the very Charter of such Separation; *Propterea mando & regia autoritate præcipio, ut nullus Ep'us aut Archidiaconus de Legibus Epis[206]-copalibus amplius in Hundredo placita teneat, nec causam, quæ ad Regimen animarum pertinet, ad judicium secularum Hominum adducant*. This Charter, as Mr. *Selden* has told us, was recited in a close Roll of *Richard II.* and then confirmed; but the Charter of *William I.* does not mention Matters Testamentary, or the Probate of Wills to be of Ecclesiastical Consuance, but only says that the Crimes, that were to be prosecuted *pro Salute Animæ*, were to be of that Consuance.

That which seems first to have given Birth to the Ecclesiastical Jurisdiction was the Charter of *Henry I.* which says, *Si quis Baronium vel hominum meorum infirmabitur, sicut ipse daret vel dare disposuerit pecuniam suam, ita datum esse concedo,*

quod si ipse confectus vel armis vel infirmitate pecuniam suam nec dederit nec dari disposuerit, Uxor sua, sive liberi, aut parentes, & legitimi hæredes sui, pro anima ejus eam decident. This let in the several Canons herein before mentioned into England; for since the Personal Estate was to be disposed of for the Good of the Soul, they looked upon every Will to be a Disposition of the Testator in a gratuitous or charitable Manner; that whatever was left, was to be disposed of by the Executor, for the Good of his Soul: So that all the Canons touching charitable Dispositions, were to take Place in England.

In the Time of *Richard I.* when he was in Confinement, the Clergy got a Confirmation from him of the Ecclesiastical Immunities. This is mentioned by *Mat. Paris*, 161, Item, *Distributio rerum quæ in Testamento relinquitur auctoritate Ecclesie fiet, nec decima pars ut olim subtrahetur, si quis enim subitanea morte vel quolibet casu præoccupatus fuit, ut de rebus suis disponere non possit, distributio Bonorum ejus Ecclesiastica auctoritate fiet.*

This Charter is likewise mentioned in the same Terms in *Radulphus de Diceto*, one of the *Decem Scriptores*, fo. 658. These Ecclesiastical Immunities were confirmed by the Pope, and the Confirmation appears in Vol. 1, *Fredra*. 104, though there is no express Mention of a Testamentary Jurisdiction.

Note: Also it appears by the Charter, that the King releases the Tenth that used to be taken on the Death of the Tenant, and thenceforward the King and his Lords only took Heriots, as an Acknowledgment in Lieu of such Decimation.

From henceforth the Ecclesiastical Court began to consider a proper Method for the Publication of Wills: Therefore when any Person died, they summoned in the Executor, or next Relation, to take Care of his Soul; and the Executor was obliged to bring in the Will, and both Executors and Administrators were obliged to bring in an Inventory of his Goods, and the Charges were lightened by the Canons, in order to bring every Thing into the Ecclesiastical Court. *Lynwood*, 176, Canons of *Simon Mepham*. And it appears by the Canons of *Stratford*, that the Residue in the Hands of the Executor was to be distributed, for the Good of the Soul. *Lynwood*, 178. And by the Canons of *Ottobon*, an Inventory was to be exhibited. *Lyn*. 167.

Notwithstanding all this, the Jurisdiction of the County-Court still continued. for this was acknowledged to be a Matter *mixti fori*; and therefore they could not hinder the County-Court from proceeding, even according to their own Canon Law.

[207] But in order to get the whole Jurisdiction in the Time of *Richard II.* as is mentioned by *Selden* in his Notes on *Eadmerus*, they got the King to publish the Law of *William the Conqueror*, and confirm the same, That no Matters of Ecclesiastical Conusance should be transacted in the County-Courts: This is the Charter of 2 *Richard II.* *Membrano* 12, N. 5, and is mentioned in *Selden's Eadmerus*, 168.

From henceforward the Clergy had the whole Jurisdiction of Wills, because the County-Court could not receive the Probate, &c., and the King's Courts had never intermeddled with it, because by the Charter of *Henry I.* herein before mentioned, and likewise by *Mag. Chart.* cap. 18, the King had granted the Liberty to his own Tenants to dispose of their Goods; and therefore the Will touching the Personal Estate never received any Sanction in the immediate Court of the King.

This reconciles that Case of *Fitzherbert*, *Abr. Tit. Testament*, fo. 148, where 'tis said by *Fairfax*, that it was but of late the Church had the Probate of Wills, which was by an Act (I suppose he must mean the Confirmation of *Richard II.* herein before mentioned, for there is no Act of Parliament that gives them that Probate): And he says, that in other Countries the Probate was of Temporal Conusance, which *Selden* notes to be true in all Countries except *France*; and *Tremaile*, in that Case, asserts the Usage of proving Wills in Courts Baron, which certainly may be where the Custom prevails.

In the 11th of *Henry VII.* *Fineux* asserts, that the Probate of Wills did not belong to the Spiritual Court by the Ecclesiastical Law, but came to them by Custom and Usage: And these are the Foundations on which my Lord *Coke*, in *Henslow's Case*, 9 Rep. 38, concludes, that when the Will is proved in the Ecclesiastical Court, the Court has executed its Authority; but the Executors are to sue in the Temporal Courts, to get in the Estate of the Deceased.

Fourthly, We are to see what have been the several Distinctions in our Law touching this Jurisdiction, which will fall under five Heads.

First, That the Spiritual Court is the only Court now that has Authority to receive the Probate of Wills, and to give a Sanction to them, because the Jurisdiction of the

County-Court is lost by Non-usage ; and since *Magna Charta*, c. 18, the King's Courts did not intermeddle with the Goods of a deceased Tenant. But here must be excepted all Courts Baron, that have had Probate of Wills Time out of Mind, and have always continued that Usage.

Secondly, The Seal of the Ecclesiastical Court does authenticate the Will, for there the Will is to be brought in and proved (3 Roll. 299) ; and therefore the Case in Raym. 406, 407, is certainly good Law, that the Seal of the Ordinary can't be contradicted, because if there be no Way in the Temporal Courts to prove the Will relating to Chattels, it must go on in the Spiritual Court, and the Determination there must be final ; for the Temporal Courts can't make a Judgment concerning the Will contrary to what was made in the Ecclesiastical Court ; and therefore it is certainly good Law, that if they shew a Probate under the Hand of the Ordinary, they can't prove in Evidence that the Will was forged, or that the Testator was not *Compos*, or that another Person was [208] Executor ; but they may give in Evidence that the Seal was forged, or the Will repealed, or that there were *Bona notabilia*, because that is not in Contradiction to the real Seal of the Courts, but admits the Seal, and avoids it. Lev. 235 ; 6 Vaugh. 207 ; 1 Show. 293. And since the Ecclesiastical Court has the Probate of Wills now settled by Custom, the Temporal Court can't prohibit them in their Inquiries, whether the Testator was *non compos* or not, or whether the Will be revoked or not, because that is necessary for the authenticating the Will. Hard. 131, 313.

If a Temporal Matter be pleaded in Bar of an Ecclesiastical Demand, they must proceed in the Ecclesiastical Court, according to the Temporal Law, or else the Temporal Courts will hinder them ; as if Payment be pleaded in Bar of a Legacy, and there is but one Witness which the Ecclesiastical Court will not admit, there the Temporal Courts will prohibit them, because it is a Matter Temporal that bars the Ecclesiastical Demand, *Shutter & Ux' versus Friend*, Show. 158, 173 ; 1 Vent. 291 ; 3 Mod. 283. But if, upon a Probate of a Will, they alledge on the other Side that the Will was revoked, and they would prove the Revocation by one Witness, according to the Resolution in Yelv. in the Case of *Brown and Wentworth*, fo. 92 or 96 (which is but that of three Judges against two, and seems against the Opinion, 2 Rolls Abr. 299), they might be prohibited : This seems to intrench upon their Jurisdiction ; for if they can't judge by their Law whether the Will is revoked or not, they can't judge whether there is a Will or no Will. Indeed the Judges there say, that the Revocation is a temporal Matter, and therefore it is to be proved according to their Law by one Witness : But then we don't suffer them to determine touching the Validity of a Will of a Personal Estate, which every Body allows to be of Ecclesiastical Consuance. But if the Spiritual Court do admit a Will, but yet will not give the Probate to the Executor, because he can't give Security for a just Administration, it seems that a *Mandamus* will lie ; and this was resolved in the Case of the *King and Sir Richard Raines*, Mich. 10 W. [1688] in B. R. MS. Rep. fo. 1, for tho' they are to determine whether there be a Will or not, yet if there be a Will, the Executor has a Temporal Right, and they can't put any Terms upon him but what are mentioned in the Will ; and therefore if they will not grant the Probate, where they admit there is an Executor, the Court will grant a *Mandamus*.

If a Man gives Lands to be sold for the Payment of Debts, and disposes of the Money to several Persons, that can't be sued for in the Ecclesiastical Court, but only in a Court of Equity, because that is not a Legacy merely of Goods and Chattels, but it arises originally out of Lands and Tenements, and they have a Testamentary Jurisdiction touching Chattels only. Hob. 365, Case 345 ; 2 Roll. 285.

The Courts of Equity can hold Plea concerning a Legacy, and likewise concerning the Devise of a *Residuum*, which is but a Legacy : They may in notorious Cases declare a Legatee, that has obtained a Legacy by Fraud, to be Trustee for another ; as if the Drawer of a Will should insert his own Name, instead of the Name of a Legatee, no Doubt he would be Trustee for the real Legatee. As to the Devise of the [209] *Residuum*, nothing can be more clear ; for since the Case of *Foster and Munt*, 1 Vern. 473, wherever an Executor hath had a specifick Legacy, he was looked upon as a Trustee of the *Residuum* for the Relations, in a Course of Distribution ; and no Body ever attacked these Decrees in Favour of the Relations, upon this Head of Argument, that they were contrary to the Ecclesiastical Jurisdiction. (See 2 Vern. 648.)

But in all Cases a Court of Equity must consider what was the real Intent of the Testator ; and they can't declare a Trust according to their own Fancy, nor according

to what the Testator should have willed, for then they make the Will, and not the Testator; but they may, according to the real Intention of the Testator, declare a Trust upon such Wills, altho' it be not contained in the Will itself, which is in these three Cases.

First, In the Case of a Fraud upon a Legatee, as before is mentioned.

Secondly, Where the Words imply a Trust for the Relations, as in the Case of a specifick Devise to the Executors, and no Disposition of the *Residuum*.

Thirdly, In the Case of the Legatees promising the Testator to stand as a Trustee for another.

And Nobody has thought that declaring a Trust in these Cases, is an Infringement upon the Ecclesiastical Jurisdiction.

N.B. This Cause was agreed; but if the Point of Jurisdiction had been insisted on by the Executrix, my Lord Chief Baron *Gilbert* had prepared this Argument.

JOHN EDWARDS *versus* RICHARD HUGHES & al'. [1726.]

On a cutsomary Distress, on an Amerciament for not appearing, and serving at a Court-Leet. Of affeering Amerciaments, &c.

This is an Action of Trespass for taking away two Steers. To this the Defendants plead, That *William Morgan* was seised of the Manor of *Brecon* in his Demeasne as of Fee; and that the said *William Morgan*, and all those whose Estate he had, had Time out Mind, within the said Manor, a Court-Leet or View of *Frankpledge* three Times a Year, *viz.* on *Monday* next after the Close of *Easter*, on *Monday* next after the Feast of *St. Michael*, and on *Monday* next after *St. Hillary*: That in the Manor there was a Custom, that every Tenant of every Freehold Tenement within the said Manor used and ought to appear Personally, without any Notice or Summons, once in every Year, at one of the said three Courts of View of *Frankpledge*, so to be held; and if he did not appear at the two other Courts, then he was to pay the Steward for the Use of the Lord of the Manor an Essoin Penny for each of the two said Courts for his Default; and that every such Tenant not appearing at either of the said three Courts, was to be amerced by the Steward for his Default 7s. for each of the said three Courts; and that every Tenant being lawfully summoned to appear and inquire, and present upon Oath all such Matters as ought to be inquired into and presented, and therein making Default, was to be amerced by the Steward for his Contempt at 7s., and that the Bailiffs [210] of the said Manor, by the Warrant of the Steward, should levy these Amerciaments by Distress and Sale of the Goods and Chattels of the Defaulter.

And the Defendants farther say, that *John Edwards* then, and for three Years before, was a Tenant of a Freehold Tenement, and Resident, and inhabiting within the said Manor; and that there was a Court held on *Monday* next after the Close of *Easter*, *viz.* upon the 25th of *April* in the 6th of the King, and that the Plaintiff was lawfully summon'd to appear and to be put upon the Jury, to present all Things presentable within the said Manor; and that the Plaintiff did not appear, for which he was amerced by the Steward at 7s.

And that at the second Court held on *Monday* after *Michaelmas*, *viz.* the 3d of *October* in the 7th of the King [1720], the Plaintiff was summon'd to appear and be on the Jury, but did not, and for that Default was amerced another 7s.

And that the third Court was held the *Monday* after *Hillary*, *viz.* the 16th of *January* in the 7th of the King [1721]; and that the Plaintiff was lawfully summoned to the said Court to be on the Jury, and made Default, for which the Steward amerced him another 7s.

And because he did not appear, and pay his Essoin Penny for his Non-Appearance, according to Custom, for this Default the Steward amerced him another 7s.

And for not paying his several Amerciaments, *Hughes* the Steward directed his Precept to *John Pitchard*, *Thomas Loyd*, *John Meredith* and *John Powell*, which was delivered to them; by Virtue of which they took the two Steers (in the Declaration mentioned) as a Distress, and levied on the said Steers the several Sums, amounting to £1, 8s. to the Use of *William Morgan* the said Lord of the Manor, and sold them to certain Persons, to them unknown, for £5, as they lawfully might, and paid the said £1, 8s. to the Lord of the Manor, and were ready, and offered to pay the Overplus to

the Plaintiff, which he refused to receive ; which is the same Transgression of which the Plaintiff complains.

The Plaintiff replies, *de Injuria sua propria*.

To this the Defendant demurs.

The Question in this Case is, Whether the Custom is good ?

And we are of Opinion that this Custom is not good for many Reasons.

First, Because this Amerciament is not affeered.

By the Statute of *Magna Charta*, cap. 14, it is directed expresly, that *nulla prædictarum Misericordiarum ponatur nisi per Sacramentum proborum & Legalium hominum de vicineto*.

And by 27 *Hen. VIII.* c. 26, all Laws and Statutes in *England* are to run in *Wales*.

And so if this Custom be against *Magna Charta*, it is as much abolished in *Wales* as 'tis in *England*.

The Statute of *Mag. Chart.* was intended to take away all Fines and Amerciaments at the Will and Pleasure of the Lord and his Steward, [211] and likewise all excessive Fines and Amerciaments, if they were never so certain.

For before this Charter of Liberties the Lords used to set such excessive and grievous Amerciaments on their Tenants, that under Pretence of such Amerciaments, they used to seize the whole Profit of the Tenement which they had granted.

To hinder this Oppression, *Magna Charta* appoints that every Amerciament should be affeered.

This has been so understood, that though a Court may award that the Party shall be amerced, yet the Quantity of the Amerciament is to be settled by the Affeerors, and they are particularly sworn to that Purpose.

And they are called Affeerors, because they do affere, or bring in the Quantity of the Amerciament.

In a Court Baron, where the Suitors are Judges, the Homage may present the Defaults on small Trespasses within the Manor, but the Amerciaments must be afterwards particularly affeered by the Affeerors. *Hob.* 129. And *Kitchen*, 153, says, That the Office of the Homage, and that of the Affeerors, are not to be confounded.

The Homage are to present the little Offences and Trespasses within the Manor, as *Kitchen* says ; but the Affeerors are in Nature of Trustees, to settle the Quantity of the Amerciament.

Indeed *Hob.* goes so far as to say that the Homage may set a Sum upon the Offence ; but the Affeerors are then to mitigate it so, that the Quantity of the Amerciament is totally to be settled by the Affeerors.

And so in the Courts above, where Amerciaments were ordered either against Plaintiff or Defendant, they were carried down to the Coroner, to be settled and affeered.

In a Court-Leet, which was a Court of Record, if an Amerciament was imposed, if it were affeered even by the Jury, and not sworn by Affeerors appointed for that Purpose, it was a void Amerciament, and the Lord of the Leet could not maintain his Action for it. 3 *Lev.* 206.

'Tis very reasonable there should be such an Affeement ; for in this very Case 'tis very possible the Tenant might not have been summoned, and that this might come to the Knowledge of the Affeerors, and that would be an Excuse for this Default.

Objection. This is an Amerciament in Nature of a Fine, and a Fine may be set by the Court without any Affeement.

Answer. 'Tis true, a Fine may be set without Affeement, because it is out of the Statute of *Mag. Chart.* for the Statute of *Mag. Chart.* don't comprehend the Cases where a Court of Justice may imprison, and where the Fine is set by Way of Mercy as a Ransom and Purgation of the Offence ; for the Statute was designed in Mercy to the Offenders, and not to hinder them from Mercy, and so did not extend to Offences that might be punished by Imprisonment.

So in all Breaches of the Peace, the Court may set a Fine.

And so for all Contempts, because the Court may imprison.

So a Steward of a Court-Leet may impose a reasonable Fine for a Disturbance committed *in facie Curiae*, which is *Griesley's Case*, 8 *Co.* 39.

[212] And so he may, if a Suitor will not be sworn on the Homage, because in those Cases the Steward may imprison, as is expresly resolved in *Fitz. Abr. Tit. Leet*, n. 4, *Dalton Sher.* 400, and when such a Fine is imposed, it becomes a Debt to the Lord, for which an Action of Debt lies. *Cro. El.* 581.

Nobody can say that a Default for not appearing in a Court-Leet is such a Default upon which a Steward may imprison the Party, and so can't set a Fine as a Ransom from Imprisonment.

But it is said, That this may be good by Custom. Now as to the Custom, that is in the very Teeth of *Mag. Chart.* for it's a Custom to amerce without Affeerment ; and this Statute was made to abrogate and abolish such Customs.

Secondly, Another Reason against this Custom is, that the Amerciament is too excessive : it is not *salvo contemento*.

Now if the Amerciament was so great as to sweep away the whole Profits of the Freehold of the Offender, it was too great.

As if he were a Sockman, and it extended to take away the Beasts of his Plough.

If he were a Military Man, and it extended to take away his Arms.

If he was a Merchant, if it extended to take away his Merchandize.

If he were a Villein, if it took away his Cart or Wainage.

All these Amerciaments were too grievous, and against the Statute of *Magna Charta*, which says, *Liber homo non amercietur pro parvo delicto, nisi secundum modum illius delicti ; & pro magno delicto secundum magnitudinem delicti salvo sibi contemento suo, & mercator eodem modo salva Merchandiza sua, & villanus ulterius quam noster eodem modo amercietur salvo homagio suo, & si amercietur sit in misericordia nostra.*

And this makes an essential Difference between a Fine and an Amerciament ; for the Amerciament is to be set as that he may sustain his Station, as Feudatory to his Lord ; but the Case of a Fine has no Relation thereunto, for where the Offender is imprisoned, he can't sustain that Station.

This Case is among the *Minora Delicta*, and as such, there should be only an Amerciament, and that reasonable.

But according to the Custom, it may happen that the Amerciament may sweep away the whole Profit of the Tenement.

For a Man that has but a Rood of Land, or a Tenement of 5s. *per Ann.* must be obliged to pay £1, 8s. for his Default.

Lord Coke, in 2 Inst. fo. 28, expounds the Words of the Statute in such a Manner, that the Amerciament must not destroy the Livelihood of the Offender : But such Amerciaments as these, in ancient Times, would certainly have been thought very exorbitant, before the Quantity of Money was so very much increased ; and even at this Day the Fine would swallow the annual Profit of a small Tenement.

Thirdly, Another Reason against the Amerciament here is, that it admits of no *Essoin*, to excuse the Default.

Now there are several *Essoins*, that excuse even an Appearance at the King's Courts upon Demand ; as the *Essoin de malo lecti, de malo veniendi, de servitio regis, &c.*

[213] But here at this Court, if a Man were summoned, and were taken ill the Day before the Leet, or were sent for into the Service of the King, this was to be no Excuse, but immediately the Amerciament was to run upon him.

Now this is perfectly against Reason, because these *Essoins* excuse these Defaults ; but here by this Custom he is to be amerced, even where the Law excuses his Non-Appearance.

Fourthly, It is not *secundum modum delicti*, because the Non-Attendance of a poor Man, or Day-Labourer, is a less Fault than of a rich Man that has his Time to command.

And the Statute was made on Purpose to proportion Punishments to the Default ; but this Custom runs alike upon all Defaults, small and great.

This is contrary to that known Rule, *i.e. Regula peccatis quæ penas irrogat æquas.*
Objection. But tho' they say that this can't be maintained as an Amerciament, yet it might begin by Tenure, and the Lord might settle what Sum he pleased, on making Default at his Leet, and then such Sum ought not to be reckoned excessive, and subject to Affeerment, because it was settled in the original Settlement of the Tenure.

Answer. First this is pleaded as an Amerciament for a Default, and not as a Sum due by Tenure, and we must take it as it was pleaded, and not by any Imagination out of the Plea.

Secondly, If it were due by Tenure, it must be laid upon the Lands and Tenements in Certain, and not personally upon the Tenant, because upon the Contingency it will be a Sum issuing out of the Lands.

Thirdly, This could never grow into a Custom, because upon any Alienation of Part

of the Lands, or any Division of the same upon Descent, the Sum must be divided, and could not remain the same intire and uniform Sum.

This was the Opinion of the Court, delivered by Lord Chief Baron *Gilbert*.

EAST INDIA COMPANY *against* MATHEWS. [1726.]

(See the Case of *Sands* and the *East India Company*.)

This is an Information exhibited by the *East India Company* against *Thomas Mathews*, on the Statute of 9 & 10 W. III. c. 44, and sets forth, that the Defendant between the first of *April* 1722 and first of *June* 1724, being a Subject of this Kingdom, and being neither Factor nor Agent, or Servant of the said Company, or thereunto licensed by the said Company, nor having any lawful Authority, did trade and traffick *ad & in India Orientali*, and divers other Places within the Limits, where none, except the said Company, their Factors, Agents, or Servants, or Persons by them authorized, ought to exercise any Trade or Merchandize, and did acquire Goods to the Value of £3000 in the *East Indies*, and other Places within the Limits and Time aforesaid, and the said Goods did put on Board the *Lyon* [214] and *Fancy*; which said Ships, with their Furniture, valued at £5000, and with these Goods so put on Board, did trade, traffick, and adventure; the Proceed and Effect of which was to the Amount of £15,000, for which Offence they claim the Forfeiture of the said Ships, and all the Proceed and Effects of the same, and also the Sum of £6000, being double the Value of the Goods.

To this Information the Defendant pleaded Not guilty, as it was tried, and a special Verdict was found.

That on the 23d of *January* 1720, the Defendant *Thomas* was appointed Commander of a Ship called the *Lyon Man of War*, and three other Ships which were sent out for the Security of the Trade of the *East India Company* from Pirates, and for that Purpose the Defendant received several Instructions from the Lords of the Admiralty, and among other Things, that he should take Care that neither himself, nor any of the Officers in Company, belonging to any of his Majesty's Ships under his Command, should take on Board any Goods or Merchandizes upon any Pretence whatsoever (Gold and Silver only excepted), as he and they should answer the same at their Peril; and that on the Receipt of these Instructions the said Defendant sailed from *England*, for the *East Indies* in the said Man of War, called the *Lyon*, and on the 30th of *March* 1721 arrived there, and that after his Arrival, being neither Factor, Agent, nor Servant unto the said Company, nor being thereto licensed by the said Company, he did trade with the said Ship at the *East Indies*, and other Places within the Limits, in the Information mentioned, from Port to Port and from Place to Place, and acquired Goods to the Value of £13,676, 17s. 6d. and that the said Goods were shipped on Board the *Lyon Man of War* (Value 20) within the Limits aforesaid; and whether this is within the Act is the Question.

In order to consider this Case, it will be proper to look into the State of Things, at the Time of making this Act.

There was then an old *East India Company* incorporated by Charter, but the Charter of the Crown could not exclude any Person to and from the *East Indies*; for nothing can exclude the Subject from Trade but an Act of Parliament.

The Crown, at the Time of making the Act, had Occasion for two Millions of Money for carrying on the War, and the Act is a Plan for raising that Sum in this Manner.

Books are to be laid open to Subscribers for raising these two Millions, and every subscribing Person, both Subject and Foreigner, is to have an Annuity of £6 *per Cent.* and a Fund is settled.

Besides, such subscribing Persons have a Right to Trade, within certain Limits, exclusive of all others, from the Cape of *Good Hope* to the Streights of *Magellan*; so that the new Right, purchased by Subscription in pursuance of the Act, is a Right to exclude every unsubscribing Person.

Those that have argued for the Defendant, do admit, that the Power of trading to and from the Limits is taken away from all unsubscribing Persons, but say that the Right of Trading Coast-ways [215] within the Limits, is not taken away by this Act, that is a *Casus Omissus*, and not within the Law; so that if a Man does not pass the Limits, or transport any Wares, Commodities, Coin, or Bullion from a Place out of the Limits to a Place within the Limits, he is not within the Letter of the Law.

If it were so, that the Coast Trade were a *Casus Omissus* and out of the Letter of the Law, I could not construe it to be within the Intent, for that were to torture a Penal Law, by excluding it in Point of Construction ; and if there be a *Casus Omissus*, the Parties concerned in Interest had better apply to Parliament, which are sitting every Year, than for the Judges to stretch the Law in Point of Construction.

So that the Question is reduced to this, Whether the Coast-ways Trade is within the Letter of the Law ?

Now plainly the 61st Section does grant a Coastman's Trade to the Subscribers, as well as a Trade to and from the Limits ; for it is, that they shall freely traffick, and use the Trade of Merchandize, in such Places, and by such Ways and Passages, as are already frequented, found out, or discovered, or which hereafter shall be found out or discovered, and as they severally shall esteem and take to be fittest or best for them, into and from the *East Indies*, in the Countries and Ports of *Asia* and *Africa*, and into and from the Islands, Ports, Havens, Cities, Creeks, Towns, and Places of *Asia*, *Africa*, and *America*, or any of them beyond the Cape of *Bona speranza* to the Streight of *Magellan*, where any Trade or Traffick of Merchandize is, or may be used or had, and to and from every of them.

Indeed if there were no more in the Act than this Grant, it would have given them no more than what they had as Subjects originally, and before the making of the Act ; for they had a Power of trading to and from the Limits, and likewise a Power of trading Coast-ways ; so this Case is only Preparatory to the 81 Clause, which runs thus :

That such Persons or Corporations as in Pursuance of this Act shall have a Right and Power to trade to the *East Indies*, and other the Parts aforesaid, according to such Provisions, Proportions, and Restrictions, as are in this Act contained, and subject to the Condition or Power of Redemption beforementioned, from and after the Date of the said 29th of *October* 1698, shall have (sell), use and enjoy the whole and sole Trade and Traffick, and the only Liberty, Use and Privilege of trading, trafficking or exercising the Trade or Business of Merchandize to and from the *East Indies*, and other the Parts aforesaid, according to such Provisions, *viz.* to and from all the Islands, Ports, Havens, Cities, Towns and Places within the Limits aforesaid, or any of them, as shall after the said 29th of *October* 1698 be visited, frequented or haunted by any other of the Subjects of his Majesty, his Heirs or Successors, during such Time as the Benefit of Trade hereby given, or intended to be given to the Subscribers or others, as aforesaid, ought to continue by Virtue of this Act. And if any the Subjects of his Majesty, his Heirs or Successors, of what Degree or Quality soever they be, other than such as may lawfully go and trade to the *East Indies*, or other the Parts aforesaid, by Virtue of this Act, and their Factors, Agents or [216] Servants respectively who shall be employed according to the true Meaning hereof, shall directly or indirectly visit, haunt, frequent, trade, traffick, or adventure into or from the said *East Indies*, or other the Parts beforementioned, contrary to the true Meaning thereof, all and every such Offender and Offenders shall incur the Forfeiture and Loss of all the Ships and Vessels which shall be employed in such Trade, with the Guns, Tackle, Apparel, and Furniture thereunto belonging ; and also all the Goods and Merchandize laden thereupon, and all the Proceed and Effects of the same ; and also double the Value thereof, *viz.* one fourth Part thereof to such Person or Persons as will seize, inform, or sue for the same, to be recovered in any Court of Record as aforesaid ; and the other three fourth Parts to the said general Society, until, &c., as aforesaid ; and after the erecting (uniting) thereof, if any such be, then to the Use of the said Company without Account, the Charges of Prosecution being born by the said Society or Company.

If the 61st Clause had stood alone without the 81st, it would have been no Grant at all ; for the 61st would have granted no more than that which all Subjects had before the Making the Act ; but the 81st is the effectual Clause which excludes all other Subjects, in as large Terms as the 61st Clause grants the whole and sole Trade to and from the *East Indies*, and to and from all the Islands, Ports, Havens, Cities, Towns and Places within the Limits ; and then came the Words which inflict the Penalty, which say, That if any Person, of what Degree or Quality soever, shall directly or indirectly visit, haunt, frequent, trade, traffick, or adventure to and from the *East Indies*, or other Parts aforesaid, contrary to the true Intent and Meaning thereof, they shall incur the Forfeiture, &c.

So that the Words of the Law do as well extend to the Trading within the Limits, as to and from the Limits : For trade, traffick and adventure to and from the *East Indies* and other Parts aforesaid, are relative Words, and relate to any Island, Port, Haven, City, Town or Place within the Limits.

I cannot see how plainer Words could have been made Use of, both to grant a Coast-

ways Trade to the Subscribers, and to exclude all other Subjects from it. And indeed the Grant would have been nothing if the Exclusion had not been equal and parallel to the Grant ; for the Subscribers would have no more than they had before, if all other Subjects had not been excluded ; and so it was necessary to pen the exclusive Clause in these strong Terms, in order to make the Grant itself any Way effectual.

There is another Clause that manifests the same Intent ; I cannot say it makes it plainer, for no Words could, I think, be plainer, and that is Clause 83. Provided also, and be it enacted by the Authority aforesaid, That nothing in this Act shall extend, or be construed to extend, to hinder and restrain the Governor and Company of Merchants in *London*, trading into the *East Indies*, to continue to Trade within the Limits aforesaid, until the 29th of *December* 1701, any Thing in this Act contained to the contrary notwithstanding.

[217] By this Clause it is plain, That the old *East India* Company were excluded from a Coast-ways Trade after the Time appointed ; for though they had a Settlement under the King's Charter, and had Effects in the *East Indies*, yet they could not make any Advantage of the Effects after the Time limited.

And if the Act excluded them from a Coast-ways Trade, to be sure it must be designed to exclude all other Persons whatsoever.

Those that argue for the Defendant argue from the intermediate Clauses between the 61st and 81st. And they say that every Person that subscribes £100 shall have Power to sell £100 in Goods, Wares and Commodities, or Coin, within the Limits.

This is the 61st Clause ; and indeed all the rest of the Clauses go upon the Supposition, that any Person that would Trade to the *East Indies* would freight his Ship with Commodities, and not go out empty to carry on a Coast-ways Trade : For no Man in his Wits, that ever traded to the *East Indies*, would carry on a Trade in such Manner ; for that would be to lose the Profits of his outward Voyage.

But certainly any subscribing Person, that had carried out £100, might make the best of it by a Coast-ways Trade : For otherwise, if he had not found a Market for the Commodities at one Haven or Port, he could not carry them to another. For if the Act were interpreted, that the Subscriber was to carry the Commodities from a *Terminus a quo* without the Limits, to a *Terminus ad quem* within the Limits ; and that was the whole Power given to the Subscribers ; then if a Subscriber could not find a Market in one Port, he could not carry them to another ; it would be the most absurd Construction of the Act that could be.

So if a Subscriber of £100 had carried out a Cargo of that Value from a Place out of the Limit, and within the Limit the Ship should meet with a Storm, and it were necessary to lighten the Ship by throwing the Cargo over board, no Man will say but that he may take in Goods to freight, or take up Goods on Credit to the Value of £100, that any Person might do before the Act, and the Subscribers too had the same Power and Liberty of the Act made.

And whatever Power the Subscribers had after the Act, they were by the Act to have and enjoy the same, exclusive of all other. For if a Subscriber might carry on a Coast-ways Trade, as they that argue for the Defendant must admit, he must by the 81st Clause enjoy it sole and separate, and exclusive of any unsubscribing Subject.

Indeed the 61st Section, that begins to settle the Proportions, says, That Persons subscribing shall not ship, lade, or put on Board, to or for the *East Indies*, or other Parts within the Limits aforesaid, from *England* or any other Country or Place whatsoever, any Goods of greater Value than as in the Act is expressed, *viz.* That he that has subscribed £100 shall and may ship, lade, and put on Board yearly for the said *East Indies*, or Parts within the Limits aforesaid, Goods, Wares and Merchandizes that shall amount to the Value of £100, so that tho' in this Clause the *Terminus ad quem* is the *East Indies*, or a Place within the Limits, yet the *Terminus a quo* is *England*, or any [218] Country whatsoever, which comprehends all Places, either within the Limits or without.

So when the Oath is limited in the 64th Clause, they are to swear not to ship, or cause to be sent from *England*, or any other Country, to the *East Indies*, or other Places within the Limits, any Goods of a greater Value than such as they may lawfully send.

Here the *Terminus a quo* is left at large ; for the Goods may be shipped from any Country, either within the Limits or without.

So that the penning of these Clauses does comprehend a Coast-ways Trade, as well the Trade from Places without the Limits, as to Places within ; and the *Terminus a quo* is left at large, that it may comprehend all Sorts of Trade whatsoever.

Indeed the 66th Clause says, That every Person that shall send any Goods to the

East Indies, or other Parts within the Limits, shall enter the Quantity and Value of such Goods in a Book, and likewise the Name of the Ship and Commander.

Now 'tis argued, that no Subscriber could carry on a Coast-ways Trade, because he could not be able to make these Entries.

Indeed the Law is here adapted to the common Manner of the Trade ; for no Subscriber that was fitting out a Ship, would carry her out empty to the *East Indies*, in order to freight her there. The Law does not suppose any Thing so absurd, as that he would lose the Profit of his outward-bound Voyage.

But there is no Doubt, that if any Person had by Storms lost the Cargo of his Ship, he might take Goods to freight, to the Value of his Subscription, within the Limits ; and if he enter such Goods *ex post facto*, he would be within the Equity of the Law ; For the Statute does not put any Cases upon particular Accidents ; but the Regulation of the Proportion is adapted to the general Course of Trade ; that is, to carry out Goods to the *East Indies*, and not merely to take in Goods to freight there.

But the Regulation of Subscribers in this Manner, by these Entries, can't induce a Consequence that the Coast-ways Trade is not within the Act, since it is within the express Letter of the Law as aforesaid.

And if a Man were to Trade with Goods, to the Value of £100, from a Place without the Limits to a Place within the Limits, he must be obliged to unload at some one Place, to make his Market there, in Case the Subscriber was excluded from making the best of his £100 by a Coast-ways Trade within the Limits.

From all which it is plain, that the sole Coast-ways Trade is by this Act sold to the Subscribers, as well as the Trade to and from the *East Indies*.

It has been likewise argued for the Defendant, that 12 *Car.* cap. 18, concerning Navigation, is of as large Extent as the Act ; and yet it did not comprehend a Coast-ways Trade. That no Goods or Commodities whatsoever, shall be imported into, or exported out of any Lands, Islands, Plantations or Territories, but in *English*-built Ships, and whereof the Master and three fourth Parts are *English*.

This Act did not comprehend the Coast-ways Trade ; for 7 & 8 W. 3, c. 23, was forced to be enacted to prevent this Abuse in a Coast-[219]-ways Trade, which enacts, That no Goods shall be exported or imported into any Part or Place in the said Colonies or Plantations, but in *English*-built Ships.

But the Answer is very plain ; for indeed 12 *Car.* did not comprehend a Coast-ways Trade of the Plantations ; for the Goods were carried from one Port to another, within the same Plantation, and though the Goods are imported and exported, yet they are not exported from the Plantations.

As if Goods are carried from *Portsmouth* to *London*, Coast-ways, though the Goods are exported and imported, yet they are not exported from *England*.

So the Word *Plantations*, in the Statute, is a general Name : And though Goods are carried there, from one Port to another, yet they are not exported from the Plantations.

But there is no arguing from the Words of one Statute to another, unless the Words were exactly the same, because the Difference of the Words will alter the Sense and Intent of the Law.

And it is not right Reasoning to say, That because (as) the 12 *Car.* is so penn'd, as not to prohibit a Coast-ways Trade, in Foreign-built Ships, within the Plantations, that so the 9 & 10 W. 3 does not give a sole Coast-ways Trade to the Subscribers within the Limits, where the Language, the Penning, the Sense and Signification of the Words, and Intent of the Statute, is perfectly different ; for no Subject by the Act is directly or indirectly to visit, haunt, frequent, trade, traffick, or adventure, into or from the said *East Indies*, or other the Parts aforementioned.

As the Words are not the same in any Particular, so there is no Similitude between them.

The Statute of *Car.* respects the Thing ; this Statute respects the Person.

It is penned in as strong a Language as I think is possible to be used, to forbid all Subjects all Manner of Trading within the Limits.

There is no Ambiguity in the Words.

I don't see how they can be tortured, or represented in any Manner, to let a Subject into a Coast-ways Trade.

The sole Trade is granted to the Subscribers ; they are to execute it in the Manner they think proper.

The Subscribers before the making of this Statute had a Right to Trade Coast-ways.

By their Subscription, in Pursuance of this Statute, they have the sole Right of Trading Coast-ways, and excluding all others; so that which was before the general Right of all Subjects, became the Property of the Subscribers by this Act.

Whatever the Law granted to them, it excluded all other Persons from it.

And the exclusive Words are penned in the most forcible Manner, and in the most significant Language, to exclude all other Subjects from Trading within the Limits.

And it is highly probable, that this Act of the *East India* Company being made after the 7 & 8 W. 3, which makes Use of these Words, That they shall not carry Goods from one Port or Place to another [220] Port or Place in the said Colony; so in this subsequent Law they thought it enough to say in general, that no Subject should carry Goods within the Limits, but into or from any Creek, Haven, Port, or City within the same.

DOMINUS REX *versus* MANN and others.

Jan. 28, 1726.

Mr. Strange's Argument in the Exchequer for the Defendants.

My Lord, It is truly said, That this is a Matter that very much concerns the Crown in Point of Revenue, and that your Lordships will at all Times, and upon all Occasions, take a particular Care of the Prerogative of the Crown: But I humbly hope I may be admitted to observe at the same Time, that this is a Case too wherein the Property of all the Subjects of *England* is very highly affected; for I am bold to say, that if the Practice which is now contended for be allowed to prevail, no Man can be safe in transacting with another, who has any Thing to do with the Money of the Crown.

My Lord, the Case has been fairly opened by Mr. *Bootle*, as it stands upon the Record; and as to the Objection, that we are improper to take Advantage of Antedating the Extent upon a Plea, as averring against the Record, which imports it to have issued on the 6th of *July*, I must own I am a little surprized to find that Matter so strongly insisted on, after what has already passed in this Cause.

It is in the Memory of every Body who attends this Court, how much we pressed to have this Writ superseded, as a Writ that had irregularly issued; and we then offered the Distinction between an erroneous and an irregular Proceeding; that the one may be taken Advantage of by a Writ of Error, or by Plea; and that the other depended upon the Practice of the Court, and was proper to be redressed at my Motion; but the Court being of Opinion that we might have Advantage of this Matter on a Plea, we acquiesced accordingly: And having now pleaded it, in Consequence of that Opinion, it is very extraordinary now to see how the Argument is turned upon us. On the other Side, when we moved on the Irregularity, we were told by them, It was a Matter we might have the Advantage of by Plea; and now we have pleaded it, they object against it for that very Reason.

My Lord, in *Lut.* 332; 1 *Leo.* 173; 1 *Sid.* 273, there are Instances of these Averments, that Writs did not Issue till a Day subsequent to the Teste. I can't say the Judgment of the Court is either Way upon these Cases; but since in this Case the Court have already given their Opinion, that this was a Matter pleadable, I don't think myself any otherways concerned to answer this Objection.

If I rightly apprehend, the Design of the Court, in refusing to relieve us on a Motion, was in Order for a more solemn Determination of a Point of this prodigious Consequence; and since this was a Method not invented by us, but prescribed by the Court, in Order to bring that Point upon the Stage, I little expected to hear a Matter of Form insisted on, when I apprehended we should be confined to the Merits of the Question; and as it was brought before the Court upon Record with [221] that only View we must rely upon the Justice of the Court, that we shall suffer no Prejudice by the putting this Question into the one or the other Method of Determination.

Taking it too for granted, that we are properly before the Court on this Plea, I shall beg Leave to offer, That Mr. *Attorney* having demurred to the Plea, he has thereby admitted all the Facts contained in our Plea, *viz.* That in Reality the Extent did not issue till the 5th of *October*; before which there had been a regular Commission of Bankruptcy and Assignment. And that this is a Bar to the Extent, appears from *Capel's* Case, 2 *Show.* 480, where a prior Commission of Bankruptcy and Assignment was held a good Plea to the Extent.

So 2 Ro. Ab. 158, G. 2, where a Subject extended Lands and Goods, and after Seisure, but before a Liberate, there came a Prerogative Writ, and which had Place, because there was not an actual Liberate : But in that Case it is not pretended it would have avoided the Subject's Extent, in case there had been a compleat Execution, as in Dy. 61.

That these Writs issued, tested in the Vacation, is a Fact Nobody will deny. Your Lordships Records afford us a thousand Instances of that Nature, and none of them bear Test before the *Fiat*, except in one only Instance, which I shall account for by and by. That in *Capel's Case* was Tested the 24th of *December*, which must necessarily be out of Term.

But then it is objected, That the Subject's Execution bears Test the last Day of the preceding Term, and that at Common Law the Goods were bound from that Time ; and why then, say they, should the Crown be in a worse Condition than the Subject ? especially since it must be admitted, that the Crown is not bound by the Statute of Frauds and Perjuries ?

To this I answer, That there is a very material Difference between the Case of the Crown and that of the Subject. The Subject, it is true, has his Writ Tested the last Day of the preceding Term, because he has run through the whole Course of a judicial Proceeding ; and his Cause was ripe for Execution at that Time, and he can have no Process tested out of the Term : Whereas the King, by his Prerogative, may have Execution awarded out of Term, and that in the first Instance ; and if he has an immediate Execution upon that Award, he is not in a worse Condition than the Subject, nay, he is in a much better ; for the Subject must stay till the next Term, if his Cause was not ripe for Execution.

And this differs it from the Case of a *Certiorari*, made out in Vacation, tested the last Day of the preceding Term, when there is a Necessity to test it in Term-Time, it not being a Prerogative Writ : And, besides, it is of no Consequence in the Case of a *Certiorari*, which removes all Orders, though after the *Teste*, so as they be before the Return.

And I take the true Reason why this is not provided against by the Statute of Frauds, is, that it was not a Practice so much as thought of at that Time : It was certainly a Case within equal Mischief. No Doubt but there have been many Occasions to antedate Extents before [222] this ; and the never doing it till now, is, according to *Littleton*, a strong Argument against the Legality of doing it at all. *Capel's Case* cited before, was 2 *Jac.* 2 [1686-87], and even then there was no Thought that it might have been tested backwards, so as to over reach the Assignment ; though every Body knows Matters of Prerogative went very high at that Time. And as this is a Novelty in Law and Practice, I beg Leave, in the next Place, to consider a little what will be the Consequence of it.

The Goods will, without Question, in the Case of the Crown, be bound from the Award of the Execution, according to Sir *Gerard Fleetwood's Case*, 8 Co. 171. Now the Award of Execution is in Point of Time the Test of the Writ : So that all Transactions by the Bankrupt, all Sales *bona fide*, for a valuable Consideration, and all Payments by them made in the Way of Trade, between the 6th of *July* and the 3d of *December*, will be avoided, which will introduce great Confusion.

By Law the King's Execution relates, as to Land, to the Time of becoming in Debt to the King ; and as to Goods, from the Award of Execution ; but by this Means it must, as to Goods, be made to relate to a Time precedent, even to the being in Debt ; for a Debt may be contracted in the Vacation : So that the Execution, according to this new Practice, shall issue before any Debt ; whereas the Process is to be awarded for the Debt, and must recite the Bond entered into to the Crown. In this Case indeed it was four Days old at the Test of the Writ : But what an Absurdity will it be, if it should happen to bear Date after the Term, which may be the Case ? It has been thought a little hard to make it relate as to Lands, to the being in Debt, which Debt could not appear to a Purchaser ; but it will be much harder, if it be suffered to relate to a Time before the being in Debt.

My Lord, the Practice of every Court is the Law of that Court ; and it has been so strictly adhered to, that in the Case of *Bewdly*, a Practice of seven Years only was allowed to prevail against the express Words of an Act of Parliament.

I would too consider this Writ, in the next Place, upon the Practice. And the 33 *H.* 8, c. 39, sect. 35, that Act says, That the King's Process shall be preferred, and he first shall have Execution : So always that the King's said Suit be taken and com-

menced, or Process awarded for the said Debt, at the Suit of the King, before Judgment given for the said other Person.

Upon this Act, I take it, the Suit must be said to be then taken and commenced, when the first Step is made towards the Proceeding to Execution. Now the first Step to be taken, is to procure the *Fiat* of a Baron; and then it is in Fact that the Process is awarded: So upon the Foot of the Act of Parliament this was not a Suit taken or commenced, or a Process awarded, till the Assignment of the Defendant had taken Place. The Court will, I apprehend, take Notice of its own Practice: And therefore since it appears upon the Record that there was no *Fiat* till the 5th of October, the Court will take Notice that such a Writ as this could not issue according to the Course of the Court; and then, whether we can be admitted to say, that in Fact it issued at a Day [223] subsequent to the Test, will not be material, since it appears to the Court to be so, without our Averment.

My Lord, I did mention before that there had been one Instance of antedating an Extent, and that it was the Case of the *Attorney General*, and quashed in 1713. There the *Fiat* was the 24th of *February*, and the Writ taken out upon it was tested the last Day of the preceding Term, which was the 12th of *February*; and after great Consideration, and Search of Precedents, that Writ was set aside on Account of the Novelty and Consequences of such a Practice.

So that as to Precedents, your Lordship will consider how the Case stands with Regard to them: Here is a new Sort of Writ taken out, and the only Instance of such a Writ is an Instance wherein it was set aside; they who would introduce this Practice are to justify it by Precedents, and we say there are none on that Side, but that every Extent which bears Test in Vacation, is a strong Precedent in our Favour, since if it might have been tested in the precedent Term, it is impossible to think so great an Advantage would not be taken by such learned and eminent Men as are employed for the Crown.

If this be a Prerogative, it is like all others, to be proved by Usage; and that there is no Pretence of Usage to support it, is clear. If the Crown has engaged by *Magna Charta* not to run upon the Subject, *nisi per Legem terræ*, let them shew us the *Lex terræ*, by which this extraordinary Proceeding is to be warranted.

My Lord, There having been so great an Alteration in this Court since the Time of the Motion, it may not be improper to mention what seemed to be the Opinion of the Court, as to the Merits of this Question. The Lord Chief Barons *Bury* and *Montague* were both of Opinion the Writ was illegal, and would have suspended it; *Price* and *Page* indeed were for having it pleaded: But I did not observe, that the Opinion of either of them was, that the Writ was right.

My Lord, I humbly apprehend your Lordship will consider this. Extent on the Foot it stood on the 6th of *July*, when the Bond was but four Days old; and if at that Time there was no Ground for this Proceeding, surely it is not to be supported by Matter *ex post facto*, by a mere Relation or Fiction of Law, without Precedent, to divest a Right which has been once legally vested.

For this Purpose I beg Leave to mention a Case that was in *B. R. Trin. 4 Geo. I.* [1718], *Waring* and *Dewberry*: There a Landlord, who had Rent due to him, died Intestate; after which the Plaintiff in Action sued out Execution against the Defendant, who was Tenant, and levied the Debt upon him; after this Administration was committed to *J. S.*, who thereupon came into the Court, and moved for a Rule on the Sheriff, to pay him a Year's Rent out of the levied Monies, pursuant to the 8 *Ann. c. 17*, urging, that tho' he was no Administrator at the Time of serving the Execution, yet as soon as the Administration was committed, it had Relation to the Death of the Intestate, and he might bring *Trover* for Goods taken between the Death of the Intestate and Commission of the Administration: But the Court held, that Relations, which are but Fictions of Law, should never divest any Right legally [224] vested in another, between the Death of the Intestate and the Commission of Administration; and the Plaintiff in the Action having duly served his Execution before the Administrator had a Right to demand his Rent, it was not reasonable the Plaintiff should be defeated by any Relation whatsoever. They did not, in that Case, deny the Authorities which give the Administrator *Trover* by Relation; but went on a Distinction, that will govern this Case, between Relations that are to defeat lawful Acts, and such as are to punish those that are unlawful.

An objection was taken, that we should not have *Oyer* of the first Writ; but if your

Lordship pleases to cast your Eye upon the Writ itself, you will find it is indorsed upon it, and made Part of the Record in the Case ; it is marked at the Bottom of the Writ. But they were so sensible of the Absurdity of the *Fiat* in *October* for a Writ that issued in *July*, that in this particular Instance they have deviated from the common Form, and have modestly indorsed it upon the Back of the Writ.

The Traverse is objected to, That it is to put the Matter of Law in Issue. But surely that is no new Thing : Where Matter of Fact and Matter of Law are intermixed, it was necessary to put the Matter of Bankruptcy and the Assignment in Issue ; and as we pleaded to the Inquisition, we must traverse that which is the Point of it.

Upon the whole too it is certain that his Majesty has many great and valuable Privileges and Prerogatives, and may he live long to enjoy them in their full Extent ; our own Experience of the Happiness of his Government may assure us, that he himself designs only to make the Law of the Land the Measure of his Actions : And it is a Pleasure to observe, that this single Attempt to stretch his Prerogative beyond its Bounds, proceeds only from a private Dispute between two Co-Obligors in the same Bond to the Crown, and wherein 'twas necessary to make Use of his Majesty's Name, though he is not concerned in Interest. It is one Article of the Bill of Rights, that the late King *James* had, under Pretence of Prerogative, levied Money on his Subjects in other Manner than was warranted by the Laws of the Land ; and yet it does not appear that the Practice now set up was attempted even in that Reign : And I am sure that we now live in Times so much happier than those, that it will be sufficient to confute this Doctrine, if we only shew, as I have already done, that this is an *unprecedented Attempt to stretch the Prerogative of the Crown to the Subversion of the Liberties and Properties of the Subject*.

BRIDGES *contra* MITCHELL. [1726.]

Where 20 Years Acquiescence bars Accounts between Merchants.

A Bill was for an Account by Plaintiff, a Merchant, against the Defendant another Merchant, who was his Partner. The Defendant pleads, That the Dealings, concerning which the Plaintiff prays an Account, were transacted above 20 Years before the Bill brought, and pleads such Acquiescence without Suit, and also the Statute of Limitations, 21 *Jac.* 1, c. 16, in Bar of the Account.

[225] *Per Cur'*, Forbearance of Suit for 20 Years will in Equity be a good Bar, though in a Demand by one Merchant upon another.

Secondly, It is not necessary in the Answer for the Defendant to aver his having not promised within six Years to Account, &c., unless such Promise is particularly charged in the Bill, as was resolved *inter Bodvil* and the Bishop of *Meath* in this Court ; and further, that though the Statute has been always construed to except Accounts open between Merchant and Merchant, yet that is to be understood with this Distinction, that if open Accounts be by subsequent Acts continued, they are not barred by the Intervention of such Length of Time from the original Transaction ; but if such an Account is by the Complainant deserted, then in such Case it is barred.

And held the Defendants Plea good.

HANSON and FIELDING. [1726.]

Of Exemptions from Tithes.

A Bill was brought by an Impropiator, claiming under a *Grant* from the Crown, after the Dissolution of the Religious Houses, for the Tithes of Corn, Grain, Wool and Lamb, for the Year 1723. Defendants, as to the Tithe for Wool and Lamb, say they are Lessees of the Vicar of *Austis*, and that the small Tithes did not belong to the Mother Church, but were received by the Chaplain of *Austis*, long before the Dissolution of Religious Houses, and that after they came into the *Hands* of the Crown they were also enjoyed distinctly ; as to the Tithes of Corn and Grain, they say, that the Lands were formerly Part of the Possessions of the Hospitallers of *St. John of Jerusalem*, and that their Lands were discharged from the Payment of Tithes, while they continued in their own Manurance and Occupation ; that their Lands, by Virtue of some Acts of Parliament (27, 31, 32 *Hen.* VIII.), were vested in the Crown, and were to be held and

enjoyed by the King and his Grantees, in as large and ample Manner, as the late Religious Houses held them ; that they were Grantees under the Crown, and consequently intitled to hold them discharged from Tithes.

Mr. *Bunbury* for the Defendant objected, that the Lands of the Hospitallers of St. *John of Jerusalem*, coming to the Crown by the Statute 32 *Hen.* 8, c. 24, they could not claim the Privilege of the Clause of Exemption, in Statute 31 *Hen.* 8, c. 13, by which it is appointed, that all Monasteries, Abbies, &c., which before had come, or hereafter should come to the King, by Suppression, Surrender, &c., should be held and enjoyed by him, in as large and ample Manner, as the Religious Houses held them ; and whereas many of them were discharged from Tithes, they should be held by the King, and his Grantees discharged, &c., and cited 2 Co. 47, *Bishop of Canterbury's Case*, where it was resolved, that the Clause of Discharge should extend only to those Possessions, which come to the King by the said Act, and that it would be absurd, that the Branch of the Act 31 *Hen.* 8, should extend to a future Act of Parliament, which the Makers of the said Statute [226] 31 *Hen.* 8, without the Spirit of Prophecy, could not have Fore-knowledge of, and insisted strongly upon the Case of *Cornwallis* and *Spurling*, Cro. Jac. 57, Moor, 913, as an express Authority in Point.

Serjeant *Pengelly* for the Defendant made Use of two Ways to take off the Objection. First, That Part of the Land of the Hospitallers of St. *John of Jerusalem* were vested in the Crown by the 31 *Hen.* 8, and that the 32 *Hen.* 8 was only made, because of the great Compass of their Estates (some of which were in *Ireland*), and to be so general, as to comprehend all that might be omitted in 31 *Hen.* 8, and then without Doubt the Branch of the Act, concerning Discharge from Tithes, extends to them : But if the Court should think these Lands passed only by the 32d, he thought Secondly, that even upon that Statute the Grantee should hold them discharged from Tithes ; and seeing it had been resolved by some Judges, that the Clause of Exemption in the 31 *Hen.* 8 should not extend to latter Statutes (tho' at first that was a Doubt upon the Words or hereafter shall come), he would therefore wave that, and rely upon the 32 *Hen.* 8, by which they are vested in the Crown with all Privileges, &c., now one of their Privileges was, that they should hold the Lands discharged from Tithes whilst they continued in their Occupation, which being continued to the Crown by the said Statute 32 *Hen.* 8, we say is a Real Discharge annexed to the Land, and going along with it ; and it has been accordingly expressly granted to us, for we have a Grant dated the 15th of December, 4 *Edward* 6, of this Manor of *Barnacle*, &c., with the very same Words as are in the Statute, viz. with all Privileges, &c., and we have enjoyed it ever since, with the Benefit of this Exemption ; and cited Raym. 225, *Fosset* and *Franklin*, where 'tis said *per Hale*, C. J., that by Reason of the Word *Privileges*, they shall not pay Tithes, and resolved accordingly by the Court.

Serjeant *Cummins*, senior, and Mr. *Ward*, senior, on the same Side, cited Dy. 277, pl. 60 ; W. Jon. 182 ; Bridg. 32 ; Lat. 89, and *per Ward* in *Trin. Term*, 1687, the Case of *Daniel* Vicar of *Bengeo* in *Hertfordshire*, and Sir *John Gower*, where upon considering all the Cases, this Court held all the Lands discharged, and dismissed the Bill.

Mr. *Bunbury* said in Reply, that in the Case in *Dyer*, the Lands came to the Crown by 31 *Hen.* 8, and then they were immediately exempt, as Bridg. 32 ; Lat. 89 ; W. Jon. 182. As the Case appears, the Court was equally divided upon the Point of Discharge ; as to Raym. 225, it was a very short Report, and does not appear upon what Reasons the Court went. The great Stress is laid upon the Word *Privileges*, in the Statute 32 *Hen.* 8, and yet that very Word is used in Statute 31 *Hen.* 8, and if that of itself had been sufficient, for what Reason did they insert a particular Clause of Exemption from Tithes ? He insisted upon the Case of *Cornwallis* and *Spurling*, which being determined upon a special Verdict, the Book also taking Notice, that the like Judgment was given upon a Demurrer, is of great Authority.

Gilbert, Chief Baron. Those Privileges were granted to these Ecclesiastical Corporations by Bulls from the Pope, but these Discharges, for want of a special Clause to continue them, were extinguished in as many of them, as were dissolved by the 27 *Hen.* 8, but that cramping [227] the King in his Alienations, in 31 *Hen.* 8, they put a Clause to continue to the Crown the Privileges that were in them as special Corporations ; now the Question is, whether the Word *Privileges* in 32 *Hen.* 8, has not the same Intent to carry all the other Privileges to the Crown ? If the Point had been resolved, we should not have disputed it.

Nota : It was no further settled, for when the Plaintiff went into his Proof of the

Grants of the Tithes of these Lands, they appeared to be Grants of different Possessions, therefore his Bill was dismissed.

ALLPORT *versus* THOMAS. [1725.]

On a Marine Contract, Relief pray'd against Executors.

A Person that had furnished necessary Tackling for a Ship, that was afterwards sold, by his Bill prays a Discovery of the Personal Estate of one of the Part-Owners, who was dead, and to have Relief against his Executor and the surviving Part-Owners.

Mr. *Ward*, senior, for the Plaintiff said, that by the Civil Law the Bottom of the Ship was liable to answer for the Tackle and Furniture which the Defendants had contracted for ; and here they having sold the Ship, they were very proper to demand Satisfaction out of the Profits arising by such Sale, and as their Bill was proper to have a Discovery of the Personal Estate of the Part-Owner that was dead, so from thence they would be intitled to Relief against the others ; for in the Case of *Dupins versus Duke of Kingston*, which was a Bill brought by a Millener against the Duke, as Administrator of his Son, for a Discovery of Assets, and to have a Debt which was due to her from his Son discharged, it was laid down as a Rule that Discovery should draw with it Relief.

Mr. *Bunbury* for the Defendant said, that if that was to be taken as a general Rule the Common Law would be of little Use, for then always after the Death of one of the Parties, they might bring their Bill here upon any Contract ; besides, here they should have proceeded in the Court of Admiralty to have subjected the Bottom of this Ship, and that this Court could not do it.

Chief Baron *Gilbert* said, that the Chief Distinction upon the Rule, *that Discovery should draw with it Relief*, seemed to be, that where a Discovery is prayed, and a liquidated Debt admitted by the Answer, the Court might then proceed to give Relief ; but where the Debt was unliquidated being uncertain, and sounding in Damages, it was proper for a Jury to ascertain it, there being nothing for a Court of Equity to found a Determination on ; that though this Case was within the Mercantile Law, yet it being admitted by the Answer that the Charge was for Tackling, &c., a Court of Equity must grant them the Redress as a Court of Admiralty would, *viz.* upon the Bottom of the Ship, and that it would be very hard to send them back again there to obtain Relief ; and that all the Part-Owners ought to make Satisfaction, having received the Profits of the Voyage, which the Ship was enabled to perform, by the Plaintiff's furnishing the Tackle, &c.

Baron *Hale* thought the Case of the Duke of *Kingston* should have gone no further than a Discovery, and after that should have proceeded at Law ; that in this Case the Proceeding in this Court was very proper, and they might go on ; for in the Court of Admiralty Seamen's Wages are recoverable, and they are likewise chargeable properly upon the Bottom of the Ship, and yet the Court of Chancery retains Bills for them ; and Sir *John Trevor*, late Master of the Rolls, used to say, that a Court of Equity had a concurrent Jurisdiction with them.

QUILTER *versus* MUSSENDINE. [1726.]

Non-Residence pleaded in Bar to a Bill for Tithes.

A Bill was for a Discovery of Tithes by Lessee of a Parson. The Defendant pleads 13 *Eliz.* c. 20, against Non-Residence in Bar.

Ward for the Plaintiff objected to the Plea.

First, That it was bad in Substance, for that it did not shew that he was not of Necessity, or justifiably absent (barely saying he was voluntarily absent not being sufficient), as he might have done, according to *Butler and Godall's Case*, 6 Co. 21 b.

Secondly, The Time of Absence, the Statute requires to avoid the Lease, is 80 Days and more, which ought to appear to be a continual Absence for 80 Days altogether, and at one Time. 1 Bulstrode 111, *Shepherd versus Townslee*, Mod. 436.

Thirdly, Tho' the Plea should be thought good in Substance, yet it could be no Bar to the Discovery, tho' it might as to the Relief, to prove which he mentioned the Case of a *Modus* pleaded in Bar to a Bill for Tithes, in which Case it was held, that altho' the Plea was good as to the Relief, yet it was no Bar as to the Discovery ; but that the

Defendant must answer, and shew the Quantity, Quality and Value of the Tithes ; and the Reason upon which that has been so resolved is, because if the Defendant's Plea in Bar should prove to be false, the Plaintiff then is to have a Discovery from the Defendant upon Oath, and they won't let him run the Hazard of losing such Discovery, which he might do if the Defendant should die in the mean Time ; and that in *Hillary* Term last, the Court would not allow a Plea of the Statute of Limitations to be a good Bar to a Bill for Tithes.

Fourthly, *Edlin* objected, that they had set out the Year wrong in the Plea, and that it did not appear that he was absent for above 80 Days in any one Year, taking the Year to commence according to the Computation of the *Æra* upon the 25th of *March*, as he insisted it ought.

Bunbury and *Bootle*, for the Defendant, to what had been said, gave the following Answers.

As to the first Objection, that if he had any good Excuse for his Absence, it being a Thing lying intirely within his own Cognizance, they need not take Notice of it, but he must shew it in his Replication.

And the whole Court held the same.

Secondly, The Construction they contend for would intirely defeat the Statute, for at that Rate he need only be there five Days in the whole Year ; as to the Opinion in *Bulstrode*, 'tis only that of two Judges *Obiter* ; and as to *Moor*, 436, the *insimul ac pariter* are in the special Verdict, but no Notice taken of it, that it was necessary they should be in.

[229] *Thirdly*, They distinguished this from a Plea of a *Modus*, for that admits the Plaintiff's Title to the Tithes, but only avoids the Payment of them in Kind, for that by Custom he was to have something else in Lieu of them : In that Case the Demand is allowed to be just ; and the only Question is, In what Manner that Demand is to be satisfied ? But the Plea in the present Case denies and defeats all the Plaintiff's Right and Title to the Tithes, and to any Manner of Satisfaction for them. The Plea of the Statute of Limitations was also very different from this, for that Statute could not be extended to a Demand for Tithes.

Fourthly, That the Year was to be 365 Days, without reckoning it from the 25th of *March* ; and they insisted upon the Case of *Etheridge* and *Mills* in this Court being in Point.

Gilbert, Chief Baron. The Case of *Etheridge* and *Mills* can't be distinguished from this.

Secondly, The Case in *Bulstrode* is not Law, for that would defeat the Statute *Causa qua supra*.

Thirdly, That this was a good Plea in Bar, both as to the Discovery and Relief. As to the Case of pleading a *Modus*, that allows the Plaintiff's Title, and so that is Pleading against what you allowed before.

The Reason why the Statute of Limitations was not allowed to be pleaded in Bar to a Bill for Tithes, was, that Tithes were not of the Nature of those Demands that are intended to be barred by the Statute : Besides, that Plea allows the Title ; Years shall not refer to the *Æra*, but must be intended a Solar Year, 365 Days.

Price, Baron, agreed the Year shall be 365 Days, and the Absence any 80 Days within that Compass.

As to the second Objection, how inconvenient it might be to allow such Plea a good Bar, as to the Discovery, for that supposing the Plea to be false, if the Defendant should die, the Plaintiff might lose the Benefit of a Discovery, the Answer was very plain ; for the Defendant having here shewn that the Plaintiff has no Title to the Tithes themselves, he in Consequence can have no Title to a Discovery concerning them.

Page, Baron. The Plea of a *Modus* is an Acknowledgment of the Title of the Plaintiff, and is in Part a Discovery itself ; for it sets out he is to pay so much for Corn, so much for Pigs, &c., and then it is nothing strange he should be compelled to go on a little farther, and shew the Quantity and Number of his Corn, Pigs, &c.

He took the Distinction to be between a Plea acknowledging the Title, and one which absolutely denies it. If a Bill be brought by an Heir, claiming by Descent against another, suggesting some Fraud, and praying a Discovery, there if Defendant pleads he is a Purchasor for valuable Consideration, such Plea which goes to the Plaintiff's Title is always good, both as to the Relief and Discovery. So in Case of a Bill for an Account against one as Bailiff, suggesting Fraud, if the Defendant pleads that at such

a Time he did account, he need not go on, [230] and set out an Account : And he also agreed as to the Computation of the Year.

Hale, Baron. That the Plea is a good Bar to the Discovery, and that the Case of a *Modus* had been rightly distinguished from this. (Of *Modus's* for Tithes, see 2 P. Will. 462, 520, 522, 565, 572, &c.)

As to the Statute of Limitations, he thought it might have been pleaded in Bar to the Discovery, if it could have been pleaded at all, which it could not ; for that Specialties are not barred by the Statute, and Tithes are of a higher Nature.

And he farther said, that *no Construction could be too liberal to make Parsons reside, and take Care of their Parishes.*

CUTHBERT *versus* WESTWOOD & al'. [1726.]

What Payments in Lieu of Tithes are good, &c.—No Tithes originally due of *Forest Lands.*

Bill against Land-Owners, to establish a Right of £40 *per Ann.* and in Lieu of Tithes ; which by a Decree in the Time of *Car. I.* was to be paid out of particular Lands (which were formerly Part of the Forest of *Braden*) to the Vicar of *Churchlade* in *Wiltshire*.

Two Objections were taken, for want of Parties. *First*, That these Land-Owners were Tenants to the Crown, of Lands lying within the Bounds of the Forest (which formerly paid no Tithes) ; and that so the *Attorney General* ought to have been made a Party.

Resp. It does not appear by the Bill that they are Lessees under the Crown, and the Defendants have not insisted upon it in their Answers, and so that is out of the Case.

2d Objection. It is not sufficient to make the Land-Owners only, but they should have made the *Occupiers*, Parties to the Bill, for a Decree against the Land-Owners could not affect them.

Resp. per Bunbury. That it would be endless to make all the *Occupiers* Parties ; and if that was necessary to be done, the Plaintiff could never come at his Right, for there were great Numbers of them, and any single one dying would put the Plaintiff to his Bill of Revivor ; and cited the Case of *Biscoe* against the Undertakers of the Land-Bank, before Lord Keeper *Wright*, who said he would not oblige them to bring all before the Court, since the Right might be determined by having a View ; which *Cur'* thought reasonable.

Per Cur'. Though we can decree only against the Land-Owners, who are before the Court, yet that will affect the Lands ; the £40 *per Annum* ought to be apportioned among the Owners, and the original Decree may be carried against the *Occupiers*. And

Decreed a Commission should go to inquire into and ascertain the Value of the Lands, the Owners and *Occupiers* Names, and what Proportion of the £40 *per Ann.* each Tenement ought to pay.

[231] COLEMAN Impropiator of THOMPSON in Norfolk, Plaintiff, *versus* BARKER, Defendant. [1726.]

Tithes for depasturing of Sheep on Turnips, &c.

The Plaintiff by his Bill demanded Tithe for the depasturing of Sheep on Turnips remaining on the Ground unsevered.

The Defendant said the Sheep paid Tithe of Wool, and that Tithes ought not to be paid twice.

It appeared, that after Sheering-Time the Defendant fed his Sheep with Turnips, whereby they were bettered 5s. *per* Sheep ; that they went about five Months on the Turnips, and then were sold for the Butcher ; and the Defendant brought in a like Quantity of new Sheep, before Sheering-Time came again ; so that the Plaintiff always had Tithe-Wool of the full Number.

Pengelly, for the Plaintiff, said, this Improvement of the Sheep by the Turnips was a new Increase, and that consequently Tithe ought to be paid for the Improvement and Increase ; and if the Turnips had been severed, there had been no Doubt but Tithes had been due : He cited three Cases which he relied on.

First, The Case of *Nicholas and Hooper*, 1 Ro. Ab. tit. *Dismes*, 642, pl. 7, where

it is adjudged, that if a Man pays Tithes of Lambs, and two Months after sheers the other nine Parts, he shall pay Tithe-Wool, altho' he had before paid Tithe of the Lambs ; for, says the Book, it is a new Increase.

Secondly, The second Case which he quoted was Shower's Parl. Cases, 192, *Eastmond* versus *Sandys*, a Demand for Tithe-Herbage of Oxen, which were depastured to be fatted.

The Defendant insisted, that these Oxen had been used for the Plough, and so were exempted ; that their Labour improved the Parson's Tithe, and so to pay Tithe for their Agistment would be double Tithing : But the Court of Exchequer decreed, and it was affirmed in the House of Lords, that Tithe-Herbage was due from the Time they were taken from the Plough, they being then no otherwise beneficial to the Parson in Tithes.

Thirdly, The Case most relied on was a Decree in this Court, *Hill*. 1 W. & M. [1689], *Dummer* and *Wingfield*, which was a Demand of Tithe for Pasturage of Sheep, from the Time of Sheering till they were sold. The Defendants insisted, that by the Sheep's depasturing on the Land it was improved, and the Plaintiff's Tithes bettered thereby. But the Court decreed an Account, and said that was no Bar to the Plaintiff's Demand : And this Decree, upon a Re-hearing, was affirmed.

Ward and *Bunbury*, for the Defendant, argued, That if this Demand prevailed, it would be double Tithing, which was contrary to the whole Tenor of the Law ; and cited many Cases for that Purpose. But

[232] *Curia* agreed, That it was a new Increase ; That they could not distinguish it from the Case of *Dummer* and *Wingfield* ; That the Distinctions laid down in the Case of *Eastmond* and *Sandys*, Shower's Parliament Cases, 192, were good ; and decreed, That the Defendant should go to an Account.

The End of the Exchequer Cases in England.

[233] REPORTS OF CASES HEARD AND DECREED IN THE EXCHEQUER IN IRELAND,
TEMPORE GEORGH I. [1714-1727.]

JAMES BARNWELL and EDWARD DOWDAL, Executors of THOMAS DILLON, *Plaintiffs* ;
JAMES RUSSELL, PATRICK RUSSELL, GEORGE AYLMER, WALTER HUSSEY, DANIEL
WYBRANT, ROBERT, JAMES, ELIZABETH, MARY and ELEANOR RUSSELL, Minors,
per TERENCE GEOHEGAN their Guardian, PETER DAY and EDWARD HUSSEY,
Defendants.

Subpœna Sci' Fa' to execute a Decree.

Matthew Russell being seised in Fee of *Brownstone, &c.*, by Indenture dated the 5th of *March* 1691, between the said *Matthew* and *Clare* his Wife, of the first Part, the Defendants *George Aylmer* and *James Russell*, of the second Part, and *Elizabeth Russell* and *Bridget Russell*, his Daughters, of the third Part, did grant the Premises to *James* and *George Russell*, for 99 Years, in Trust (*inter alia*) to raise out of the Profits £500 to the Use of such Daughter as should marry with one of his Name ; and in Trust to raise £50 *per Ann.* for the other Daughter, during her Life.

Bridget intermarried with *Patrick Russell*, and had Issue *Robert, James, Elizabeth, Mary* and *Eleanor Russell*, the Minors ; and *Elizabeth Russell*, the other Daughter of *Matthew*, intermarried with *Thomas Dillon*.

Matthew Russell, the Grandfather of the Infants, died ; *Patrick Russell* entered, and took the Profits of the Premises, and the Annuity of £50 was in Arrear ; and *B.* and *Thomas Dillon*, and *Elizabeth* his Wife, preferred their Bill in this Court against the now Defendants.

That pending the Bill *Elizabeth* died. *Thomas Dillon* took out Administration to her, and revives the Proceedings, and obtains a Decree for the Annuity and Arrears, and then dies.

The now Plaintiffs, Executors of *Dillon*, sue a *Subpœna Sci' Fac'* to have the Decree executed.

[234] The Defendants, by *English Plea*, plead, that an Executor of an Administrator can't revive a Decree obtained by an Administrator, but it ought to be brought by the Administrator *de Bonis non* of the Intestate ; that *Peter Russell* is the Administrator

de Bonis non; that *Dillon* did not administer the Money recovered by the Decree, that *Peter Russell*, by Deed the 24th of April 1714, for a valuable Consideration, released the said Decree; and farther, that the *Subpœna* is not sufficient, because that the said *Peter Russell* is not made a Party.

I take this to be wrong in Matter of Form, because to the *Latin* Process of this Court there can be no such Thing as an *English* Plea; as *Wan* and *Lake's* Case is full in Point, 1 Chan. Rep. 50, and is reported by Sir *Anthony Keck* as follows:

Wan versus Lake.

Demurrer to a *Subpœna Sci' Fa'.*

The Demurrer was to a *Subpœna*, in Nature of a *Sci' Fa'*; and it was, that he that brought the *Subpœna* did not thereby alledge himself Heir or Executor to him who had the Decree.

Resolved there was never any Demurrer of this Nature before, and the *Subpœna* was no Record, nor any where filed, and so not to be demurred to; but that Cause was to be shewn upon the Return of the Writ upon the Order, and the Order did mention him that brought the Writ to be Heir and Executor: So this Demurrer was conceived very ridiculous, and over-ruled.

It was attempted in the Exchequer, but denied, the *Subpœna* was the old Prerogative Process to bring any one into Court; and it appears to have been appointed first in the Reign of *Richard* the II^d, by *John Waltham*, Bishop of *Salisbury*, Roll's Chan. 371, D. No. 2.

Therefore there is no Plea to that Process, but the Plea must be some *English* Allegation to the Court: And in this Case they ought to have shewn by Motion, that the Person who sued the *Subpœna* was not intitled to the Decree.

Secondly, The Plea is not good in Substance, because the Husband is intitled to the Arrears due to the Wife out of this Estate *jure proprio*, and not merely as Administrator or Representative to the Wife, and therefore the Benefit of the Decree belongs to the Representative of the Husband, and not to the Administrator *de Bonis non* of the Wife; for whether it is taken as a Chattel Interest, or a Charge on the Estate, it belongs to the Husband; for if the Wife be possessed of a Term for Years and dies, the Husband shall have it by Survivorship, and not the Executor or Administrator of the Wife; for 'tis vested in the Husband in the Right of his Wife, and therefore it can't be devested by the Death of the Wife.

Indeed if the Wife had been dispossessed before Marriage, and no Recovery during the Coverture, the Representatives of the Wife should have the Term, and not the Husband, because it is there a *Chose in Action*, and goes according to the Contract to the Representative of the Wife, Co. Lit. 351.

[235] Now this must be looked upon as a Term in Possession, because the Trustees either were in Possession, or the Husband of *Bridget*, as *Cestui que Trust*, as Tenant at Will to them.

The Possession of a Trustee is the Possession of *Cestui que Trust*.

And the Possession of one *Cestui que Trust* is the Possession of all, as the Possession of one Tenant in Common is the Possession of the rest.

It is ruled, That the Trust of a Term shall go in the same Manner as the legal Interest would have gone. This is laid down as the Foundation of the Argument in the Case of Perpetuities, by Chancellor *Nottingham*, fo. 48, 3 Chan. Cases; and in which there was no Difference of Opinion between the Judges, because there can't be one Rule of Property in the Court of Chancery, and another in the Courts of Law. So that if this Trust of a Term is to go as the legal Interest of the Term would have gone, it must survive to the Husband.

3dly, If this Trust to make an annual Payment be looked upon as a Charge upon the Estate, it belongs to the Husband. Here the Distinction is, that if the Wife be seised of a Rent-charge during Life, the Husband (at Common Law) had the Arrears incurr'd during the Coverture; but he had not the Arrears fallen due before Marriage till the 32 H. 8, cap. 57, but by that Statute he has the Arrears incurr'd as well before as after. Co. Lit. 351 b.

This Statute takes Place in *Ireland* by 10 Car. 1, Sess. 2, cap. 5, and therefore such Arrears at Law belong to the Husband's Executors or Administrators.

Therefore his taking out Letters of Administration to his Wife, and suing as such, is only Surplusage, and does not hurt his Title ; and therefore the Benefit of this Decree belongs to his Executors, and they are intitled to the *Subpœna* ; and the Plea, &c., ought to be over-ruled.

CONSTANTINE MAGENNIS, Lessee of RICHARD CLOSE, *versus* WILLIAM and JAMES MAC-CULLOGH.

[See *Roe dem. Earl of Berkeley v. Archbishop of York*, 1805, 6 East, 90 ; *Doe dem. Courtail v. Thomas*, 1829, 9 Barn. & Cress. 296.]

Lease cancelled on a Misnomer no Surrender.

Richard Close being Tenant for Life, with Remainder to his first and other Sons in Tail, with several Remainders over to the Brothers of *Richard*, the Reversion to *Richard* in Fee (*prout* the Will) ; *Richard* makes a Lease for Years by Indenture to *William Mac-Cullogh*, and afterwards has the Lease delivered up to him by *William Mac-Cullogh* ; and then *Richard* tears off the Seal, by the Consent of *William* ; *William* continues in Possession after the Lease was cancelled as aforesaid ; and some Time after *Richard* makes a Lease to *William*, being in Possession, of the same Lands for three Lives, with Livery and Seisin ; after Livery and Seisin *Richard* marries, and has a Son, *Richard*, the Lessor of the Plaintiff.

Question 1. Whether the Lease for Years be surrendered by the cancelling the Indenture as aforesaid ?

[236] Question 2. Whether the contingent Remainders, to the first and other Sons of *Richard* the Father, be destroyed by the Lease for Lives, made as aforesaid by *Richard* the Father ?

The above Case, and Points thereon, are referred to the Right Honourable the Lord Chief Baron Gilbert, for his Judgment, at his Chamber.

I am of Opinion, that since the *Statute of Frauds and Perjuries* a Lease for Years cannot be surrendered by cancelling of the Indenture, without Writing, because the Intent of that Statute was to take away the Manner they formerly had of transferring Interests to Lands, by Signs, Symbols, and Words only ; and therefore, as a Livery and Seisin on a Parol Feoffment, was a Sign of passing the Freehold before the Statute, but is now taken away by the Statute : So I take it, that the Cancelling of a Lease was a Sign of a Surrender before the Statute, but is now taken away, unless there be a Writing under the Hand of the Party ; and the Words, *viz. by Act and Operation of Law*, are to be construed a Surrender in Law, by the taking a new Lease, which being in Writing is of equal Notoriety with a Surrender in Writing.

2dly, I am of Opinion, that if the Lease for Years continued in Being till the Lease for Lives was made, &c., as it seems by the Case that it did, then that Interest which passed from *Richard Close* to *William Mac-Cullogh* did not pass by Livery and Seisin, so as to work a Discontinuance of the Estate for Life, but only by Way of Release to the Tenant for Years, and by Way of enlarging of his Estate ; for it was a Reversion depending on a Lease for Years, and passes by Way of Grant and Attornment to a Stranger, and by Way of Release to the Tenant himself ; and such Grant and Release transfers no more than the Tenant for Life might lawfully pass, *viz.* an Estate during the Life of the Tenant for Life ; and consequently the particular Estate for Life was in Being, when the contingent Remainder came *in esse* ; and therefore I think the Plaintiff must have the *Postea*. 19 H. 6 ; 33 Gro. Eliz. 487 ; *Brook, Surrender*, 49, Tit. *Dower*, 55, *Hugh Cholmley's Case*.

KELLET *versus* CARTHMORE.

William Kellet brings an Ejectment on the Demise of *Philip Savage*, *Thomas Maule* and *John Kidmore*, against *Honora Mac-Carthmore*, of the Premises in the Declaration : On Not guilty, the Jury find a Special Verdict ; That the Plaintiff's Claim was by Letters Patent from the Crown, and that *Daniel Mac-Carthmore*, on the 22d of August 1641, was seised in Fee of the Premises ; and that afterwards, *viz.* the 14th of August 1647, by Indenture of Feoffment, conveyed the Premises (*inter alia*) to the Marquess of Antrim and *Alexander Mac-Donnel* and their Heirs, to the

Use of the said *Mac-Carthymore* [237] and Dame *Sarah* his Wife, and the longer Liver of them ; and after their Decease, as to one Moiety of the Premises, to the Use of the Heirs Male of the said *Sarah* by the said *Daniel Mac-Carthymore*, and the other Moiety to the Use of the said *Sarah* and her Heirs. They further find, that the Premises were seized and sequestered the 1st of *May* 1653, on Account of the Rebellion, which begun the 23d of *October* 1641. They find the vesting Clause in the Act of Settlement, and the Clause, Fol. 540, that the King shall have Power to nominate Commissioners, who are authorised to put the King's Declaration and Instructions in Execution ; and what they do in Pursuance of the same is declared to be good, firm and effectual in Law, to all Intents and Purposes ; and that they, and every of them, are ratified and confirmed to the final Settlement of every such Person, their Heirs and Assigns, according to such Decrees, Orders, Sentences and Judgments as have been, or shall be, by the said Commissioners, respectively given for or concerning any Matter cognizable by them against his Majesty, his Heirs and Successors, and all and every other Person and Persons whatsoever, their Heirs and Assigns ; any Thing in the said Declaration and Instructions notwithstanding. They find that *Daniel Mac-Carthymore* put in his Petition before the Commissioners, setting forth that he was seised of the Premises the 28th of *October* 1641, and for many Years after : That he was an innocent Papist, and prayed to be restored.

That *Daniel Mac-Carthymore* died the 14 of *January* 1662. That the said Dame *Sarah* and *Charles Mac-Carthymore*, Son of the said *Daniel*, put in their Petition setting forth the said Settlement, and alledging that *Daniel*, at the Time of making the said Deed, was Innocent, and that the said *Sarah* and *Charles* are innocent Papists ; on which there was a final Hearing the 28th of *July*, 25 *Car.* 2, and on such Hearing it appeared the said *Sarah* was and is an innocent Papist, and that *Daniel Mac-Carthymore* in his Life-time, and till the Time of his Death, was an innocent Papist ; and that the said Settlement appeared to them ; and therefore they Order and Decree, That the said *Sarah* is an innocent Papist within and according to the Meaning of the said Act ; and that the said *Daniel Mac-Carthymore* in his Life-time, *quoad hoc*, was an innocent Papist ; and that the Claimant *Sarah* be forthwith restored ; and that she and her Assigns may hold and enjoy the Premises, except as is after excepted, by Virtue of the said Feoffment, and by and after the Death of the said *Mac-Carthymore*, did of Right, or ought to come to her, for and during her natural Life, she the said Claimant having claimed no other Estate than for Life by her said Claim.

They find further that *Charles* is dead, and *Honora* is his Widow, and in Possession by Jointure, and that *Randal*, Son and Heir of *Charles*, is living. And hereupon 'twas argued by the *Chief Baron*,

First, It is plain by the vesting Clause in the Settlement, all Lands that were in Seisin and Sequestration were vested in the Crown, as a Royal Trustee, to settle the Adventurers and Soldiers in the Lands that were justly forfeited to the Crown, of which they were in Possession, in *May* 1649, and such innocent Persons as were to be restored in their own proper Lands. And then comes the divesting Clause, which says, That the Act is not to extend to the vesting any Lands or Tenements of any innocent Papists, their innocent Heirs, Executors, Administrators and Assigns ; but it appears both by the Declaration that is incorporated with the Act, Fol. 518, and by the Instructions, Fol. 525 and 542, that the then innocent Persons were not to be restored immediately, nor is the divesting Clause so to be construed, to take the Lands again from the King, till they had made their Innocence appear before the Commissioners : For since the Statute divests the Lands of innocent Papists, and of their innocent Heirs, Executors and Administrators, it appears by the Declaration and Instructions, that the innocent Papists were to make their Innocence appear before they could be restored to their Lands, or intitled to a Restitution.

Now as to the Innocence of Papists, and their Restitution to their former Lands, there were three Cases that chiefly happened before the Commissioners on this Head.

First, Of Innocents restored by the Decree of the Commissioners.

Second, Of Innocents left to the Law.

Third, Of Innocents *quoad hoc*.

First, As to Innocents restored by the Commissioners, the Case was thus, *viz.*

If there was any Soldier or Adventurer that was in the Possession of any Land, to which an innocent Papist claimed to be restored, if the Soldier or Adventurer did not deny the Land to be the Estate of such Papist, then such Soldier or Adventurer was

to be reprimed, and the Papist to be restored to his Land if he made out his Innocence ; and then the whole Contest between the Papist and the Adventurer was, whether the Papist was Innocent ; and if that was proved the Lands were thereby devested out of the Crown, and the Papist restored to the Possession, the Adventurer being first reprimed in other Lands.

Secondly, Of Innocents left to the Law.

This was where a Papist was innocent, and pretended a Title to Land, and summoned the Proprietor to appear before the Commissioners ; and the Proprietor not only denied his Innocence, but likewise the Title of the Papist claiming the Estate : There, if his Innocency was found, he was found Innocent at large, and left to the Law to try his Title to the Estate ; and by the Act of Explanation, such Adventurer was within three Months after the Sitting of the Commissioners, for the Execution of the Act of Explanation, to make his Election, whether he would deliver up and relinquish his Possession, and resort to Reprizals, or abide the Trial ; and if he chose to abide the Trial, then he was to be excluded from any Reprizal, tho' it went against him ; but the Papist Claimant was not to give in Evidence any other Title, but what he exhibited in his Claim before the Commissioners for the Execution of the former Act.

Thirdly, Of Innocents *quoad hoc*.

This was where there was a Decree of Innocence to such Lands, where there was no Soldier or Adventurer in Possession, or to be [239] summoned ; and where there was no Person to be summoned, as Possessor of the Lands, there the Commissioners for the Execution of the said Act of Settlement declared them innocent *quoad hoc* ; and here the Statute mentions the Grounds on which these Decrees were made, *viz.* That it arose from an Invention and Stratagem of the Papists ; that they used to claim such Parcels of Lands, to which no Opposition was made ; and when the Commissioners had declared the Claimant Innocent, they would, by Virtue of such Decrees of Innocence, claim Title to great Possessions ; which if they had claimed at first, and summoned the Adventurers to defend them, they would not have been found Innocent ; and therefore to elude such Artifices, where small Parcels were claimed, and no Person came in as Adventurer or Soldier, to oppose their Pretensions, they were used to declare them innocent *quoad hoc* : And these Decrees were by the Act of Explanation made valid, and not to intitle such Claimant to any other Lands, to which he had not exhibited his Claim.

Our Case falls under this third Head ; for *Daniel Mac-Carthymore*, who made the Settlement in 1647, was declared (Innocent) *quoad hoc*, the Lands in Question, and *Sarah* his Wife is declared an innocent Papist, and she shall be forthwith restored to the Premises, except what is after excepted, by Virtue of the Feoffment, and by and after the Death of the said *Daniel*, did or ought of Right to go to her, for and during her natural Life, she the said Claimant having claimed no other Estate than for her Life by the said Claim.

Now the Question is, Whether when *Sarah* is Tenant in Tail of one Moiety by Feoffment, and of the other Moiety in Fee, she is to be reduced, by the Decree of the Commissioners, to an Estate for Life ?

And I am of Opinion, that she still continues the Estate which vested in her before the Claim.

First, Because the Decree of the Commissioners does not make a Title to the innocent Papist. And here there is a manifest Difference between the Decree of the Adventurer and Soldier and Person to be restored ; for the Certificate and Patent begins, and makes the Title to the Adventurer and Soldier ; for that the Lands were forfeited to the King by the Rebellion. And tho' the Statute 17 *Car.* cap. 34, in *England*, had enacted, That the Lands forfeited should be set apart by Lots for the Adventurers ; yet such Lots being set out in the Time of the usurped Powers, created no Title to the Adventurers ; but the innocent Papist that was to be restored by the Act, tho' the Lands were in Seisin and Sequestration during the Usurpation, yet if he were really Innocent, no Forfeiture was ever committed ; and therefore when the Commissioners declared any Person Innocent, he was restored to his Title that he had before the making of the Act, only he had no Action for the mesne Profits. And in this Case they were in the same Condition with all other Cavaliers whose Estates were seized in those Times.

Secondly, 'Tis plain from the devesting Clause : For as soon as the Persons are declared Innocent, the Lands are devested out of the Crown ; and then they must be in the Proprietors in the same Con-[240]dition and Manner as they held and enjoyed

them before the Act. For the Commissioners had no Power to make any Alterations in Estates devested out of the Crown, for then they were out of their Power ; and when they had declared the Person Innocent *quoad* the Estate, it was out of their Authority and Power, and they would not make any Decrees to alter or change it.

Thirdly, This appears by the several Manners by which the Papist and Adventurer contested before the Commissioners ; that they did not determine the Title ; for if both the Claimant and Adventurer agreed, That the Lands in Question were the Claimant's before the Rebellion, the only Question was, Whether the Papist were Innocent ; and if he were Innocent he was then restored, because the Adventurer who was in Possession admitted it to be the Estate of the Papist ; but when the Adventurer disputed not only his Innocence, but also his Title, there, if it appeared that he was Innocent, he was declared Innocent at large, and his Title left to the Law ; which shews plainly they were never authorized to inquire about the Title. And if the Question was, Whether the innocent Papist was intitled to the Lands, that was a Question meerly to be tried by the Law. And therefore in the Act of Explanation, the Adventurer was either to make his Election in three Months, to take the Lands he had in Possession, subject to the Title of the Papist, or resort to a Reprizal.

Fourthly, It is plain from the Clause of the Innocents *quoad hoc*, that tho' the Commissioners might declare him Innocent *quoad* Part of the Lands, that they could not declare him Innocent *quoad* Part of the Estate in the Lands, because the Words of the Statute are, That "no Decrees, wherein any Persons have been declared Innocent *quoad hoc*, shall give any such Person or Persons any Title, by Virtue of any such Decree, to enter upon or enjoy more or other Lands, than what were particularly mentioned in such Decrees, but that all other Lands of such Person as was decreed innocent *quoad hoc*, which were sequestered on Account of the War, shall remain to his Majesty, to the Uses in the Act." Here 'tis plain, that this explanatory Act only extends to the Land in Dispute *quoad* which the Papist is declared Innocent. And tho' the Statute admitted a Solecism in speaking, that a Man should be Innocent *quoad* some Lands, and not *quoad* others, which was to avoid a greater Inconvenience, *viz.* that a Proprietor should be turned out of his Estate without ever being summoned or heard, or any Opportunity given him to make his Defence, yet it will not thence follow that we must admit a much greater Inconsistency, where no such Inconvenience would follow, *viz.* that he should be Innocent to an Estate for Life in Lands, and not as to the Remainder or Reversion : For whether a greater or a lesser Estate was claimed, the Tenant was to be summoned, and the *Attorney General* was to defend, where there was no Person in Possession of the Estate ; and therefore in this Case, if *Sarah* was intitled, as it appears she was, she was intitled to an Estate Tail in one Moiety of the Land, and a Fee in the other, which the Commissioners by the Act had no Authority to change, alter, or abridge.

[241] *Fifthly*, It would be the highest Absurdity, that the Commissioners should be intitled to alter the Titles of the innocent Persons, and is contrary to the whole Tenor of the Act, for that declares that such innocent Persons are to be restored ; and a Restitution must be to the Title they formerly had to the Lands, otherwise 'tis not a Restoration to an old Title, but a Creation to a new one.

Therefore I think that *Randall*, the Grandson of *Sarah*, is well intitled, by the Verdict, to the Estate ; and therefore that Judgment should be for the Defendant.

DEVIT, Lessee of COWPER, *versus* THE COLLEGE OF DUBLIN, in Ejectment.

Bill of Exceptions, &c.

This is an Ejectment, wherein *James Devit* declares against the Provost, Fellows and Scholars of *Trinity College*, on a Lease made to him the 1st of *May* 1704, for six Years, by *Arthur Cowper*. On Not guilty, Verdict is given for the Plaintiff. On this a Bill of Exceptions is entered on Record, wherein they set forth the Certificate, by which the Commissioners say, That it appeared to the Court that these Lands were seized and sequestered in the Rebellion that broke out the 23d of *October* 1641, and that these Lands were allotted to *Edward Cowper*, and certify their Judgment to the *Lord Lieutenant* and *Chancellor*, in proper Form : And on this Certificate a Patent is made *November* the 19th *Anno* 18 *Car.* 2 [1667], to *Edward Cowper* and his Heirs, under the Rent in the Certificate reserved ; and that *Arthur Cowper*, Lessor of the Plaintiff, is Son and Heir of the said *Edward Cowper*.

The Bill of Exceptions farther saith, That it was given in Evidence for the Defendant that Queen *Elizabeth*, by Letters Patent, dated the 28th of *June* in the 39th Year of her Reign, gave those Lands to the Provost, Fellows and Scholars of *Trinity College*, and their Successors; and that they the 21st of *November Anno 40 Eliz.* granted them to *Maurice Fitzgerald* and his Heirs in Fee-Farm, under the Rent of 8s., and that *Maurice Fitzgerald* was a forfeiting Person, *prout per Inquisitionem* set out.

In order to settle this Case, three Things are to be considered.

First, The general Frame of this Act, and what Persons are obliged to claim in Pursuance of it.

Secondly, The particular Construction of the College Clause.

Thirdly, The Consequence to the Titles of *Ireland*, if Claims should be allowed that are not saved in the Certificates.

First, Of the general Frame of the Act, and what Persons are obliged to claim by it.

By this Statute all the Lands that were in Seisin and Sequestration were vested and settled in the King, without Office or Inquisition; but this was not for the King's mere Use and Benefit; but the King was in Nature of a Royal Trustee, for answering the several Uses and Intents of the Act; and this was in Pursuance of the 17 *Car.* 1, c. 3, 4, in [242] which several Lands were to be set out to such Adventurers as should advance Money for the Reduction of *Ireland*.

The Lands vested in the King were to be devested by the Claims of the several Parties in Interest; and these Persons were by the Act of Parliament to make their Claims by a certain Time appointed: The Words are, "That all Persons, and Bodies Politick and Corporate, who have not already put in their Claims before the Commissioners, do put in their Claims within the Space of thirty Days immediately after the Proclamation made by the Chief Governor; which Proclamation was not to be made till the Commissioners for executing the Act should arrive at *Dublin*, and should have met for the Execution of the Commission, but as soon after as might conveniently be; and that after the said Time should be expired no Claim should be received, but the Party left without Remedy, and debarred for ever."

Now there are three Sorts of Persons particularly concerned in this Act.

First, The Soldier and the Adventurer.

Secondly, The Innocents that were to be restored.

Thirdly, The several Persons and Bodies Politick mentioned in the Act by Name.

First, The Soldier and Adventurer. And these are intitled not only in Pursuance of the 17 *Car.* 1, c. 34, but likewise by the King's Royal Declarations, which are incorporated into this Act, and say, That the Lands and Tenements, which the Adventurers and Soldiers possessed the 7th of *May* 1659, should be confirmed and made good to them: But those Persons, no Doubt, were obliged to claim, in order to divest the Lands, which by the vesting Clause were in the King.

This is plain from the two Clauses of making out Certificates, for by these the Commissioners were empowered to make out their Certificate, according to every Man's Interest; and on such Certificate the Chief Governors, with the Advice of the Council, were to order Letters Patent under the Great Seal: So that the Adventurer and Soldier being to begin a Title from the King, he was to make out his Right before the Commissioners; and the Patent was to be granted, not in the usual Way, where the Patents are *ex Gratia*, by Letters from the King, and *Fiat* to the Lord Chancellor; but these Patents were *ex Debito Justitiæ*, and founded only on the Certificate of the Commissioners, without any Order from the King.

Secondly, The Innocents that were to be restored.

These come under the divesting Clause, which immediately follows after the vesting Clause in the King: The Words of the Proviso are, "That the Act should not vest, or be construed to vest, the Lands of innocent Protestants or innocent Papists, their innocent Heirs, Executors or Administrators." Now these likewise were obliged to Claim, in Pursuance of the Act, because they were obliged to make out this Qualification of Innocence; but when they had made that appear, they were not inforced to take out any new Patents, because they were not to begin any new Title from the King, but remitted to their old Title to such Lands as they claimed, and the Lands [243] came out of the Crown, not by any Patent or new Grant, but by the divesting Clause in the Act of Parliament.

But then the Adventurer and Soldier was to be reprized, wherever such Innocent was to be restored; and the Words are, *That he shall be forthwith reprized*: So that the

Reprisal was to go *pari passu* with the Restitution. This appears by the enacting Clause, immediately following the divesting Clauses ; and also by another Clause in the Instruction.

Thirdly, The several Persons and Bodies Politick, mentioned by Name in the Act.

Those of several Sorts ; some that were restored to their old Titles or Estates, others that obtained new ones.

First, Those that were restored to their old Estates, and those by the first Act, were not obliged to claim, because they were not obliged to make out their Innocence, since they were declared innocent by Act of Parliament ; nor were they obliged to make out any Title to their Estates, because they claimed by their old Title, to which they were remitted, and not by any new Grant from the King ; and such were the Archbishops, Bishops, Deans, Duke of *Ormond*, and others.

But here a Distinction was made ; for my Lord *Clanrickard*, and several other Papists, restored by Name in the Act of Parliament, entered into more Lands than they were intitled to, and therefore such Persons, who claimed under such Clauses, were by the Act of Explanation to make out their Title to the several Parcels of Lands they claimed before the Commissioners for the Execution of the Act, within such Time as should be by them limited, or in Default thereof, to forfeit two Years Value of the Lands in their Possession respectively.

Secondly, As to those particularly named in the Act, they were to begin new Titles ; their Clauses are in Confirmation of Letters Patent granted from the King, and then the Particulars of the Estate granted appeared in the Patent, as in Sir *George Lane's* Clause, 565 ; or else the Particulars of the Lands were mentioned in the Act of Parliament, as in Sir *Robert Southwell's* Clause, 568, 569. And in these Cases there was no Occasion to claim, because they had Title by Letters Patent, or by the Act itself.

So in the Duke of *York's* Clause there seemed no Occasion to claim, which vests the Lands of the Regicides in the Duke of *York* ; and the Reason is, because by the Instructions it appeared that those Lands were ascertained by a Certificate, returned by the Commissioners into the Exchequer ; for it appears, by Instructions, that the Commissioners were to return a Particular of their Estates in the Exchequer, upon their first Sitting to do Business ; and here no reprisable Persons were in Possession, for the Regicides were in Possession, who were forfeiting Persons.

But in all other Cases, I take it, where the Persons were to begin a new Title from the Crown, and there are only general Words in the Act of Parliament, there they ought to claim, because the Commissioners are to ascertain the Particulars that are to pass by such Clauses. I can't say, but that if an Act of Parliament should grant in general Terms all the Estate of *J. S.* but that it would pass by the Act : [244] Yet such is the Wisdom of the Legislature, that where Property is concerned, the Statutes do never grant Estates and Interests without ascertaining them in the Acts themselves, or without settling some Means whereby they may be reduced to a Certainty ; for such Act would breed Confusion, instead of a certain Distinction and Settlement of Property.

When these Persons that were particularly named in the Act enter'd into their several Estates, those Adventurers and Soldiers that were possessed of them and ousted were repris'd, and these being favoured of the King, they easily obtained that such as were ousted by their Claim should be immediately repris'd ; and therefore we find that, in the Act of Explanation, those who were removed from the Duke of *Ormond's* Estate, and afterwards repris'd in *Catherlough* should retain two Thirds of it, were possessed the 7th of *May* 1659.

And there were such Numbers of those that came in on the Commissioners Stock of Reprisals, so many Innocents restored, whereby the Adventurers and Soldiers were reduced to a Necessity of claiming Reprisals, that the Stock of Reprisal fell short, and therefore the Soldier and Adventurer were by the Act of Explanation retrenched one Third of what was their real Due.

But it is the perfect Model of that Act of Parliament, that the Soldier and Adventurer was not to be removed out of what he was in Possession of, for any Restitution, till he was duly possessed of his two Thirds : This is provided both at the Beginning and Ending of the Act of Explanation. After this Retrenchment, there seems to be Room made for every Body, in Pursuance of the Act of Explanation ; for by this Act, if an Innocent claimed more than was his Due, the Adventurer or Soldier in Possession had it in his Election, either to give it up to the Claimant, and have Recourse to the

Stock of Reprisals, or choose it as Lot, and try it with the Claimant, who was to set up no Title but what he had put into his Claim.

Two Years Time was thought a competent Time, in which all these Matters ought to be settled ; and therefore a Clause was added to the Act of Parliament, that in Cases which should happen before the Commissioners, which were doubtful, and the Act found defective in Points necessary for carrying on the intended final Settlement, that the Commissioners, or any three of them, might acquaint the Lord Lieutenant, or Chief Governor and Council, with their Proceedings and Doubts, and such Order for Amendment, Enlargement of Period, Explanation and Direction, as should therein be made by the Lord Lieutenant and General Governor, and Council, should be as effectual as if the same had been inserted in the Act.

This is the Top-Stone and Finishing of this Building ; for it was apprehended by the Legislature that some Time should be given, before every Man's Right should be settled and adjusted, and the Lord Lieutenant and Council were armed with a Power to fix every Man in his proper Settlement, so that there might never after be any Controversy or Contention about it ; and this they've done by their Answer or Resolution of Doubts ; where they've ordered, that where any Certificates of Let-[245]-ters Patent shall have been passed to Persons intitled, they shall hold and enjoy the Land against the King, Bodies politick, and all Persons whatsoever, unless those whose Titles are saved in such Certificate.

Now the Persons intitled must be understood the Soldiers and Adventurers, who by the Act were intitled to receive Certificates ; for otherwise the Confirmation would be utterly insignificant, for the Construction that is made by those who argue for the Defendants, is only, that if a Certificate be granted to those that have Right to them, they shall have Right ; whereas the Meaning of the Act was to make the Certificate Final to the Parties, that after they had been retrenched they might never after be disturbed in that Part which they enjoyed ; but if the Construction were, that they were in all Points to be intitled to the Certificate, or else they were to be open to all other Titles, then it would amount to no Confirmation at all ; and this Rule made for the final Settlement of all Adventurers and Soldiers, and their Security, would come to nothing.

Secondly, We come now to the Provision for the College, which in the Act of Explanation stands thus :

Provided always, and it is hereby enacted and explained, that no Lands, whereof the Provost, Fellows and Scholars of the College of the Holy and undivided Trinity of Queen *Elizabeth*, near *Dublin*, were seised in Fee in the Year 1641, and are now in their actual Possession, nor any Lands held by Virtue of any Grant, Lease or Fee-Farm, from the said Provost, Fellows and Scholars, and forfeited to his Majesty, shall be disposed by Virtue of this, or the said former Act, but that they, and every of them remain, and be in the Provost, Fellows and Scholars, and their Successors for ever, subject nevertheless to the Payment of such Quit-Rents for the said forfeited Lands, as Adventurers or Soldiers, by Virtue of this or the former Act ought to pay ; any Thing in this or the said former Act contained to the contrary notwithstanding.

This Clause is not only a Clause of Restitution, but likewise of Augmentation of Revenue to the College, and the Reason of Augmentation at this Time was, that the Restauration had in its Consequence lessened their Income ; for during the usurped Power, the College had several Lands given them, which belonged to the Archbishop of *Dublin*, the Dean and Chapter of *St. Patrick's*, and Bishop of *Meath*, which by the Act of Settlement were all restored to them again, and therefore the Lands held of them in Fee-Farm, and forfeited to the King, were granted to them in Compensation ; but whatever was the moving or procuring Cause of this Grant, yet it was still a new Grant, and as such it was to be expounded ; so that as to the Lands which were held of them in Fee-Farm, and forfeited to the Crown, these were an Augmentation and Gift from the King, and the College was to begin a Title from him, and therefore they were to be passed to the College by Certificate and Patent, and they are not immediately vested in the College by the Act till they are claimed, nor can they, as it has been argued for the Defendants, be immediately executed by the Act in the [246] College, as the Statute which transfers Uses into Possession, and that for many Reasons.

First, Because there is no Description of the Land by Quantities, and other convenient Certainities, and therefore not being certain in themselves, must be reduced to Certainty by Somebody else ; for it can never be supposed the Statute intended to

execute the Lands, without setting out and describing the Particulars of the Lands that were so to be granted and conveyed.

Secondly, That which puts this Matter out of Doubt, is the Clause which obliges the College to pass a Certificate and Patent; the Words are, "That the Commissioners shall appoint Books to be made of the Allotments of Adventurers and Soldiers, the Augmentation of Bishops, and Provisions for the College of *Dublin*, and on Certificates under the Hands and Seal of the Commissioners, expressing the Names of the Persons, with convenient Descriptions, Denominations and Number of Acres, that then the Lord Lieutenant shall grant a Patent, without any Letter or Warrant from the King."

By which Clause 'tis plain, that the Provisions, *viz.* all the Provisions of the College must be passed to them by Certificate and Patent, as well as the several Lots of the Adventurers and Soldiers, and there was the same Reason it should be so, because they were to begin a Title, and the Right was to pass out of the Crown to themselves, and if the Commissioners were to grant a Certificate, there must be a Claim before such Commissioners, for they could not certify a Right till they had Notice there was such a Right in them.

Thirdly, There is another Clause in the Statute, that shews there was a Necessity that they should claim, and this is a Clause that stands subsequent to the College Clause, *viz.* Provided nevertheless that no reprobable Soldier, Adventurer or Officer, shewing before the 5th of *June* 1659, or Protestant Purchasor in *Connaught* and *Clare* be removed out of any Part of the Premises, which they are to have by this Act, before they be reprobated for the same, according to the said Statute, and indeed it is the whole Plan of the Act of Explanation, that the reprobable Person was to be actually reprobated before he was to be removed to make Room for any Person that was to be restored; so that this Person being in Possession of the Lands belonging to the College, was not to give up any till such Time as he was restored to other Lands; and therefore the College must needs claim before the Commissioners, otherwise it was only keeping during the Time they were to claim, and then they would oust the Person in Possession without any Claim at all, which is contrary to the whole Design and Tenor of the Act of Parliament.

Fourthly, This was the contemporary Exposition of the Act of Parliament, because they did actually claim in Pursuance of the Act, and these Claims have been read to the Court, and these can't be said to be *ex abundanti cautela*, since the Words of the Law require that a Certificate and Patent should be passed of them.

But those who have argued for the Defendants have very much relied, That since the Words of the Act are, "That no Land held by [247] Virtue of any Grant, Fee-Farm, or Lease from the College, and forfeited to his Majesty, shall be disposed of by Virtue of these Acts, but should be and remain to them for ever, any Thing in this Act to the contrary, notwithstanding;" That therefore every Disposition of these College Lands by the Commissioners is absolutely void; that the Commissioners had no Power to dispose; that what they did was *coram non judice*, and that this Clause is to be construed as the *Non obstante* in Patents, and as an Exemption; and the Lands contained in this Clause are out of the Power of the Commissioners.

It is very true, that if the Commissioners had no Power over those Lands by Virtue of this Clause, and that their Disposition was void, then no Confirmation can operate to make a void Clause good, nor would the Plaintiff have been within the Resolution of Doubts, if what the Commissioners had done was *coram non judice*.

But the Commissioners have Power over the Land granted to the College; and this appears plainly from what has been said already.

First, Because the Commissioners had a Power to declare whether the Lands had been forfeited or not, for they were to declare whether the Persons that held of the College were innocent or not, and if this Clause was to be construed as an Exception out of their Power, then they would make no Declaration of the Nocency or Innocency of the Persons holding the Lands, and consequently the College could have no Title, for they derive Title by the Attainder or Outlawry of *Fitzgerald* for High Treason, for they've set out the Inquisition, tho' they say he is guilty *per Inquisitionem*, and the Title they set upon this Record is, by the Declaration of Nocency, by the Commissioners set forth in the Plaintiff's Title, so that if the Declaration be void the College can have no Title, which concludes plainly these Lands are not out of the Verge or Power of the Commissioners.

Secondly, If this was an Exemption of the Lands out of the Power of the Commissioners, they would have no Authority to reprobate such Adventurers and Soldiers

as were turned out by Virtue of this Clause ; and by the Clause 884, such Adventurer and Soldier was not to be removed till he was reprimed ; so that to make such Construction on this Clause, as if it extended to exempt the Lands, would be to construe it in a Manner that would make it inconsistent with that Part of the Act.

If then the College ought to claim, then by the Clause 542, 543, they are debarred by their own Non-claim ; and if the Certificate was not void, but only voidable by the Clause of the College, then by the Clause 540, but more especially by the Act for Resolution of Doubts, such Certificate is confirmed against all Persons and Bodies Politick.

Thirdly, There is no Doubt but the Act of Resolution of Doubts confirms the Certificate against the Claim of any innocent Person, that is not expressly mentioned within the Certificate, and the Clause for the Innocent is much stronger penned, than that for the College ; the Words are " That this Act, or any Thing therein contained, shall not vest or be understood, or construed to vest in their Majesties, their Heirs and Successors, or otherwise to prejudice or take away [248] any Estate from any "innocent Papists, their innocent Heirs, Executors or Administrators," and yet the confirming Clause sets up the Certificate against their Title, if they be not expressly mentioned in such Certificates.

Now the Words in the Innocents Clause, That they shall not vest, are much stronger than the Words in the College Clause, That they shall not be disposed of ; the Innocents, is a Clause of Restitution to the Land, to which the King had no Title by Forfeiture ; the College Clause is a new Grant of Lands under a Forfeiture ; if therefore by the Resolution of Doubts, the Person that claims by Certificate is to hold against the Title of the Innocent, he ought to hold against the Title of the College where 'tis not mentioned in the Certificate.

To consider the Consequences of this Doctrine, if this Certificate should be adjudged void.

And this Twofold.

First, That the Adventurer and Soldier would be perfectly stripped of his Inheritance, because he could not be reprimed, which were to destroy the Title of a Person who was a Purchaser for valuable Consideration, under several Acts of Parliament, wherein by those Acts he was intitled to a Relief, and where he had likewise paid an Half Year's Rent for the King's Royal Bounty, which went towards the Charges of the Act, and likewise one Penny *per Acre* to the Commissioners and Sub-Commissioners for settling the Act, and likewise retrenched by the Act of Explanation, one Third of his real Due, and by the Terms of that Act, were not to be removed till he was reprimed ; now if after all this Construction of the Defendants were to take Place, after all these Payments and Deductions, he would be turned out without any Satisfaction at all, whereas the College only suffers by their own Laches and Negligence, where they ought to claim.

Secondly, The last and most terrible Consequence of all, if this Certificate should be adjudged void, is, that it would introduce an Uncertainty of Property through the whole Kingdom : That which is the present Happiness of the Kingdom of *Ireland* is, that after all the Revolutions and Changes, which have been in their Property, they are now come to so firm and lasting a Foundation, that, it is to be hoped, will never be shaken ; and the very Basis of this Establishment is this Certificate and Patent ; this is the Beginning of every Man's Title ; Men have no Deeds nor Evidences higher to shew, whose Estate it was before the Date of the Certificate.

I take it therefore, that these Laws of Settlement and Explanation are to be construed according to the Intent of the Legislature for the Quiet of the Kingdom, and always liberally to be expounded to the Settlement of Persons interested, and 'twill be a very dangerous Thing to the Peace of the Kingdom, if the Certificate and Patent should in any Case whatsoever be construed to be *coram non judice*.

I should have all manner of Tenderness for the Right of the College ; they are Nurseries of Religion and Learning, and therefore all Donations for Increase and Augmentation of their Revenue are to be liberally expounded : But I dare not make such an Exposition in Behalf of the College, as would let in a general Uncertainty into the Property of the [249] whole Kingdom ; and if I should adjudge the Certificate and Patent to be void, I don't know what would be the Consequence of such a Judgment : How many other Certificates and Patents may be contrary to the Direction of the Act, is what no Man living can foresee ; and if any Person should meet with Success on such a Question as this, and receive a Judgment in his Favour, that a

Certificate and a Patent are void, it would beget infinite Questions on other Certificates and Patents, and so by Degrees the whole Act of Parliament would be unravelled. On Statutes that are made for quieting the Kingdom, such Resolutions are to be made as tend to the Peace of the Nation ; and 'tis better the Non-claimant should lose the Right he would have had, if he had claimed, than a general Uncertainty should have been made in Property, by the Negligence and Laches of those who have not claimed.

It is a general Rule of Judgment, that a Mischief should rather be admitted than an Inconvenience ; it is only a Mischief to the Defendants, if their Right be barred by their own Laches in not claiming ; but it will be an Inconvenience to the whole Kingdom, if the Certificates and Patents (under which the Titles, Purchases and Settlements of this Kingdom should stand) shall be adjudged void, and *coram non judice* : Wherefore I think Judgment should be given for the Plaintiff.

PEPEYS *versus* CRERETON.

Promise to pay at the Day of Marriage, or Death.

This is an Action on the Case on a Promissory Note, whereby the Defendant promises to pay the Plaintiff £23 at the Day of the Marriage of the Defendant, or the Day of his Death.

So there is a second Count on a Promise to pay £23 to the Plaintiff at the Defendant's Day of Marriage, or Day of Death. The Plaintiff avers, That the Defendant married *Lucy Grave*, whereby the Action accrued.

The Defendant demurs generally.

The Plaintiff joins.

To this Declaration it has been objected, That there being two Days of Payment mentioned, *viz.* the Day of Marriage, and the Day of Death, and the Defendant being to do the first Act, that is, to pay the Money, that he, according to the Case of *Sir Rowland Hayward* (2 Co. 35), has his Election, which of the Times he will make the Payment.

But I think in this Case the Defendant has no Election, but must pay the Money on his Marriage ; for *Sir Rowland Hayward's* Case, and all Cases upon Bonds and Promises, turn upon this general Rule, That all Contracts are to be taken according to the Intent of the Parties expressed by their own Words ; and if there be any Doubt in the Sense of these Words, such Interpretation must be made as is most strong against the Grantor or Obligor, that he may not, by the obscure wording of the Contract, find Means to evade and elude it.

Therefore if a Man grants a Rent of £20 or a Robe to one and his Heirs, the Grantor shall have the Election, for he is the first Agent, by the Delivery of one, or the Payment of the other ; *viz.* he having [250] by his Contract undertaken to do one Act or the other. he has still left it in his Election to chuse which he will do : But if a Man grants a Rent-Charge to another out of his Lands, 'tis but one Act to be done, and the Grantee hath two Remedies, either by Way of Distress, or Writ of Annuity ; for the Grantor having granted it, he has charged his Person, and having granted it out of his Lands, he has charged his Lands also ; and having thus granted two Remedies, it must be in the Election of the Grantee, who is to have the Benefit of these Remedies, which he will have.

So in the Case of *Hill and Grange* (Plowd. 172), if a Man makes a Lease for years, and reserves a Rent payable at *Michaelmas* and *Lady-day*, and there is a Condition, that if the Rent reserved be behind and unpaid at the said Feasts, and ten Days after, that then the Lessor shall re-enter : The Construction of such Leases has been, that the Rent is due at the Day, so that the Lessor may distrain for it ; but to save the Condition, the Lessee may tender at the last of the Ten Days, because those are Days of Grace given by the Condition, that the Lessee may save his Estate by the Tender ; and therefore if he tender at the last of the ten Days, it is sufficient ; and that is likewise the Day for the Lessor to demand the Rent, in order to have Advantage of the Condition broken.

In the Case of *Resvill and Coates* (1 Vent. 58) the Condition of the Bond was, that the Obligor should bring the Son and Daughter of *J. S.* at their full Age, to give such Releases as a third Person should require : The Defendant pleads that the Son is alive, and under Age ; to which the Plaintiff demurs, and the Demurrer allowed ; for the

Force of the Bond is not suspended till they are both of Age, because 'tis to be taken, not conjunctively, but respectively and distributively ; for the Obligor undertakes that the Daughter shall release at her full Age, as well as the Son ; and if she does not, the Condition is broken.

And so universally, when any person undertakes to pay Money on two several Contingencies, the natural Sense of such Contract is, that he must pay it at either of the said Contingencies, for the putting in, that he shall pay at the one or other, is for the benefit of the Oblige or Promisee, that he may have his Money at any of the Contingencies happening : And this is the genuine Signification of those Words, and likewise that which is strongest against the Promisor or Obligor ; for if he would have the Payment suspended by both the Contingencies, the Promisor or Obligor must take Care in express Words to limit the Payment, after the happening of both Contingencies : And there is an express Resolution in the Case of *Sayer and Gleane* (1 Lev. 54, 55), in Debt on an Obligation, That if a Ship put to Sea, and either the Goods or the Obligor came safe, he should pay such a Sum over and above the Use allowed by the Statute ; the Defendants plead, that the Obligor died before he returned ; and it was objected, that the Defendant had an Election to pay at which of the Contingencies he would ; and therefore the Executors of the Obligor were excused, because their Testator never returned safe. But 'twas resolved, that the Law supplies the Words *which should first happen*, and no Prejudice to the Executors of the Obligor, because it was the Sense of such Contract, that Payment should arise on either of the Contingencies.

[251] But it is much stronger in this Case, because the Promise is to pay at the Day of Marriage, or Day of Death : Now if the Payment were not to be made at the Day of Marriage, that Part of the Promise were vain and idle, and to no Purpose ; for since 'tis certain all must die, the putting into the Contract the Day of Marriage would be altogether insignificant, since, according to the Defendant's Exposition, the Payment could not be made on the Day of the Marriage of the Defendant, but must wait till the Time of his Death ; and therefore Judgment must be for the Plaintiff.

FITZ-PATRICK *versus* STRONG & al'.

In Debt upon a Bond the Defendant craves *Oyer* of the Condition, which was, That if we the above-bound *John Strong* and *Patrick Strong*, or either of us, any or either of our Heirs, Executors or Administrators, do well and truly pay to the above-named *Lawrence Fitz-Patrick*, his Executors, Administrators and Assigns, all Sum or Sums of Money which shall appear to be due upon a fair Account stated, on Account of Rent, or Arrears of Rent, due the first Day of *May* last, at or before the first Day of *November* next ensuing the Date hereof ; then the above Obligation to be void.

The Defendants plead, that on the first Day of *November* then next ensuing the Date of the Obligation, *viz. 4 die Nov. 1709*, at *Dublin*, in the Parish of *St. Michael* in the Ward of *St. Michael*, they paid to the Plaintiff all such Sum and Sums of Money which then appeared to be due on a just Account stated, on the Account of Rent, or Arrears of Rent, due on the first Day of *May* in the Year aforesaid.

To this the Plaintiff demurs, and shews for special Cause, that the Defendants had not shewn any particular or certain Sum of Money that they had paid to the Plaintiff, nor what was the value of the Rent, or Arrears of Rent, due the first of *May*.

The Defendants join in Demurrer ; & *judicium pro Quer'*.

It is here to be considered in what Cases the Defendant may follow the general Words of the Condition, and where he must plead particularly, so as to make a Bar, that is Substantive and Traversable by the Plaintiff.

The general Rule is, that every Bar being a Confession and Avoidance of the Plaintiff's Action, must be Substantive and certain, with an Avoidance of the Plaintiff's Demands, which he may traverse, and thereon go to the Issue ; because the Declaration of the Plaintiff stands confessed, as far as it is not avoided by the Defendant, as the Obligation in the Penal Sum in this Case stands confessed, unless the Defendant shews some other less certain Sum contained in the Condition, and by him paid in Avoidance of it.

But these are Cases in which the Defendant may plead a Performance, according to the Generality of the Condition ; and it shall come on the Plaintiff's Part to assign a Breach : And these are,

[252] *First*, Where the Bar is in the Negative, there 'tis impossible for the Plaintiff to go to an Issue ; for a Negative can't be proved, and therefore the Plaintiff must assign a

Breach, by replying in the Affirmative, on which the Issue may be properly taken : As if a Condition of a Bond is, that the Defendant should not deliver Possession to any Person but to the Lessor, or to such Persons as him lawfully evicted ; the Defendant pleads, he did not deliver the Possession to any, but such as him lawfully evicted : Here it comes on the Plaintiff's Side to assign a Breach, and shew that he delivered the Possession to some Person that had not lawfully evicted him, because the Condition being in the Negative, the Defendant's Plea must necessarily be in the Negative also ; and the Plaintiff, to assign a Breach, must assign a Fact directly opposite to such Negative Condition. 1 Lev. 83, *Pullen versus Nicholas*. So if an Obligation be to perform an Award, and the Defendant pleads no Award made, 'tis not sufficient for the Plaintiff to shew an Award made in his Replication, unless he shews also a Breach, because the Defendant's Plea is in the Negative, and the Plaintiff, by replying in the Affirmative, does not shew the Obligation to be broke, for the Shewing such an Award leaves it uncertain whether it was performed or not ; and his having shewn that there was an Award subsisting, does not make it appear that he was intitled to the Money, unless he also shews that Award to be broken. *Hayman versus Gerrard*, Saund. 102. The Condition of a Bond was, that the Obligor should render an Account of the Goods of *William Narrel* deceas'd, which came to his hands, and make an equal Dividend between him and the Obligee : The Defendant pleads, no Goods came to his Hands ; the Plaintiff must reply what Goods came to his Hands, and over that assign the Breach that he did not account for them ; because the Plaintiff, by replying the Goods came to the Defendant's Hands, leaves it on his own Shewing indifferent to the Court, whether he be intitled to the Penalty of the Obligation or not, unless he goes over and shews, that the Defendant did neither account nor divide them.

Secondly, Where the Condition refers to a Multitude of Particulars, which may never be brought to Issue by the Parties, there 'tis sufficient for the Defendant to plead in general ; and it lies on the Plaintiff, by way of Replication, to assign a Breach ; because for the Defendant, in his Plea, to descend to that great Variety of Particulars, would overcharge the Record to no Purpose, and would tend to intangle the Defendant, who would fail, if he mistook in pleading any of them ; whereas the Plaintiff, by choosing out of that Variety that singular Matter by which the Condition is broken, brings it to one proper single Issue : And therefore in this Case the Modern Lawyers have relaxed the ancient Rules of Pleading which required the Bar to be sufficient and substantive ; and, in such Cases, have only required the Defendant to follow the Generality of the Words of the Condition, without descending to Particulars.

Thus anciently, where the Bond was for Performance of Covenants, they held it necessary to demand *Oyer* of the Condition, and likewise of the Covenants, and to plead particularly the Performance of each of them. 26 Hen. 8, 5. But this was found to be very inconvenient, be-[253]-cause this over-loaded the Proceedings with a Recital of all the Covenants, and exhibiting to the Court a Performance of each of them ; whereas one might be in Controversy between the Parties, and if one only were broken, 'twas as sufficient and effectual for the Recovery of the Penalty, as if there had been a Breach of them all ; and therefore it was thought much more convenient, that the Defendant should plead a general Performance, and the Plaintiff should assign a Breach in such particular Covenant as he insisted on to be broken.

But this Rule, touching the Proceedings in general, fails in these four Particulars :

First, Where some of the Covenants are in the Negative ; for a Negative can't be said to be performed in a proper literal Sense (tho' the not doing may improperly be called a Performance), and therefore on a Special Demurrer the Defendant's Plea would be bad ; *aliter* on a General Demurrer. 1 Leon. 311 ; Cro. Eliz. 232 ; 8 Co. 132.

Secondly, Where some of the Covenants are in the Disjunctive, there the Defendant can't plead Performance generally, because both the Alternatives are not to be performed ; and by pleading Performance generally, he does not shew in certain which is performed by him ; and therefore this is bad on a Special Demurrer, which shews the Want of that Certainty ; but where the Plaintiff does not demur for Want of such Certainty, it shall be intended that the Defendant performed one of them, and therefore good enough.

But in both these Cases, where the Covenants are in the Negative or the Disjunctive, and the Defendant pleads Performance generally, and the Plaintiff replies, and assigns a Breach which is ill assigned, and the Defendant demurs, the Plaintiff shall not take Advantage of this ill Pleading of the Defendant's ; because by his Replication he admits

the Performance of all the other Covenants, but that only where he undertakes to assign the Breach. 8 Co. 132; Hob. 14, 199.

Thirdly, Where the Covenants are to do a Matter of Law, as to convey, discharge an Obligation, ratify or to confirm, &c., there it must be pleaded specially; because it being a Matter of Law to be performed, it ought to be exhibited to the Court, to see it be well performed, who are Judges of the Law, and not to a Jury, who are Judges of the Fact only. 1 Leon. 172; Dyer, 229. (Hob. 69, 107; 1 Leo. 297; 1 Vent. 99.)

Fourthly, Where the Covenants are Matters of Record; because that must appear to be done by the Record, and therefore not to be tried by the Jury on the General Issue, whether the Covenants are performed or not. Co. Lit. 303.

This general Manner of Pleading is allowed, not only in Case, where, on a Bond to perform Covenants, the Defendant pleads Conditions performed, but it obtains in all other Cases, where the Defendant's Plea would be overcharged with useless Matter, by descending to Particulars; and by following the general Words of the Condition the Plaintiff can properly draw it to a single Point, by assigning a Breach; as if the Condition be, that the Defendant, at all Times, and at Request, shall deliver the Fat and Tallow of all the Beasts, &c., the Plaintiff must reply, and assign a particular Time when he did not deliver it; for if the Pleadings were not so contrived [254] as to pursue the Covenants, the Defendant would be obliged to fill the Pleadings with Multitudes of useless Deliveries, which might not be controverted by the Plaintiff; whereas the Plaintiff, by assigning a particular Breach in the Non-delivery at any one Time, may bring the whole Matter in Question. Cro. Eliz. 749.

Here likewise there is another Sub-distinction, *viz.* when the Condition consists of Matters to be done, that lie within his own Knowledge; for there, though they consist of great Variety, yet he can't plead generally, but must shew the particular Performance of all Matters in his Plea; as if the Condition was, that the Defendant, Bailiff of the Plaintiff's Manor, should render an Account of all the Rents of the Manor he has received, before such a Day; there, if the Defendant pleads he has accounted for all the Sums before such a Day, 'tis ill; but he must shew the particular Sums, because it lies within his own Knowledge only. Cro. El. 749, *Saunds and Maleverer*. So if the Condition be, that the Defendant should deliver Briefs to all Churches within such a Time, and should collect the Money given upon them, and should deliver it over to the Plaintiff, there the Defendant can't plead generally, that he has delivered the Briefs, collected the Money, and delivered it over to the Plaintiff; but he must particularly shew what Briefs were delivered, what Sums were collected, and that he delivered them over to the Plaintiff, because such particular Facts lie within his own Knowledge only. 1 Sid. 215, *Woodcock's Case*.

The Rule is, *Non sunt longa quibus nihil est quod demere possis*; and therefore the Length of the Defendant's Plea is unavoidable, where 'tis impossible to make it shorter; but where it lies as well on the Knowledge of the Plaintiff as the Defendant, there the unnecessary Prolixity is avoided, if the Defendant pleads generally, according to the Words of the Condition, and it comes on the Plaintiff's Part to assign a Breach.

But where there is no such Prolixity in the Defendant's Plea, there he can't depart from the Rule, by shewing a general Performance, according to the Words of the Condition; but he must plead it specially, by shewing in certain how 'tis performed; or else he does not plead a proper and substantive Bar, according to the Rule of Law, by which he should confess, and avoid the Plaintiff's Declaration; as if the Condition be, that the Defendant pay the Plaintiff all Manner of Costs and Charges that *J. S.* shall charge the Plaintiff with, for carrying on a Suit; the Defendant pleads, he did pay all Manner of Costs and Charges; this is ill, because it relates to one single Point, which may and ought to be sued in certain, in order that the Plaintiff may take Issue on it. 1 Lutw. 419; Nel. Lutw. 126, 127.

So in the Case at Bar, it is not enough for the Defendants to say, that the Defendants paid to the Plaintiff all such Sums of Money which then appeared to be due on a just Account stated, because he does not shew any Sum in certain; and not shewing what is paid there, there is no proper Issue for the Jury to try; and therefore saying that at such a Time, and such a Place, he paid all Sums, is shewing nothing in certain, on which the Plaintiff can descend to Issue; and therefore the Obligation stands confessed, since the Defendant does not [255] shew to the Court that it is properly avoided, by the alledging the Payment of any other Sum, that by the Condition is to be paid in

Discharge of the Obligation, and consequently the Plaintiff's Declaration stands good : *Et ergo judicium pro Quer'*.

Note : Where the Condition of a Bond is to perform Covenants in an Indenture, and the Defendant bringing the Indenture into Court pleads that there are no Covenants, the Plaintiff may in his Replication pray that the Indenture may be inrolled, and on such Inrolment he shall have Judgment on Demurrer ; because by the Inrolment it is become Part of the Plea ; and it appears that the Defendant on his own Knowledge has pleaded a false Plea. 1 Saund. 316.

LODGE, Lessee of RUSSEL, *versus* The Widow JENNINGS.

Will attested by three Witnesses at different Times. See Lucas's Rep. 15.

This is an Ejectment, brought by *Joseph Lodge*, Lessee of *John Russel*, against *Penelope Jennings* ; and on Not guilty pleaded, the Jury find, that *Samuel Jennings* the 11th of *May* 1708 made his Will, which they recite *in hæc verba*, in which he gives the Lessor of the Plaintiff all his Real and Personal Estate : They farther find, that the Will was signed, sealed and published, and declared by the Testator, the 11th of *May* 1708, in the Presence of *Henry Rhodes* a subscribing Witness, who signed as a Witness to the said Will in the Testator's Presence : They farther find, that the 12th of *May* 1708 the said Will was signed, sealed and published by the said Testator, in the Presence of *Thomas Louphier* and *Edward Harmer*, other subscribing Witnesses, and that *Louphier* and *Harmer* then signed as Witnesses in the Presence of the said Testator : They find that *Russel* demised to *Lodge*, that *Lodge* entered and was ejected by the Defendant : They say farther, that if the said *Rhodes*, *Louphier* and *Harmer*, subscribing their Names as aforesaid, are three sufficient Witnesses according to the Statute, and as the Law requires ; and if the said Will so proved be a good Will in Law, and sufficient to transfer the House or Tenements, and Back-House, &c., to the said House, then they say she is guilty ; and if the said three Witnesses are not sufficient, then they say she is not guilty.

On this Special Verdict there are these two Points, *viz.*

First, Whether the Lessor of the Plaintiff has a sufficient Title, the Verdict not finding that *Jennings* the Devisor was ever seised or possessed, or died seised or possessed ?

Secondly, Whether this be a good Will within the Statute of Frauds and Perjuries ?

As to the first, I think it is sufficiently found for the Plaintiff, tho' it be not found that the Testator was ever seised or possessed, or died seised or possessed, because they find the Defendant is guilty of Trespass, in Case this is a good Will ; and it is a certain Rule in all special Verdicts, that if the Jury find the Point in Issue, and only put a Special Doubt to the Court in Matter of Law, 'tis a good Verdict ; but if they don't find a sufficient Matter of Fact to bring Light enough to the Court to resolve that Doubt, then 'tis an imperfect [256] Verdict, and an immaterial Issue, and a *Venire facias de novo* shall be awarded.

This Rule is founded on clear and evident Reason, and undeniable Authority.

It is founded on clear and evident Reason, because the Jury are Judges of the Fact, tho' the Judges are to judge and determine the Law arising on that Fact : Now the Jury being Judges of the Fact, they in finding the Gift of Action have taken upon them to find every Thing that is necessary to make the Defendant guilty, if the Point of Law be resolved for the Plaintiff ; in finding the Defendant guilty, they find every Thing that is material to make him so, in Case the Doubt of the Law in which they are not resolved appear to be for the Plaintiff, and the Court can't intend any Thing to the contrary of the Finding ; therefore in this Case the Court can't intend the Devisor was not seised, or did not die seised ; for then instead of resolving the Point of Law they would take on them to be Judges of the Fact, which is not their Province : If they should intend that the Devisor was not seised, or did not die seised, they must intend the Defendant was not guilty, tho' the Doubt of Law was for the Plaintiff, which would be an Intendment against the express Finding of the Jury ; and then the Court, who are no Judges of the Fact, would resolve against the Judgment of the Jury, who are Judges of the Fact.

Again, It is the Nature of a Special Verdict that some especial Point at Law be found ; now when that special Point is removed by the Resolutions of the Law, it is as if that were only a general Verdict, and it would be absurd for the Judges to intend any Thing

contrary to such Finding ; and the Special Verdicts are drawn up with a *Si, &c.*, i.e. if the Special Point at Law be for the Plaintiff, they find the Defendant guilty (5 Co. 97) ; if for the Defendant, not guilty ; and the Judge would not permit the Jury to find such Special Verdict, if all Matters necessary to come to that Point had not been proved.

Secondly, As to the Authorities. It is resolved in *Goodall's Case* (Cro. Jac. 63), that on a special Verdict the Court will never doubt farther than the Jury have doubted : The same Rule is laid down Hob. 55, 262 ; Cro. Car. 458 ; 2 Roll. Abr. 698.

In the Case of *Fairchild and Gaire*, in an Action of Trespass, the Jury doubted whether a Surrender of a Donative Rectory to the Donor was legally good or not, and do not find that the Donor had accepted such a Surrender : Yet because the Jury's Doubt was, whether the Surrender was good ; and if the Surrender was good, they found for the Plaintiff ; the Court held, that such Acceptance shall be intended, and yet the Plaintiff had no Title, unless such Surrender was accepted (Cro. Car. 21).

In Ejectment, *Castle and Hobbs*, the Jury find no Title in the Plaintiff, but found that *Hen. 8* was seised and conveyed to the Defendant by Patent, which they set out *in hæc verba*, and pray the Discretion of the Court, touching that Patent. The Court adjudged it a void Patent. It was objected, that there being no Title found for the Plaintiff, he could not recover : But 'twas resolved by the Court, that the sole Question being, whether the Patent was void, they would intend the Plaintiff had Title if the Patent was void, because the Jury had declared the Defendant guilty, if that Patent was illegal.

[257] In Ejectment, a Will is found, wherein the Testator devises several Rents to his Children, in several Writings under his Hand and Seal, and that his Heir should enjoy in Case of Payment, and in Case of Non-payment devises over (Cro. Jac. 41, *Molineaux* against *Molineaux*). *John* his Son and Heir paid, who left *Edward*, who conveyed to *Bridget*, the Lessor of the Plaintiff, for Life. There were several Questions put to the Court by the Jury, *viz.* Whether the Will was good, or the Entry of the Devisees lawful without Demand ? But it was objected, that the Life of *Bridget*, Lessor of the Plaintiff, was not found ; so that the Plaintiff had no Title found, but it being on a special Verdict, the Court intended she was alive.

There is a Resolution of the same Nature in *Moor*, 267, 268 ; Cro. El. 238, *viz.*

ALLEN versus HILL.

Note : This Case seems to have been only cited in arguing the foregoing Case.—Vide Cro. El. 238, 239, That this Case is an Authority to the Purpose, for which it is cited here, but the right Point is not taken.

In Ejectment, Special Verdict was found, that an Estate for Life was devised to *Agnes*, on Condition, that if she departed clearly out of *London*, and dwelt in the Country, she should have a Rent, &c. They find that she *totaliter* departed from *London*, and went to *Milton* in *Suffolk*, and after, the Heir before Entry, and the Executor, release to *Agnes*, and afterwards the Heir entered. Question was, Whether this Release was good, which depended on this Point of Law ? Whether, after the Condition was broken, the Estate was devested before an Entry ? For if so, she was Tenant at Sufferance, and the Release would not enure by Way of Enlargement of her Estate. The Judges resolved she was only Tenant at Sufferance. 'Twas then objected, that the Verdict was insufficient, for the Condition does not appear to have been broken ; for it was not found that she dwelt in the Country : But the Court was of Opinion that it must be intended she did dwell in the Country, and consequently that the Condition was broke ; because the only Point the Jury doubted of was, whether the Estate for Life was devested out of her without Entry ; and whether she had such an Estate, as a Release would operate upon.

But it has been objected, that the Seisin of the Devisor, and his dying seised, can't be taken by Intendment ; and for this, the Case of *Plumer and Whitcot*, which has been reported in 1 Vent. 214 ; 2 Mod. 119 ; but much better in 2 Lev. 158, and 2 Jones, 60.

The Case is this : An Action of Debt is brought against *Sir Jeremy Whitcot*, as Guardian of the *Fleet*, in Fee, for the Escape of *Holt*, in Execution for £2000 at the Plaintiff's Suit, out of the Custody of *Duckenfield* ; to whom *Sir Jeremy* had granted that Office for his own, and two other Lives. On *Nihil debet* a Special Verdict was found, That *Sir Jeremy* was seised in Fee of the Office, and made a Grant for three Lives to *Duckenfield* ; that *Holt* and divers others, in Execution for great Debts, did escape out

of the Custody of *Duckenfield*; and that he being a Man of desperate Circumstances suffered them to escape, and went with them; and that *Duckenfield*, at the Time of the Grant, and the Commitment of *Holt*, and of his Escape, was insufficient; and the Question referred was, Whether *Jeremy Whitcot* the Defendant, [258] on the Statute of West. 2, *quod respondeat Superior*, should be obliged to answer this Debt? And this having been several Times argued at the Bar, *Wild* from the Bench took an Exception that the Verdict was insufficiently found, because it did not find *Duckenfield* insufficient at the Time of the Action brought; and, on that Exception, a *Venire Fac' de novo* was awarded.

But this Case, which I admit to be Law, does not impugn the Doctrine I have laid down; for in this Case there was not a sufficient Finding, but it comes within the second Branch of the Distinction. For here is not sufficient found to bring the Matter of Law in Judgment before the Court; for the Action being on the Statute of West. 2, cap. 11, which says, *Si Custos Gaolæ non habet per quod justicietur, vel unde solvat, respondeat Superior*: So that the Gist of the Fact, from whence the Point of Law did arise, is the Insufficiency of the inferior Gaoler at the Time of the Action brought; for otherwise no Action lay against the Superior: So that the very Fact is not found, that brings the Question touching the Law before the Court. But this no Way contradicts the Rule already mentioned, touching Special Verdicts, nor in the least influences the Resolution of this Court: For here all Facts are found that create any Doubt, touching the Legality of the Will; and therefore the Court can't receive any Doubt on any Thing that is the Matter found, as touching the Devisor's being seised, or dying seised.

So is the Case in Ro. Ab. Tit. *Trial in Ejectment* (2 Ro. Ab. 699). The Jury find a Special Verdict, That *J. S.* was seised of the Manor of *D.* in his Demesne as of Fee; in which Manor there was a Copyholder, who did Waste, by cutting an Oak; and that *J. S.* the Lessor of the Plaintiff, being his Cousin and Heir, entered on the Place where, &c., for the Forfeiture, and was seised in his Demesne as of Fee, and conclude, *si super totam materiam* he had Title, they find the Defendant Guilty; if not, they find him Not guilty. This was judged to be an imperfect Verdict, because here is no especial Doubt left to the Court; but the Court must judge upon the whole Title; and if *J. S.* had aliened, the Forfeiture had been dispensed with; and if the Lessor of the Plaintiff had re-purchased from the Alienee, he would have no Estate by reason of the Forfeiture, though he had been Cousin and Heir to *J. S.* So that the very Gist of the Plaintiff's Title in this Case is the Continuance of the Seisin of *J. S.* and the Descent of the Manor to the Lessor of the Plaintiff.

So in the same Page, Pl. 11, in *Ejectment* by the Lessee of the College, the Jury find a Special Verdict, That the College made a Lease to *A.* upon Condition, and find a Special Matter in Law, where the Condition was broken, and find that the Bailiff had entered and leased to the Plaintiffs, and did not find that the Bailiff had any Deed from the College: This is an imperfect Verdict, for here likewise the Jury doubted *super totam materiam*; and the very Gist of the Action is, Whether the Condition is broken or not? Which Condition giving the Plaintiff a Right of Entry, it can never appear to the Court that there was any Breach, unless there be an Entry for that Condition; and a [259] Corporation can't make a Bailiff without a Deed, and therefore the Bailiff without a Deed can't enter for the Condition broken.

And the same Rule holds likewise in the Case of *Gimblet and Sands* (Cro. Car. 391), in *Ejectment*; where a Special Verdict was found, that *Humphry Martin* was seised in Fee, and made a Settlement to the Use of himself for Life, and then to his Wife for Life, and then to his Son *John Martin*, and the Heirs of his Body lawfully begotten: And afterwards *Humphry Martin* infeoffed *John Smith* with Warranty, who infeoffed *Smith* with Warranty, who infeoffed *Baskervill*, the Lessor of the Plaintiff. *John Martin* was the only Son of *Humphry* by that Marriage; & *super totam materiam*, if the Plaintiff had Title, they found for the Plaintiff. Now here the Court would not intend *John Martin* to be Heir, for that is the very Gist of the Fact, and is absolutely necessary, to bring the Doubt before the Court: For if *Humphry* had a Son by a former Wife, then the collateral Warranty would not descend upon *John* to bar him.

So that this is the Question of Fact left undetermined by the Jury, which is perfectly necessary to form the Resolution of Law thereupon, and being not found, it is an imperfect Verdict; for it does not settle such a Fact as the Court can determine a Matter of Law upon.

But in this Case every Thing is settled to resolve our Doubt, whether the Will be

legally executed or not ; for the Doubt is not touching the Title of *Jennings* the Devisor to make the Will, but whether he has actually made an effectual Will within the Statute, by executing it in the Manner they have found ; and therefore the Seisin, or dying seised, of the Devisor, is out of the Case.

We come now to the second Point, *viz.* Whether this be a good Will, according to the Solemnities required by the Statute of Frauds and Perjuries ? The Words are : And be it farther enacted by the Authority aforesaid, that from and after the said Feast-Day of the Nativity of *John the Baptist*, 1696, all Devises and Bequests of any Lands, Tenements, or Hereditaments, devisable either by Force of the Statute of Wills, or by this Statute, or by Force of the Custom of any Borough, or any other particular Custom, shall be in Writing, and signed by the Party so devising the same, or by some other Person in his Presence, and by his express Directions, and shall be attested and subscribed in the Presence of the said Devisor, by three or more credible Witnesses, or else shall be void and of none Effect."

The better to consider this Matter, we will consider what was the Inconvenience the Statute design'd to prevent ; and for this I would look back, to know how the Law stood before the Statute, and then consider the Solemnities the Statute has added.

At Common Law there was no such Thing as a Will of Lands ; and in this the Rule of Property of these Kingdoms (which, as *Coke* says in his first Institute, was *feudal*, and not *allodial*) agrees with all the foreign Feudists, Lib. 1, *Feudorum Tit. & Filius ; succedent Filii, vel Nepotes ex Filio, nulla Ordinatione defuncti in Feodo manente vel alente ; & Godofridus Gloss.* And all the Feudists agree, that there could be no Legacy nor Testament of them ; and the Reason is [260] the same in their and our Law ; for all feudal Lands pass by Feoffment, with Livery of Seisin, which they called Investiture, and was done in a solemn Manner in the County ; and the Heir coming in by the Words of the Feoffment, it prevented all Dispositions by Devise ; and in the *Feudum Nobile*, or Knights-Service Tenure, the Body and Lands of the Heir was in Ward to the feudal Lord, for his Education to Arms ; and therefore no Disposition by Will was admitted to his Prejudice.

That which altered this Law first in *England* was the Feoffment to Uses, which were first invented to elude the Statute of *Mortmain*, and then applied to several other Purposes ; and when they distinguished the Use from the Propriety, they resolved that the Use was devisable, as we see Bro. Feoffment to Uses, 337, 1 C. 123. But when the Statute 27 H. 8, in *England* had transferred Uses into Possession, there arose this Inconvenience, that Persons by their Wills could not provide for their Children or Relations ; and therefore the Statute 32 H. 8, c. 8, was made, which is derived hither by 10 Car. 1, and by that Statute a Man had Liberty to dispose by Will in Writing of all his Socage Lands, and two Thirds of his Knight-Service Lands ; and by this Statute no particular Solemnity is required in the Making such Will, but the Writing only.

There were several other Lands in Boroughs, which by the Custom of the Borough were devisable by Nuncupative Wills only ; and this, before the Conquest, seems to be the general Rule ; and the *Gavelkind* Lands, which did very much partake of the *allodial* Quality, were likewise deviseable by the Custom ; but there was no particular Solemnities required in making such Wills : Therefore Sir *Thomas Smith*, who was a good Civilian, and lived in Queen *Elizabeth's* Time, in *Republica Angliæ*, cap. 12, takes Notice, that our Wills were not subject to the Solemnities of the Civil Law, but made with all Liberty, and as much Freedom as in *Jure Militari*.

Now the *Roman* Military Testament was made *in procinctu*, and was a Favour allowed to the Soldiers in the War, to devise either by Word or Writing, without the Solemnity of Witnesses ; and with us there being no Solemnity required but that of Writing, which was by the 32 H. 8, the Testaments were construed *secundum jus gentium* ; and the Military *Roman* Testament being that which was most free from all Ceremony and Solemnity, therefore they construed that our Wills might be made after the same Method.

Hence it came to pass that a Nuncupative Will was good for Chattels till this Statute ; and where the Lands were Testamentary, as they were according to the Custom of (some) Boroughs, they allow'd a Nuncupative Will to pass them ; and even since the Statute, if the Will be made of Goods, and written in the Party's own Hand, without any Witnesses at all, it is allowed to be good ; but it is not a nuncupative but a written Will, and the Statute does not require any Witnesses to Chattels only.

But there were many Inconveniences found after this Statute of H. 8, for Men would

set up Papers that were not signed by the Deceased, and would get Witnesses to swear to the Publication of it ; and this was [261] easily contrived and construed, since there were no Solemnities required at the Publication of it.

2. If any Preparation was made for a Will, they would get Witnesses after the Decease of the Party to swear to the Publication of it ; and often old dormant Wills were set up, and the latest Wills were smothered by such Contrivances.

3. In Boroughs, where Nuncupative Wills were allowed, it occasioned much Perjury, by swearing to Words that were never spoken.

To prevent these Inconveniences, was the Clause in the Statute of *Frauds and Perjuries*, which was 29 Car. 2 (and add here the 7 W. 3). I have heard that this Statute, and that of *Intestates*, were drawn up by Chief Justice *Hale*, and the Judges of the Prerogative Courts ; and there are many Things in them that were according to the Plan of the Civil Law, and I have observed Constructions have been made accordingly.

There are by this Statute three Solemnities required, to the Making of Wills that pass Lands.

First, That it should be in Writing : For the first Statute, touching Wills, requires it should be in Writing ; yet the Lands deviseable by Custom, were not comprehended in the first Statute.

Secondly, That it should be signed by the Party : And this Ceremony was chosen rather than Sealing and Delivering, which was the Solemnity required in Deeds, because the Seal, which was formerly a great Mark of Distinction in Families, was then much disused, and Men sealed with any Seal, and not with the Family Seal ; and so the Ceremony of the Signing, used by the Civil Law, was rather chosen than our Ceremony of executing Deeds ; and the Delivery was not made necessary, because this would not discover any Fraud : The Signing is to be by the Party himself, or by some other Person by his Direction, in his Presence. The latter Part of the Clause is in Favour of such Persons who by some Accident lost their Hands, or were paralytick and diseased, and could not use them.

Thirdly, The third Solemnity is the Attestation by the Subscription of three Witnesses, in the Presence of the Testator ; and here the Statute pursues the Method of the Civil Law in *Testamentis Solemnibus*, not as laid down in *Justinian's* Institutions, but as reformed by the Code in the Novels. The Civil Law required, that the Witnesses should sign the Will, and that in Presence of the Testator : The Design was, that the Will may appear to be compleat, and not a Preparation only ; for by taking the Names of the Witnesses to his Paper, the Testator has shewn that he has compleated his Will ; and it was required that he should take the Witnesses Names in his Presence, as an Admonition, that the Names of Witnesses were necessary, that so the Parties concerned in the Will might have Resort to them after his Death.

As to the Number of Witnesses, seven were required by the Institutions, in the *Cap. de Testamentis Ordinandis* ; but this was relaxed to three, by the Constitution of *Leo* in the *Novellæ*, in *favorem eorum qui ruri & locis infrequentibus inhabitant* : And whereas the Institutes required they all should be present *uno eodemque tempore*, the Code re-[262]-laxed it in Case of Persons that had infectious Diseases ; and so 'tis not required with us, that all the Witnesses should be present at one and the same Time : For the *Romans*, who had once this Ceremony, and were very curious in the making of their Wills, thought fit to relax it afterwards ; and so when this Statute was made on the Model of the Civil Law, they omitted the Ceremony which the Civil Law had remitted. I am therefore of Opinion that it is not necessary that all the Witnesses should subscribe together, and at the same Time, because by the Words of the Statute they are only to attest the Will in Writing, and the signing of the Testator, that is what they attest and are Witnesses to ; and they are no Witnesses to their own Attestation : So if they do not attest the same Writing, as if two are Witnesses to the Will, and one to the Codicil, that confirms the Will ; this is not sufficient, because there are not three Witnesses to that Writing that is the Will : So if it be signed in the Presence of one, and published in the Presence of two others, this is not sufficient, because it is the Writing and Signing of that Will that is the Solemnity necessary to be attested ; but they are not to bear Witness to the Subscription of each other, because the Statute does not say that they shall subscribe together at one and the same Time ; and Nobody can add a new Circumstance or Solemnity which is not required by the Statute. 'Twas easy for the Statute to have said that the Witnesses shall subscribe at one and the same Time, or that they shall subscribe altogether, and in the Presence of the Testator ;

or to have said, that they should attest the Writing, which is the Will, and the Signing of the Testator ; and I can't by Construction add a new Solemnity not mentioned in the Statute ; for this is to make a new Law, and not to expound that already made.

If this were Doctrine, if one of the Witnesses signed his Name in the Presence of the Testator, but went out of the Room while the other Witnesses were signing, the Will should be void ; and to make this Construction, would overturn many Wills that have been made in this Manner.

No Man will say, that if one Man proves the Sealing of a Deed at one Time, and another the Delivery at another Time, that the Deed is not well proved, and yet the Law requires at least two credible Witnesses to the Sealing and Delivery ; why then may not a Witness prove the Signing at one Time ? If *Juncta juvant* be a Rule that will hold in a Deed, why not in a Will ? Nay, it is stronger in a Will, because the two Witnesses saw the precedent Signing of the Testator, and the precedent Subscription of the other Witnesses ; and the rather, because it appears that the *animus testandi* of the Testator continues in both his Acts of Signing.

We are now come to the Authorities. The first is in Chan. Ca. 109, where 'tis resolved, That a Will of Lands, attested by three Witnesses, who at several Times subscribed their Names at the Request of the Testator, but were not present at once together, is a good Will within the Statute.

It has been objected, that this is a Resolution in Chancery, but no Authority in a Court of Law : But I think a solid Answer is given, [263] that there is the same Rule of Property in Equity as in the Laws, and the same Constructions on the Statute Law ; and the rather, because it is a Statute for preventing of Frauds, which is the proper Business and Jurisdiction of a Court of Equity to suppress.

The next Case is *Libbe and Lee*, reported in 3 Mod. 262 ; Show. 68. I have seen a much better Report by the learned and excellent Lawyer Mr. Serjeant *Broderick*, and is thus :

In Ejectment the Jury find a Special Verdict, that *Thomas Denham* was seised in Fee, and the 21st of *January* 1678 made his Will in Writing, and thereby devised the Lands in the Declaration to be sold for the Payment of his Debts, which he subscribed in the Presence of two Witnesses, and afterwards made a *Codicil*, by which he confirms the said Will in all Particulars, not altered by the *Codicil*, and the Lands in Question were not mentioned in the *Codicil*, and declares the *Codicil* to be Part of his Will, and that the *Codicil* was witnessed by two Witnesses, whereof one was Witness to the Will ; and the Question was, Whether this was a good Will within the Statute ? And adjudged that it was, because the Writing, that is the Will, must be signed by the Party, and subscribed by the Witnesses, who must attest that very Writing that is the Will : for the Statute makes it necessary that they should attest the Will, and the Signing of the Party : For if a Man makes a *Codicil*, confirming his Will, which is not signed by himself, and subscribed by three Witnesses, the *Codicil* could not operate to confirm that Will, for there is a Nullity till it received its Perfection by the Testator's Signing, and three Witnesses subscribed, and being such, could not be confirmed by any subsequent Act ; and if such a Will be a Nullity because it is not signed by the Testator and attested by three Witnesses, it is as much a Nullity, though it be signed by the Testator and two Witnesses, because by the Statute the third is as necessary to compleat the Will as all the rest.

In the Report of Mr. Serjeant *Broderick*, this Case is put by Chief Justice *Holt*, Whether a Will signed in the Presence of two Witnesses, and then the Signing owned to be his Hand in the Presence of a third, and subscribed by each of them in his Presence, be a good Will or not ? He himself doubted of it ; but Mr. Justice *Dolben* said it was a good Will ; for the Testator owning his Hand, was a Signing, and no new Writing by the Testator was necessary ; but the only Doubt there was, Whether the Testator should not sign it over again in the Presence of the third Person, to fulfil the Letter of the Statute ? For it seems to be admitted of both Hands, that if the Testator had signed it over again in the Presence of the third Witness, that Will would have been good, though the three Witnesses were not altogether, and did not subscribe in each other's Presence.

It has been objected, That this Way of executing Wills may create great Perplexities : For if a Man should execute his Will, and afterwards purchase an Estate, and afterwards sign it in the Presence of two other Witnesses, the Question is, Whether such an Estate, which would be out of Dispute if the Will is executed altogether, would pass ?

But there is no Question but such an Estate would not pass by such Will, because it is not a Will to pass Lands, unless it be executed in [264] the Presence of three Witnesses, after such Estate purchased ; and if it were signed in the Presence of three before the Purchase, and afterwards signed in the Presence of two only, it would be void *quoad* those Lands.

Another Objection has been made, that the Intention of the Statute was, that three Witnesses to the Will might likewise attest the Sanity, and so a Will executed in the Manner in this Verdict is not effectual : For, say they, if a Will was executed before two Witnesses, and the Man was of sound Memory, and afterwards he becomes *non compos*, and signs it before a third ;

Now if such a third Signing by one Witness should make the Will effectual, the Sanity of the Person would turn upon the Credit of a single Witness.

But I don't think the Statute appointed three Witnesses, merely and principally to attest the Sanity of the Person ; for a Man must be *compos mentis* upon the Execution of a Deed, as well as a Will executed, and yet three Witnesses are not required to the Execution of a Deed : But the Design of the Statutes was to prevent Fraud in setting up of a Will that the Testator had not really made.

But if the principal Design of the Statute had been that they should attest the Sanity of the Testator, I don't see but the Attestation might be made by the Witnesses signing at three several Times, as well as signing all at once ; for if they say that at those Times the Testator appears a Man of Understanding, and that his Capacity was continuing till signed, it will be a most effectual Testimony in Behalf of the Will.

Indeed if any of the Witnesses swear that he was *non sanæ Memorix*, it will overthrow the Will, where the Signing is at different Times ; so it will if any one of the Witnesses should deny their Hands ; therefore Nobody can doubt, but that it is the better Way they should sign altogether : But because there is a Convenience in their Signing altogether, I can't from thence judge it to be necessary, unless the Statute had absolutely required it.

Again ; If it were signed at three several Times, and the last Witness should say he was *Sane*, and others attest the contrary, there the Question would be, Whether he was a credible Witness or not ? For it must be signed in the Presence of three credible Witnesses ; and as far as any Persons of equal or better Credit do counterpoise his Evidence, so far he is not credible ; but if his Credit stand unimpeached, though he stands singly, I don't see why he should not be a competent Witness of Sanity, as well in the Case of a Will as of a Deed : If there were three Witnesses that were all present at the same Time, yet 'twould not be uncontrollable Evidence of his Sanity ; for the Statute did not design to make three Witnesses conclusive, because it says it must be three credible Witnesses ; and so the Heir at Law, who is to be disinherited, may examine Counter-Testimony against them ; and in the same Manner he may, where 'tis executed at several Times : Nay, the Heir has a greater Advantage, because he may more easily invalidate the Testimony of any single Witness, when it is not corroborated by the concurrent Testimony of his Fellow-Witnesses ; but it is no Reason to damn this Manner of *ex-265]-cuting* Wills, because the Heir has thereby a greater Advantage in contesting the Proof of them.

But tho' this be a good Execution of a Will to pass Lands, where the Testator signs in the Presence of one Witness, and afterwards in the Presence of two, yet it is the safest Way to execute the Will in the Presence of all the three Witnesses ; for there may be great Difficulty in the Proof, where the Testator signs, and the Witnesses subscribe separately ; for if the Witness who subscribed by himself should die, I don't see how the Will could be proved ; for the Proof of the Hand can't be admitted, where there are living Witnesses to the Will ; and these can't prove the Subscription of the third Witness, who is dead. But because such Will thus incautiously executed may in some Cases fail in Proof, yet it is no Reason to damn such Wills, where the Witnesses are living, and prove the Signing of the Testator : And it is no Consequence, that because in some Cases there may be a Failure of Proof, therefore we should destroy a Will that is sufficiently proved.

In this Case the Will was signed by the Testator, in the Presence of the first Witness, who likewise signed in the Testator's Presence ; and the Testator signed in the Presence of the last Witnesses, who also subscribed in his Presence.

This is all the Solemnity required by the Statute ; and if any more had been required, it would have been specified in the Statute ; and I can't erect a new Solemnity to

destroy a Will, for which I have no Authority from the Statute : and so Judgment for the Plaintiff. (See *Lord Lansdown's Case*, in *Lucas's Reports*, 96, &c.)

[267] THE REPORT OF A CASE HEARD AND ADJUDGED IN THE KING'S BENCH IN IRELAND, TEMPORE GEORGII I.

DOMINUS REX *versus* DWYER.

See *Margrudge's Case* in *Keeling's Reports* ; and *Capt. Oneby's Case* in *Blackerby's Just.* 2d. Part.

Dwyer was indicted for Murder, and on the Statute of Stabbing ; and on each Indictment a Special Verdict was found, *viz.*

That on the 17th of *January* 1724, *Dwyer* met *Thomas Ross*, deceased, on *Essex Bridge*, with his Wife and two Children ; that *Dwyer* jostled one of the Children with his Horse he rode upon ; that *Ross* coming up to *Dwyer*, and having hold of his Bridle, seized him ; that *Dwyer* immediately drew his Sword and wounded *Ross*, and lighted down ; that *Margaret, Ross's* wife, interposed, to prevent farther Mischief, saying she had rather he would abuse her than her Husband ; that *Dwyer* then returned to his Horse, and the Sword wanting the Scabbard, one of the Crowd reached it towards him, and the said *Margaret* snatched the Scabbard and broke it, and threw it at *Dwyer* ; *Dwyer* then mounted his Horse, and sheathed his Sword ; and other angry Words then passing between *Ross* and *Dwyer*, *Dwyer* in a Passion dismounted again, and returns to *Ross* with his drawn Sword in his Hand ; and that *Ross* endeavoured to seize Somebody's Stick, as well to defend himself as to offend *Dwyer*, but that he could not ; that *Dwyer*, with his Sword lifted up, attacked *Ross*, assaulted and beat him with it ; that *Ross* and *Dwyer* closed, and mutually gave and received several Blows ; in which Scuffle *Dwyer* stabb'd *Ross* with his Sword on the left Pap, an Inch wide, and three Inches deep ; of which he died.

To consider this Case, we must settle the Difference between Murder and Manslaughter ; and whether, as this Case is circumstanced, it belongs to the one or the other Species of Crimes.

By the ancient *Saxon* Laws all Crimes were capable of Compensation by pecuniary Payments, for they thought that under the Christian Institution no Person ought to die for any Offence ; and therefore the Laws of King *Ina*, which are the first we have in *Lambard's Code* [268] of *Saxon* Laws, appoint proper Penalties : But no Compensation was for a malicious Murder.

The Laws of King *Alfred* began with a Preface, reciting the several *Mosaick* Institutions, and expressly after mentioning that the Christian Law was more mild : The Words are, *Ubi vero propagato Dei Evangelio plurimæ Nationes, atque adeo Angli verbo Dei Fidem adjunxerant, nonnullum per Orbem Terrarum cætus, atque etiam in Anglia Episcoporum & aliorum clarissimorum sapientiorum conventus agebantur, atque hi Divina Edocti miseratione cuique jam primum peccanti penam imperabant pecuniariam, ejusque (absque omni Divin' offensionis cogitatione exigendæ munus) Magistratibus (data prius venia) deferebant ; proditori tantummodo ac Domini desertori hanc mitiorem penam haud infligendam existimarunt, tum quippe qui ejusmodi vice minime parcendum censuerunt, tum quod Deus contemptores sui omni miseratione indigens vetuit (indignos voluit) tum quod Christus illorum qui ei mortem obtulerunt non omnia misertus : Dominum vero præ cæteris colend' statuit'.*

By this appears that the Law which mentions *de proditione Dominorum*, in which there is appointed an Estimate for the King's Head, and the Heads of other Lords, and the Penalty of Death in Case it were not paid, was in those Times thought a new Punishment ; which they did not think fit to inflict for heinous Offences, as High Treason against their Prince, and Petty Treason against their Lords, without making a Preface to reconcile such Proceedings to the Law of God.

But to punish Theft or other Crimes with Death, was esteemed directly opposite to the Religious Opinions of those Times, as appears by what the Canonists have observed on the Laws of *Frederick* the Emperor, who established, that a Thief that

stole five Shillings should be hanged : *Proles Frederici Imperatoris qui statuit in illa lege quod fur quinque solidorum suspenderetur, et sic quod homo ad Dei imaginem creatus propter bona occideretur, & alii Regis Successores, qui secuti sunt hanc legem, eorumque ministri non regnaverunt super terram & male vitam finierunt, nec Generatio eorum ad tertium gradum pervenit.*

But in *Alfred's* Law, in the Text *de Homicidio*, it appears that only a pecuniary Punishment was appointed for that Offence, and in those Times was levied only by Imprisonment, unless in the Case before-mentioned of High Treason and Petty Treason, where the Non-Payment was punished with Death. 'Tis not very hard to conceive how the Kingdom was maintained by pecuniary Mulcts only ; for in those Days every Man was put in the *Decenna*, and if he was found wandering but three Days out of the *Decennary* he was taken up and imprisoned, and he was presently to abjure the Kingdom, or else he lay at the Mercy of every one that would lay Hands on him. And if any Offence was committed in any of the *Decennaries*, if the Party was brought to answer, he was obliged to pay his Fine for the Offence, or he was imprisoned for ever : If he fled, the Tithing was answerable for his Mulet or Fine to the King. So that by this Discipline Men were put under a Necessity of being innocent, or paying a grievous Fine, or being totally deprived of the Conversation of Mankind. And the laying the Fine on the Tithing in Case the Offender fled, made it the Interest of every Man to bring the Offender to Light, and made it exceeding [269] difficult to conceal a Theft or a Murder. And these Fines set by Law were the *Vitæ Majores* ; for the Party was taken and imprisoned, and not to be set at Liberty without paying these Fines for his Redemption, which were therefore called a Ransom. But the pecuniary Punishments (*e re nata*) on Offences were called *Vitæ Minores*, or *Amerciaments*, or *Misericordiæ*, because they were referred to the Mercy of the Court, and not imposed by precise Laws ; but these becoming afterwards exorbitant, were affected *per judicium parium*. And tho' the Fines are now imposed arbitrarily, yet being imposed by the Court, they are supposed to be according to the Law and Precedents in the like Case.

Thus stood the Law till the Time of *Canutus*, who, as *Lambard* gives an Account, constituted a particular Species of Crimes, *viz.* he who insidiously killed a *Dane*, by lying in Wait, should not pay any Price, but was certainly to die, unless he defended himself by his Ordeal, &c. *Murdra quidem inventa fuerunt & constituta in diebus Canuti, Dani Regis, qui post acquisitam Angliam, & pacificatam, rogatu Baronum Anglor' remisit in Daciam exercitum suum ; ipsi vero Barones extiterunt fidejussores erga Regem, quatenus quotquot in terra secum retineret, firmam pacem per omnia haberent : Veruntamen si quis Angl' aliquem eor' interficeret, si se super hoc defendere non posset judicio Dei, scil' aqua & igni, de eo fieret justicia ; si autem aufugeret, solveretur ut supra dictum est.* The Fine, by the foregoing Law, was forty-six Marks, of which the King had forty, and the Relations of the Deceased the Residue, if the Murderer could not be brought to Justice.

Bracton gives the same Account of the Original of this Species of Crime, lib. 3, *de Corona*, capite 15, fol. 136. And it appears that *William* the Conqueror revived this Law for the Security of his *Frenchmen*, as appears by the Laws of *William* the Conqueror, Law 53, fol. 170, and by the Law of *H.* 1, Law 75, p. 205. And it seems from the Time of *Canutus* the Law began to inflict capital Punishments. *Canutus's* Laws, No. 61. *Sane quidem Tectorum excisiones & incendia, apertæ Compilationes, cædes manifestæ, Dominorumque proditioes, scelera sunt jure humano inexpiabilia.* So that now they began to admit the Distinction between Crimes expiable *Jure Divino*, which all Crimes how heinous soever are, and Crimes expiable *Jure Humano*. The not attending to this Distinction was the Original of imposing Pecuniary Mulcts in their former Laws ; and henceforward they began to think it no Offence against Christianity, to inflict capital Punishments for some Offences : Howbeit, in the Case of Theft, there was great Latitude left in the Punishment, even to *Bracton's* Time, *viz. Pro parvo enim latrocinio, vel pro parva re nullus Christianus morti tradendus, sed alio modo sic castigatur, ne facilitatis venia aliis præbeat materiam delinquendi, & ne maleficia maneat impunita, et ideo secundum rei qualitatem furatæ & valorem, si fur convictus fuerit, vel morti tradatur, aut Regnum abjurat, vel patriam, Comitatus, Burgum, vel villam, aut Castigetur, & sic Castigatus dimittatur.*

In the intermediate Times of *William I.* it appears that the Offence of Theft was punished with a pecuniary Mulet only ; and indeed it seems that as long as the *Decennary* Law continued in its full Force, [270] there seemed no Necessity of punishing Theft with

Death, because there was no Means of concealing the Things that were stolen : But when, by the Inundation of People, the *Decennaries* were dissolved, it was necessary, in Case of Theft, to proceed to greater Severities. And as the Law of Murder began in *Canutus*, so also now the Distinction began between Murder and Manslaughter. The Law runs thus :

Si quis alium præmeditatus trucidarit palam perempti cognatorum in potestatem dator ; sin cædis insimuletur tantummodo, atque in Excusatione afferenda ceciderit, Episcopum penes esto ejus rei judicium.

Hence it came to pass that the Laws relating to Homicide were reduced into Form by the Clergy, and constituted on the Plan of the *Mosaick* Law ; for the Clergy still taught, that the Life of a Man could not be justly taken away, but as warranted by the Laws of God ; and therefore the Law of Deuteronomy, ch. xix. became the Pattern of our Laws in the Case of Manslaughter.

Hence it is, that in this Law of *Canutus*, in Case of apparent Homicide, the Murderer was put in the Power of the Relations of the Deceased ; and from hence the Appeal still continues to the next of Kin, who was the Avenger of Blood, according to the *Jewish* Law.

From hence also came the Resolution, that the Avenger of Blood must make fresh Pursuit after the Offender ; and it was a good Plea, in Abatement to the Appeal, that the Heir had not made fresh Pursuit, which was plainly according to the *Mosaick* Pattern, which permits the Avenger of Blood to pursue the Offender, and to stay him, if he overtook him before he got to the City of Refuge. Deut. ch. xix.

But with us the Avenger of Blood was not permitted to carve out his own Revenge, as with them, because that Part of the Institution which permits the Avenger of Blood to stay the Offender, *lege Talionis*, was thought to be merely political, and permitted to the *Jews* merely for the Hardness of their Hearts, and was therefore thought to be abrogated by the Christian Institution, which seems to have abolished the *Lex Talionis*. Matth. v. ver. 28, & seq.

And by the Statute of *Gloucester*, cap. 9, it is provided, they should not plead in Abatement the Want of fresh Suit, if it was commenced within the Year and the Day. From hence Murderers being negligently prosecuted by the Relations, the Statute of *H. 7, c. 1*, was made, that they proceed at the King's Suit within the Year and Day ; but then the *Auterfoits* acquit or condemn'd, should be no Bar to the Appeal.

From the *Mosaick* Law came likewise the Distinction between Murder and Manslaughter ; though the Ecclesiastical Interpretation carried the Distinction much farther than the *Mosaick* Law, for by that, " whoso killeth his Neighbour, that he hated not of Time past, as when a Man goeth into a Wood, and the Helm of his Ax slippeth off, and killeth his Neighbour there, he shall fly to the City of Refuge, that the Avenger of Blood may not slay him, inasmuch as he hated him not in Time past ; but if any Man hate his Neighbour, and lie in Wait for him, and rise up against him, and smite him mortally, that he die, and fieth into one of these Cities of Refuge, he was not to be received."

[271] Indeed the *Jews* interpreted the Distinction that was made in these several Laws to be voluntary Homicide ; but by the Interpretation that was put upon this Law by the Clergy in *England*, they distinguished it into Murder and Manslaughter ; and they deemed him to be a Murderer that in Times past had conceived Hatred against his Neighbour, and laid in wait for him ; and him only to be guilty of Manslaughter, who on a sudden Provocation had committed the Homicide. This intermediate Species of Offence is not taken Notice of in *Deuteronomy*, for there the Examples are taken of the highest and lowest Offence ; the first from lying in Wait, and preconceived Malice, and the other from killing a Man with the Helm of his Ax against his Will : But this killing on a sudden Provocation being not taken Notice of there, the Christian Clergy placed it with the mildest.

It appears likewise by the Laws of *Canutus*, that the Bishop was to judge of the Proof of the Fact, who in ancient Times sat with the Sheriff or Earl of the County, in the Torn or Criminal Court ; and if they judged it to be Homicide, he took him into the Protection of the Church.

But in the *Norman* Times this Jurisdiction in the Temporal Courts was taken away from the Bishops, both by the Law of the Conqueror, and the Canon of *Toledo*, which ordains, that *hiis, qui in Sacris Ordinibus constituti sunt, in judiciis sanguinis adjuvare non licet*. And from henceforward the Bishops did not preside over the Proofs in

Criminal Cases in the Courts of Justice; and then the Criminals began to fly to the Church as to a Sanctuary; and there the Bishops having inquired into the Crime, if they thought it Homicide, they would not deliver him up; if it was Murder, they sometimes delivered him up to the Secular Power; and this they vindicated upon the Pattern of the Jewish Law. And to prevent this, it was one of the Constitutions of *Clarendon*, that if any one flew to the Church, or any privileged Place, he must either come *ad standum recto, vel quod cognoscat maleficium, propter quod se teneat in Ecclesia*; and if he did so, he had Liberty to abjure the Realm, and go into Banishment. *Bracton* spends a whole Chapter to consider how this Law could be executed; and whether, in Case they would not deliver up the Malefactor, they could enter the Church, or violate the Sanctuary? And he determines they could not, because this was *horribile nefandum*: But he says, that the Spiritual and the Temporal Power ought to aid each other; and adds farther, that whosoever carried Sustenance to the Offender, should be put out of the King's Protection. And thus the *Laicks* were brought under the King's Protection and the Civil Power, which punished all voluntary Murder with Death, and excepted the involuntary, according to the true Sense of the Jewish Law.

After which the Clergy challenged the Privilege not to be tried themselves by any Temporal Jurisdiction, and therefore the Punishments of Murder and Theft by Death (as to Ecclesiasticks) were brought in by the King's Laws.

The Ecclesiasticks also challenged an Exemption from all Secular Power, even in Cases of High Treason. Thus the *Quære* of the Canonist, *Numq' Clericus committens crimen læsæ Majestatis possit puniri [272] per principem, aut judicem secularem, cum sit temporaliter subditus? Resp' de jure loquendi quod non; Clericus enim non dicitur proprie committens crimen læsæ Majestatis, cum sit non vere subditus; tamen de facto principes seculares plures servant contrarium*: But he resolves the Clergy were to be degraded, before they were punished (though it were High Treason) by the Secular Arm. But—

They came to this Temper in *England*, That for Treason the Benefit of Clergy should not be allowed on the Canonists Notion, that they were not subject to the King; and therefore in the Case of the Bishop of *Carlisle*, arraigned for Treason, this pretended Liberty of the Church was over-ruled by the Judges: But in the Case of Murder, tho' 'twas to be punished by Death by the Laws of God, and the Flight of a *Levite* to the City of Refuge was not permitted (for the *Mosaick* Law had constituted the Cities of Refuge to be the Towns of the *Levites*), 'twas never to be abused for the Protection of a Murderer, yet the Clergy claimed even in this Case an Exemption from the Secular Laws.

But in all other Cases of Homicide and Theft, the Ecclesiastical Jurisdiction was readily allowed; and if they challenged any Ecclesiastical Person accused before the Secular Judge of any of these Offences, he was delivered to the Ordinary, who was to judge *de corrigibilitate*; and if he adjudged him corrigible, he appointed him a proper Penance, and after the Performance of such Penance he was assoil'd; but if the Offender was judg'd incorrigible, he was degraded.

When this was settled, the Dispute arose, Who should be Judge? And the Canonists say, *quod probatio & cognitio num aliquis sit Clericus debet Ecclesiasticæ jurisdictioni, debet fieri coram judice Ecclesiastico, non coram judice seculari*: Tho' in *Lindw. &c.* (which gives us many of our Institutions) 'tis said, *Clericus, contra quem procedet judex secularis pro aliquo delicto, exhibit coram ipso judice seculari jura sua & instrumenta, & eis visis, judex secularis illum remittet ad suum Judicem Ecclesiasticum, ubi scil', &c.*

The Clergy extended this Privilege to all that had *primam tonsuram*, as the Clerk that set the Psalm, the Door-keeper, the Exorcist, the Sub-deacon, the Reader, and they being Judges who were Ecclesiasticks, it was thought proper to restrain them within Bounds; and therefore the Temporal and Ecclesiastical Power joined in making the Reading before the Secular and the Spiritual Judge, as the Test of their being Ecclesiasticks, since no Man could be presumed to be an Ecclesiastick that could not read; and therefore the Reading was before the Secular Judge, but the Attestation that he could read was by the Ordinary: But before he was tried whether he was an Ecclesiastick, he was tried for the Fact; for if he was found guilty of Murder by Inquest, the Ordinary could not claim him, because, as has been said, all Ecclesiasticks in that Case suffered Death.

Anciently, when any Ecclesiastick was indicted or appealed of any Crime, under the Degree of Treason against the King, the Ordinary might challenge him; but if the Ordinary did not challenge him, he was to be tried as any other Temporal Persons.

But the Statute of *West.* 1, c. 2, provides, that such Persons delivered to the Ordinary, should not be discharged without Purgation; and this [273] was made by Articles, exhibited against the Offender, and his Answer to them in the Ecclesiastical Court: If he was found guilty of Murder in that Court, they degraded him; but if he was guilty of Homicide, he made his Purgation by Penance, or Commutations for Money, as the Ordinary thought expedient.

But because by the Delivery to the Ordinary the King lost the Forfeiture of his Goods and Chattels, and profits of his Lands, an Inquest was taken to know *qualis ordinario deliberari debeat*? This created a great Mischief to the Prisoner; for if he submitted to plead, he could not be claimed by the Ordinary, having subjected himself as a Layman to the Secular Jurisdiction: If he did not submit to plead, he lost his Challenges to the Jury, and the Inquest of the Jury, though he had no Liberty to Challenge, past upon him, whereby his Goods and Chattels were forfeited.

Prisoll, Chief Justice of the Common Pleas in *Henry* the VIth's Time, set this on a better Foot, founding himself on the 25 *Edw.* III. c. 4, which says, that all Clerks, as well secular as religious, from henceforth convicted before the Secular Justices, for other Treasons or Felonies than against the King, shall from henceforth freely have and enjoy the Privileges of Holy Church, and shall without Delay be delivered up to the Ordinaries demanding them: So that he allowed them to plead to the Felony, and after Conviction the Ordinary might demand them.

This introduced the Liberty for the Prisoner to demand his Clergy; and if on the Inquest he was found guilty of Murder, the Court did not admit such Demand from the Prisoner, because he was to die by the Law of God; and therefore in such Case the Court did not deliver him, unless the Ordinary did demand him, which in so heinous a Crime was seldom done for Laymen, nor even for Clerks: But Cases of Homicide and Theft were looked upon as properly corrigible by the Ordinary, because they were not guilty of Death by the Law of God; and therefore they allowed any Person of Education that could read, the Benefit of Clergy, and the Ordinary received such Persons to Corrections and Purgations by Money, because they were not Offences which by the *Mosaick* Constitutions were punished by Death.

But the meaner Persons not educated in Learning, and that had no Money to make Commutation, were generally given up to the Temporal Law.

There were several intermediate Statutes, by which they endeavoured to abridge this Privilege of the Clergy; the first was *de Bigamis*, which was, that the Bishop of *Rome* having made a Constitution that all Persons twice married should be excluded from Clerks Privilege, that such Persons when convicted should not be delivered as Clerks, whether they were Bigamists before or after such Constitution: So that after this Statute, when Felons arraigned challenged their Clergy, the Prosecutors, upon shewing that they were Bigamists, ousted them of this Privilege. To defeat the Effect of this Statute they procured another, That Bigamy should be tried by the Bishop, and not by the Temporal Law.

[274] The Statutes of *Clarendon* that forbid the taking Sanctuary, whereby to avoid the Secular Justice, were also enervated by *Articuli Cleri*; for cap. 15, if a Clerk fly to the Sanctuary, he should not be compelled to abjure the Realm: So that the Churches and Privileged Places continued a Sanctuary for the Clerks themselves.

It has been likewise resolved, that if a Clerk had confessed the Felony, and became an Approver, he should not be delivered to the Ordinary, because by such Confession he had submitted to the Secular Jurisdiction.

But the Ecclesiasticks pretended such Confessions were *coram non judice*, tho' it had been otherwise resolved in the Temporal Courts, as my Lord *Coke* observes; but the Statute of *Articuli Cleri*, cap. 16, enacts that he shall enjoy his Privilege, notwithstanding his Confession.

And now the Law amongst Ecclesiasticks stood on this threefold Distinction.

First, If a Clerk was convicted of Treason, he was never delivered to the Ordinary, for that would have given up the Prerogative of the King.

Secondly, In the Case of Murder he was delivered to the Ordinary, if demanded, but then it was in order to be degraded, and for no other Purpose; for in a Crime punished by the Law of God with Death, he was not permitted to make any Purgation, but such Degradation was taken to be in Nature of the Death and Destruction of the Clerk, and therefore he was not put to Death; they did not intend he should be twice punished

for the same Offence : And *Bracton* says, *Clericus, si de crimine convictus degradatur, non sequitur alia pœna pro uno peccato, delicto vel pluribus ante degradationem perpetratis.*

Thirdly, If the Clerk were convicted of any Felony, except Murder, he might then demand the Benefit of Clergy ; and so they permitted any Person to do, that could read ; and such Person was permitted to make Purgation before his Ordinary, and if he purged himself, he was acquitted.

But if the Clerk confessed the Fact, he was delivered to the Ordinary *absque Purgatione* ; for he having confessed the Fact, could not deny it afterwards before the Ordinary.

To understand the Reasons of these Distinctions, we must consider what is formerly laid down, that in Case of Blood, by the Common Law the Ecclesiastical Court had no Jurisdiction ; and therefore when the Clerk was convicted, he could not be delivered to the Ecclesiastical Court to make Purgation, because they had no Cognizance of the Cause ; but he was delivered to them *absque Purgatione*, in order to be degraded by them ; and the Sentence of the Common Law was, *Deliberetur Ordinario absque Purgatione, Fleta (Q.) si criminaliter agatur versus Clericum : Quamvis Clericus respondere noluerit in foro seculari, Iudex tamen Ecclesiasticus cognitionem habere non potuerit, nec Regiam auferre jurisdictionem, licet habere debeat Judicii executionem ; in causa enim Sanguinis non poterit Ecclesiasticus Iudex cognoscere, neque judicare, nisi irregularitatem committat ; & quamvis neminem valeat morti condemnare, degradare tamen potuerit crimine convict & perpetua carceris inclusione custodire.* Upon such Delivery the Ordinary not only degraded him, but put him in Prison till he obtained the King's Pardon.

[275] But if the Ordinary demanded him for a Clerk that was not so, he lost his Temporality, because it was impeaching the Temporal Jurisdiction.

But in all Cases, except Treason and Murder, the Clerk might himself demand his Privilege, and then he was delivered to the Ordinary, without any Restriction ; and by the Law of the Church, he was to purge himself of that Crime by his own Oath, confirmed with twelve Compurgators, six of which were Lay, and the other six Clerks ; and if he failed in his Purgation, he was punished as if he had been convicted, or had confessed the Crime.

When he failed in his Purgation, the Ordinary judged if he was corrigible or incorrigible ; if the former, they imposed Penance, and on his Performance or Commutation he was assoiled ; if the latter, he was deprived and imprisoned.

By the Canon Law, if the Criminal was notorious, they proceeded to Sentence, *absq. purgatione, super notorio nulli erit induenda purgatio, sc' tantum condemnationis promulganda sententia cum patrati sceleris evidentia neq. accusationis clamore indigeat.*

The Temporal Court taking Notice of the Canon Law, and likewise that the Ordinary could not take Notice of the Judgment of their Court, when a Person became infamous by a second Offence, they were wont to deliver him *absq. Purgatione*, and therefore an infamous Thief was so delivered. And—

By the 4th of *Hen. 4*, cap. [3], it is enacted, that a Clerk that was a Traitor or infamous, should be delivered to them *absq. purgatione*.

But as the Clergy had notoriously abused their Privilege, it is enacted, that none but Persons in Orders shall have the Benefit of their Clergy above once, and the Murderer shall be marked with an *M.* and the Felon with an *F.*, and that Persons in Orders demanding their Clergy, shall shew their Orders at the Day given by the Court.

By the 28th of *Hen. 8*, cap. 11, and 32 *Hen. 8*, cap. 3, Persons in Orders shall receive the Benefit of Clergy but once.

By 18 *El.* cap. 7, the Persons admitted to the Benefit of Clergy shall not be delivered to the Ordinary, but enlarged out of Prison by the Justices.

From the Time of *Hen. 7*, the Benefit of Clergy has been taken away in several Particulars. *Vide* the Statutes.

By the 12th of *Henry 7*, it is taken away from any Person, except Persons in Orders, in Petty Treason, Murder, Sacrilege, Robbery, and House-breaking, and their Accessories ; and a Clerk in Orders ought not to be admitted to his Purgation, or be enlarged by the Ordinary for any of these Offences, till bound to the Good Behaviour.

23 *Hen 8*, cap. 11, the convict Person in Orders to be delivered to the Ordinary without Purgation, who may degrade him, and send him back to the King's Bench, and there to be proceeded upon.

N.B. This was the Argument of the Lord Chief Baron *Gilbert*, on Occasion of a Murder in *Ireland*.

SELECT CASES ARGUED and ADJUDGED
in the HIGH COURT OF CHANCERY,
before the Late Lords Commissioners of the
Great Seal, and the Late LORD CHAN-
CELLOR KING, from the year 1724 to
1733. By a Gentleman of the Temple.

[1] NUTT v. BURRELL.

De Term. Paschæ, May 9, 1724. In Cancellaria.

Legacy not forfeited in equity, though ordered to be so by the will.

A. gives B. a legacy, on pain of forfeiture of it in case he should give his wife any trouble in relation to his estate ; and makes his wife executrix. B. brings a bill against the wife, for which there was very little colour, and among other particulars demands the legacy. The *Chancellor* was of opinion, that the suit was very frivolous ; and though he would not make the legacy forfeit, yet declared, if he did not pay her the costs she had been out of purse, he would dismiss the bill.

Lord LUCY v. WATTS.

(Appeal from the Rolls.)

De Term. Sanct. Mich. Nov. 7, 1724.

General words of a release restrained in equity to what was the intent of the parties.

The defendant had a lease from Lord Lucy, of a place called Froster-Court Farm, and also held a farm called Pikes under him at will ; on his payment of rent, Lord Lucy's steward gave him a receipt [2] in his verbis :—" Received then of ——— Watts the sum of £137, 10s. in full for half a year's rent due at Lady-day last."

The yearly rent of Froster-Court Farm was £263, and of Pikes £22. The release being general, the defendant insisted he was not obliged to account for the rent of Pikes. To be relieved against which Lord Lucy brought his bill, which was dismissed by his Honour the *Master of the Rolls*, in regard that he might have his action at law for the rent of Pikes, notwithstanding the generality of the words of the release.

On which an appeal was brought ; and the *Lord Chancellor* declared, he was not satisfied that he had remedy at law ; as both these lands might formerly have been held together, and the general words in the lease (*Qu. release*) might possibly extend to Pikes, contrary to the intent of the parties. If Lord Lucy should not recover at law, I must relieve here ; so it would be sending it to law in order to have a new bill : so, decreed an account.

In this case was cited, by Mr. *Talbot*, the case of *Bacon v. Harris*, two or three terms ago in this court, which was this : a tenant got a receipt in full to the date ; bill was brought for account : the tenant insisted he was not obliged to any account previous to the receipt, because his vouchers might be lost, and not preserved on account of the receipt ; so that he might be made to suffer, not through any default of his own, but

by relying on the receipt. But there being great reason to believe the receipt insisted on was obtained either through fraud, or by mistake, and that the tenant had not paid all that was due to the time of the receipt ; account was ordered to be taken previous to the receipt ; and to pay costs.

FLOYER v. SYDENHAM.

Oct. 29, 1724.

A person made a will of a settled estate, the heir claiming under the settlement may have the deeds, &c., produced before he tries the validity of the will (2 Chan. Ca. 4).

A person deriving under a settlement consulted counsel whether he could suffer a recovery, and bar the remainders ; the counsel whom he consulted being of opinion that he could, pursuant to their opinion he suffered a recovery, and made a will in prejudice of the persons claiming under the settlement. The validity of the will being controverted, and also whether, supposing it to be a good will in point of law, he was enabled by the recovery to defeat the remainders, and dispose of the estate ; to which purpose it would be necessary to have all deeds, writings, and [3] family settlements brought into court, to see whether he had such power : it was insisted, that the most natural thing was to try the validity of the will first, which if not found to be a good one as to the execution, sanity, &c., of the person, there would be an end of the question ; for that if he had not made a will valid in point of law, it would be idle and vain to examine whether he had a power so to do.

On the other hand it was insisted, that it would be totally improper to examine into the validity of the act done, without previously examining the power of doing it ; and that even an *hæres factus* was entitled to see the writings against an heir at law, though the one had only an instituted right under the municipal laws of the country, and the other had a natural inherent right. The case of the *Duke of Newcastle* was cited, who was only an *hæres factus*, and there the papers were ordered to be brought into court for perusal. In the case of the *Earl of Suffolk* and *Earl Ferrers*, for the assistance of the heir at law against the devisee, which is the present case.

Chancellor. It is most natural to see whether he could dispose : to examine whether he has made a will, before it be known whether he had a power, would be unnecessary, and really impertinent ; and therefore decreed, that all deeds should be produced, and the counsels' opinions ; not as they will be a guidance to the court, but for the case on which they might be founded ; for papers may in those cases be mentioned, which otherwise might be suppressed and not come to light.

EDWARDS v. HEATHER.

Dec. 6, 1724. [At Lord Chancellor's House.]

Agreement, if unreasonable, though in part executed, not specifically decreed.

Bill was brought for specific performance of covenants. The plaintiff sold the defendant a copyhold estate of the yearly value of £16 (on which was timber to the value of £150) for £630, and covenanted to surrender on or before Michaelmas then next ; the defendant paid 10s. in part of the purchase, entered on the premises, cut down timber, stocked the land, and did everything as owner. The plaintiff proved he had given notice in writing that he would surrender next court-day, and attended accordingly ; on the defendant's part there were several proofs, that he was disordered in his senses ; and though [4] there be proof that the timber was of the value of £150, yet, as no custom is alleged of the tenant's having power to cut it down, it must be according to common law, by which the tenant has no power over it, and therefore a plain imposition. The *Chancellor* was of opinion, it was a great over-value, and that his cutting down of timber was a convincing proof of his folly, because a direct forfeiture ; but as it is, it is a matter merely at law ; the covenant is to surrender at or before Michaelmas ; you say you were ready at the next court, which does not appear to have been before Michaelmas ; if surrender had been, action would have lain at law. Bill dismissed.

Earl of HINDFORD v. DECOSTA.

Dec. 10, 1724. [At the Lord Chancellor's House.]

Plaintiff, after election made to proceed at law, where he fails, may revive his bill.

The plaintiff brought a bill against the defendant for an account, and after brought assumpsit at law for part of what was included in the bill, so ordered to make election on which he would proceed ; he elected going to law, and injunction as to proceeding here : on the trial at law, it appeared by the witnesses that there were accounts between them ; the counsel finding they had mistaken the action, never controverted the defendant's proof, but suffered a nonsuit. So plaintiff moves to have leave to revive, which was opposed by the defendant, in regard the plaintiff had made his election.

But the *Chancellor* gave leave to revive, and declared, the only end of the injunction was, that he should not proceed on both together ; not that choosing one, in which he miscarries, should preclude his right ; it is not a favour, but *ex debito justitiæ* ; he might bring a new bill. And is it not of justice to make the coming at right as expeditious and as little expensive as possible ? For on a new bill, after much time and money spent, you would be but where you are on a bill of revivor.

The Case of one *Collett* was quoted, as in point.

LIMAX ———.

On confirming jointure, all deeds relating to the inheritance to be delivered up to the heir.

Motion made, that on confirming a jointure all deeds and leases, and writings relating to the inheritance, should be delivered ; which was opposed as to the leases ; because without them the jointress could not recover the [5] rents ; and though the leases may be expired, there may be arrears of rents and covenants.

But all deeds and writings, and expired leases, were ordered to be delivered up, unless particular reason be shown to the contrary by next seal.

The Master certified that writings were not delivered in ; the clerk offered to prove they were delivered in, but would not suffer averment against the Master's certificate.

Sir JOHN FRYAR, Knt. v. MARY VERNON, Spinster.

De Term. Sanct. Hil. Anno, 11 Geo. 1, 1724. [Before the Commissioners of the Great Seal.]

Ireland. No particular sequestration to go there, or to the Plantations.

Motion was made for a particular sequestration against the defendant's lands in Ireland, she having stood out the process of contempt here ; and relied on the case of *Hamilton and Pollard* in July or October last, where, on like motion for a particular sequestration to North Carolina, the *Chancellor* said, [6] it might be right, but the method should be well considered, as its being to be a precedent ; and inclined it should be to sequestrators.

But the Register, on being asked, said, that sequestration never went.

Master of the Rolls. What leads you into this motion was the case of the *Earl of Arglasse v. Muschamp* (1 Vern. 75), where it was denied by the Court ; but after application was made to the King, and a letter was sent to the Governor of Ireland, but never heard of anything else of that sort ; it would be very odd that the process of this Court should have anything to assist it. I remember that a bill was brought into Parliament to extend judgments to the plantations ; but it was rejected ; but as to the plantations, it is particularly odd, as it affects the King's sovereignty in council over them : But what makes it clear to demonstration that it should not go, is this, where a defendant to a bill, whose usual residence is in Ireland, happens to be here, he is obliged to give security ; which makes it plain he is not amenable to this Court ; for if he was, that precaution would be unnecessary.

So particular sequestration denied, but a general one of course granted.

SNAPE v. FURDON.

Feb. 6, 1724.

Where a plaintiff has a decree *nisi*, and does not appear, bill will be dismissed with costs.

A Decree was for the plaintiff, *nisi*, who now does not appear.

Master of the Rolls looked upon it as a giving up of the judgment. Bill must be dismissed with costs.

[7] DEWS v. BRANDT.

De Term. Paschæ, April 17, 1725. [*Raymond, Gilbert, Commissioners.*]

Bill brought by an heir, to be relieved against articles entered into by him for the sale of a reversion, for a sum of money to be paid with interest when he came into possession. (*Qu. dismissed.*)

Bill was brought to be relieved against articles. Father was tenant for life, remainder to the son in tail, remainder to the father in fee, of an estate of £371, 16s. 4d. per annum, computed worth £7000. The son being thirty years of age, in the life of the father, entered into articles to sell the estate for £3300, to be paid when he came into possession of the estate, together with interest for the same from the time of the articles to the time when he should be in possession.

The father dies within two years after the agreement made, so that the interest amounted but to a small sum. The son, on his coming into possession, completed his agreement, and now brought bill to be relieved.

On behalf of the plaintiff was insisted the great overvalue ; and that if the defendant was paid his money with interest, he could be at no loss, nor sustain any prejudice : and that sons in necessity, in the life of their ancestors, should not have that necessity made use of to defraud and impose on them ; and that the father died soon after the agreement.

On the other hand it was said, there was no fraud or imposition proved, and therefore not to be presumed ; if it was a fraud, it should be singly considered under that head ; and if such there were, would be relieved ; but to take it in the latitude that is insisted on the other side, it would destroy all sales of reversions, and put it out of the power of a person who had a future interest to provide for his [8] own present occasions ; so that a man might starve for the benefit of his family. And as by the law a man might sell such an estate, it would be very hard, that equity should take away from an honest purchaser what he had purchased under the sanction of law, without any equitable circumstances to defeat what he had so done ; and that there was great difference between defeating an agreement and carrying it into execution ; in the one case it is asking a favour, in the other merely insisting on a right ; and the case of *Barney v. Pitt*, 2 Ch. Ca. 137, and *Twisleton v. Griffith*, July 1716, were cited.

Raymond and Gilbert. Had the bargain been to have paid down £3300 when he came into the possession of the estate ; this would not have really been a purchase of the reversion, but of an estate in possession, as the payment and possession were to be at the same time ; and in that case, on account of the great over-value would relieve. Had the bargain been to pay so much down in present money, undoubtedly it had been good ; else there is an end of all sales of reversions ; and a man would be tantalized with having an estate of which he could make no use. But this is very different, for here is interest to be paid till it comes in possession ; and it really is the same as buying the reversion for present money paid, and will be considered as so much money put out to interest by himself ; the same as if he had immediately received it, and lent it to the vendee on interest ; the interest might have run up to the value of the estate ; it has happened otherwise, which was a chance on both sides ; and is it consistent with common sense, that a present agreement should be varied by future accidents ? They must be considered as they are in themselves, without anything extrinsic.

Bargains for sales of reversionary estates by heirs are never set aside, but on account of prodigality ; here is nothing of that, but the reverse ; for it appears both the father and he were in bad circumstances.

Certainly no rule has ever obtained, that an heir shall not dispose of the reversion ; that would be, that an heir should never be of age.

Besides, there is great difference between establishing and rescinding an agreement.

[9] FINCKLE v. STACY, Executor of STACY.

April 27, 1725. [*Jekyl and Gilbert.*]

Two persons join in doing a particular work, one of whom refused to join in a suit to recover what was due ; the other got his moiety ; he will not be obliged to pay half of that moiety to the other.

Joint articles were entered into for the doing a particular piece of work for the late Duke of Marlborough, on account of which several sums of money had been jointly received by them, and immediately divided between them ; there being a sum demanded by them in arrear, which the Duke refused to pay, as being unreasonable, Stacy applied to Finkle to join with him in a suit to recover what was in arrear, which he refused to do, declaring he had several advantageous works under the Duke which he should lose, should he join in a suit ; on which Stacy applied, and got his own half of the money which was due to them two. Bill is now brought for a moiety of the money so received ; and insisted, it should be considered as a partnership in trade, and this money as so much received on the joint account.

But the Court were of opinion, it was not to be considered as a partnership, but only an agreement to do a particular act, between which there is a great difference ; and that it is so is plain, for the money which they had received they immediately divided, and did not lay out on a common account. It is pretty extraordinary, that he should come here to have the benefit of another's act in which he refused to join ; which refusal was with a corrupt view for his own advantage, and not on the common account, the money due on which he would rather sacrifice than forego his own particular advantage ; and here is no insolvency in the Duke, if there had, perhaps had deserved consideration.

Bill dismissed with costs.

ORD v. SMITH.

April 28, 1725. [*Same Lord Commissioners.*]

Mortgage made to be redeemed with the mortgagor's own money ; this, as a designed fraud, will let the mortgage be redeemed after the usual time prescribed for redemption by the rules of the Court.

A person mortgaged his estate for a small sum of money in the year 1679, by an absolute conveyance and a defeasance, with these clauses in it, " That it should be redeemed with the party's own money, and in his lifetime." The mortgagor's necessities soon after forced him to go abroad ; where he died about twenty-seven years ago, and his heirs knew nothing of the mortgage. In 1702 the mortgagee made his will, and devised, that in case the mort-[10]-gage should be redeemed, the money to go so and so. Sixteen years after the will, the bill for redemption was filed ; in opposition to which the great length of time was insisted on, and that by the now settled rule of the Court, a mortgage shall not be redeemed after twenty years.

Master of the Rolls. If a redemption be decreed, shall do no wrong, nor put the party to any difficulty, for he will have a rate of interest more than the law now allows : but if we do not decree a redemption, shall establish a very great imposition.

Absolute conveyances and defeasances were formerly much used as mortgages, but left off on account of being more dangerous, by losing the defeasance, than the way now in use, where the defeasance is in the same deed. As the money was to be repaid, let the words in the defeasance be ever so much fettered, they all signify nothing ; for the borrower is under some necessities, and therefore in the power of the lender, and on that account the law makes a benign construction in his favour. But this was a fraud in its creation, and no limitation of time in redemption against that ; for to what other purpose could the words, " to be paid with his own money," be thrown in, if not to make the mortgagor imagine it could be done no otherwise. for any other person's money was of equal value : *Lord Warrington v. Booth.*

But if singly considered, distinct from the fraud, there is sufficient for redemption, by the declaration of the will, where he calls it a mortgage. I remember a case about twenty years ago, where a redemption was decreed on a mortgage made 1642, where there was neither infancy nor outer mere : the mortgagee brought a bill to foreclose, and by his so doing, it was an admission that he considered it as a mortgage ; so the mortgagor was let in to redeem.

In the case of *Stuckville* and *Dolben* there was a foreclosure ; the mortgagee after in his will disposes of the money on the mortgage ; on this admission in the will, bill was brought to open it ; the Court took time to consider of it, and after the parties agreed.

By these fettering clauses, he was by the act of the mortgagee persuaded he could not redeem ; and for that reason, as the mortgagor by that deception would have a right to redeem, so will his heir, who would thereby be as much deceived by them as he ; but here it appears, the heir did not at all know of this deed, which is something superadded, and *a fortiori* ; and if he had known of it, he would have [11] been thereby deceived, and led into an imagination that he could not redeem the estate.

Baron Gilbert. The rule for redemption, if it be for twenty years, should be inviolably abided by, for it is for the quiet of men's estates ; so long a space of time neglecting to pursue their rights, is a dereliction of the pledge, and should not be broke into : for it is natural reason to think, that persons, who had a right, in such a space of time, would have pursued it, if it was thought worth while ; and by its not being done, as it was their interest so to do (about which men are very sedulous), the natural deduction is, that they did not think it worth while. But a case may be out of the general rule ; as where the supposal of a dereliction may be answered ; which dereliction ever supposes previous knowledge of the right, for it is absurd to say a man relinquishes a right which he knows not of.

The right of redemption is here industriously obscured by particular clauses, which would be useless for any other purposes, but to create an imagination, that he could not do it unless with his own money, and in his life. By the will in 1702 he has devised, that if the mortgage be redeemed, the money to be to such and such purposes ; so that if it was not originally fraudulent, he by the will has made it redeemable ; this is out of the rule of dereliction, for there is great over-value, which for that reason cannot be supposed a dereliction, and neglected or disregarded.

So redemption decreed.

COX v. GEORGE.

April 29, 1725.

Depositions taken *de bene esse* shall not be published without affidavit of the party's death, and that could not be examined in chief.

Motion, that depositions taken on a commission to examine witnesses in the original cause *ex parte*, in the year 1697, *de bene esse*, may now, on the revivor of the suit, be published.

Master of the Rolls. They must be examined in chief after, if it be to be done : and to show that you attempted it and endeavoured it, must show an effectual prosecution for not answering ; attachment is not enough, there should be affidavits that they are dead since the examination, and that they died before they could be examined in chief, for if they could be examined in chief, their depositions cannot be read ; and therefore it is [12] necessary to be shown they died before they could be examined.

PEMMONT v. EAST-INDIA COMPANY.

By the conditions of sale of the East-India Company, the buyer is to be allowed six-and-a-half per cent. discount, if the goods are taken away in a certain time ; and if not taken away in another certain time, the goods to be resold ; and if any deficiency on the second sale, to be made good to the Company. The discount allowed on a second sale is to be a charge on the first buyer.

The plaintiff bought goods at the sale of the East-India Company. Before the sale the conditions of it were published, *viz.* that if within such a stated time the goods

were taken away and paid for, six-and-a-half per cent. discount should be allowed the buyer, else no discount to be allowed ; and if within another limited time did not pay for the goods, and take them away, they should be resold, and warehouse-room to be paid, and to make up the deficiency to the Company, in case should be then sold for less ; these conditions not being complied with by the plaintiff, the goods were resold ; and the same conditions read, the question was, whether the six-and-a-half per cent. on the second sale should be a charge on him or the Company.

Master of the Rolls. The goods sell so much dearer on account of the discount ; the buyer considers the advantage he may have by the discount when he bids for the goods ; were there to be no discount, the goods would sell so much the cheaper ; therefore it must be a charge on the first buyer, and not on the Company.

RICHARDS v. COCK.

April 30, 1725. [*Same Commissioners.*]

Legacies given to children, payable at a certain time, and a moiety of a term to one, after the death of his wife ; but if should die before portion becomes payable, to go to survivors ; this only extends to the pecuniary legacy.

A person possessed of a term for years, and a fortune in money, made his will, and left all of his children pecuniary legacies, payable at different times ; and after the decease of his wife, he devised one moiety of the term to his son Bennet, and the other moiety to his son John ; and then came this clause : " And if any of my children die before their portion becomes payable, then that to fall equally between my wife and the surviving children." Bennet died in the life of the wife ; so question was, whether his moiety of the term should be divided among the wife and surviving children.

It was resolved, that as in common parlance portion is not said of a term, and there being pecuniary legacies on which it may operate, payable shall be applicable to and be confined to that ; this contingency of the wife's dying might [13] happen when the sons were very old, and long after the money became payable ; the sons, by this contingency hanging over them, could not dispose of their interest for the advantage, perhaps the necessities of their families, which would therefore be to their prejudice, which could not be supposed to be done by a father.

HILL v. HILL.

May 3, 1725. [*Master of the Rolls, Raymond, Commissioners.*]

No new trial but on Judge's certificate. (*Postea*, p. 20, same point.)

In this case the Court declared, they would not receive account of a trial by affidavits ; it has been done on affidavits, but very improperly, for it is only hearing on one side ; and for the future will not grant new trial, without certificate of the Judge that he was dissatisfied with the verdict.

DALTON v. DALTON.

In this case it was said, that it has been taken, since the case of *Sherman v. Earl of Bath*, that after three trials had, a perpetual injunction has been allowed.

WHITACKRE v. WHITACKRE.

Trustees, or persons acting under them, cannot be purchasers.

Stock was invested in trustees by will ; the trustees ordered their agent, who was the testator's brother, to sell the stock, so that he did not sell for less than £2500, and whatever he sold for more should be for his own trouble. The agent agrees for the sale of this stock for £3400, and after becomes a purchaser of the stock from the trustees for the sum of £2800, who allow him £100 for his trouble in buying ; so that he got £600 by the stock, besides what was allowed for his trouble.

Bill was brought for the overplus ; which was decreed, the Court declaring, that no trustee, or any person acting under a trustee, can ever be a purchaser in this Court, on account of the great inlet to fraud.

COLCHESTER v. COLCHESTER.

On a rehearing nothing is opened but what is petitioned against.

On a new bill to carry a decree into execution, Court may vary and alter what is thought proper ; but on a rehearing no further than the petition extends ; but if the [14] petition be against the decree in general, though particular reasons are given, the whole is open ; but otherwise it is if the petition be only against one or two particulars. (Postea, p. 24.)

LEWEN v. LEWEN.

[S. C. sub nom. *Lewin v. Lewin*, 3 P. Wms. 16 ; 1 Eq. Cas. Abr. 159.]

May 4, 1725. [*Master of the Rolls, Gilbert, Commissioners.*]

Whether settlement of a chattel in bar of dower bars custom of London, unless said to be in bar of it.

A freeman of London, before marriage, made a settlement on his wife of lands for her jointure, and thirds at common law ; and after marriage he settled a copyhold and leasehold estate on her, for a better provision and increase of jointure, in bar of dower.

Question was, whether it will bar her of her customary estate as widow to a citizen of London, not being expressly mentioned to be so ; and that it would not, the case of *Atkins v. Watterson* was cited, as so resolved.

Afterwards, 31 May, this cause was spoke to again ; and Baron *Gilbert* said, that the settlement of lands will be no bar of dower by the custom. But as a personal estate was settled in bar of dower, it was a doubt with the Court whether it would not amount to a composition. So city to certify their custom, whether a settlement of chattels said to be in bar of dower, will bar the customary right, unless expressly said to be so.

ASHTON v. DAWSON and VINCENT.

May 5, 1725. Donatio mortis causa.

One Cowper, after making his will, three or four days before his death, gave Mrs. Dawson some bank-notes to her own use, if he died, else to be returned ; on his death, Ashton, who was his executor, on inquiring into the affair, said he was very well pleased that they were given her : she desired Mr. Ashton to keep the notes for her, and employ them to the best advantage for her ; he took them, and gave her a note for them ; she having after married contrary to his inclination, he refused to deliver up the notes ; on which action was brought on his note, and a recovery and damages. Bill was brought here to be relieved, but relief denied.

Curia. You come here to be relieved against the note, which cannot be, but on the foot of fraud : at the time of giving it the whole affair was examined ; it is not a legacy, nor is there any occasion for the executor's assent to it ; it is not a gift at common law, but in view of death ; [15] here are express words ; but if he had used no words, and had been near death, it had been looked on as a donation *mortis causa* ; it is a testamentary legacy, of which the common law takes notice, but not provable in the Ecclesiastical Court, it is only questionable here ; and the executor's assent is not necessary, because might die intestate. This further differs from a legacy, which depends solely on the disposing words ; but in a *donatio mortis causa* must be a delivery, which is something more. So bill dismissed with costs.

This cause was reheard before Lord Chancellor *King*, August 6, 1725, and affirmed the decree, only altered it in respect of the defendants' costs ; who being trustees should have it out of the estate ; but inclined to have ordered a trial at law, had Mr. Ashton not given a note.

FELTHAM v. FELTHAM.

May 7, 1725. [S. C. 2 P. Wms. 271.]

Portions were charged on lands, and if any of the children die before twenty-two, or marriage, to go to survivors ; one dies, that portion shall not be paid before it would have become due had the child lived.

A person charged his lands with the payment of certain portions to his children ; and appointed, that if any of his children should die before the age of twenty-two or marriage, such child's portion should be divided equally among the survivors ; one of the children died before the age of twenty-two unmarried ; the question was, whether the survivors should receive their proportion of it when they received their own portions, or not till this portion of the deceased would have become due. The Court was of opinion, it should be paid when the deceased would have received it ; because else would be so many several divisions of it as each person's title to it accrued, whereas it was designed to be one entire payment. If a legatee dies, his executors or administrators shall not receive the legacy before the deceased himself might have done it ; for it is absurd, that an accident of death of a legatee should vary a time of payment appointed by another person ; and this is particularly strong, being to charge a real estate. The deviser might perhaps have made a computation, and considered how, and at what time, his estate would bear such a charge ; and if the part of the deceased should be paid at the time that the survivor's portion was payable, it might be charging the estate sooner than the deviser intended it should.

[16] CHILD v. PITT.

De Term. Sanct. Trin. May 31, 1725. [Commissioners, Gilbert, Raymond.]

Bill brought by a goldsmith for commission for the custody of jewels ; the Court left him to a *quantum meruit*. (Qy. of that.)

Sir Stephen Evans had Governor Pitt's large diamond (which was after sold to the King of France), put out to polish, and inspected the work, as was suggested ; the diamond was taken out of his hands and sold.

He now brings bill for commission.

It was insisted, that commission is never for the custody of diamonds ; and that the Bank may as well ask commission for the custody of money, and commission never arises but on sale. What is called inspecting the polishing, was obliging his friend with so extraordinary a sight.

The Court declared, they could not take upon themselves to say, that the credit which arose to the shop by the custody of the jewel, was equal to the trouble in inspecting the work ; may bring a *quantum meruit*, where that will be determined.

Assignees stand in the place of the bankrupt ; and where he would be obliged to pay costs, so shall they out of the estate. Sir Stephen Evans had also diamonds consigned to him by Governor Pitt to sell for his use ; he charged them fraudulently at a less value than he sold them for, and after became a bankrupt ; upon which a question arose, whether the assignees under the commission of bankruptcy should pay costs : And resolved they should, *out of the estate* ; for if he had been here himself he must have paid costs, and the assignees stand in his place, as to his estate.

But it appearing that the paper, in which he charged them at a less value than what he sold them for, was not delivered to Mr. Pitt, it was looked upon, not as actual [17] fraud, but only a preparation to it, of which he might have repented, so no costs against the assignees.

BARKER v. GILES and SMITH.

May 31 [1725. S. C. 2 P. Wms. 280].

Devise to A and B, the survivor and survivors of them, their heirs and assigns, to be equally divided between them share and share alike, is a joint-tenancy for life, with different inheritances.

A man devised his estate to trustees, to be sold for payment of debts and legacies, and the residue in trust, " to the use of Jeremy and Robert Barker (who were his nephews),

the survivor and survivors of them, their heirs and assigns, to be equally divided between them share and share alike." Jeremy died in the life of the deviser ; so the question was, whether it was a joint-tenancy, or tenancy in common ; for if a tenancy in common, would *pro tanto* be lapsed, as dying in the life of the deviser, and go to the heir at law.

After argument, Baron *Gilbert* was of opinion it was a joint-tenancy.

Justice *Raymond*, that it was a tenancy in common.

The Court being thus divided in opinion, it was ordered to be spoke to again, *ut res nova* ; which was done, June 4, before Lord Chancellor *King*.

When it was insisted on, on the part of the plaintiff, that the words, "equally to be divided between them," do not in their legal operation amount to a tenancy in common ; this is uncontroverted, that in a deed it would be so ; and in *Dyer*, 25, it is doubted, whether even in a will, where the most liberal construction is, whether "equally to be divided between them," will be a tenancy in common ; but in *Ratcliff's case*, 3 *Coke*, 37 A, it has been resolved a tenancy in common on account of the intent, but solely on the intent, as it would not be so in a conveyance ; so not *ex vi termini*, but in the intent, which intent is explained here by his own words ; so that to make it a tenancy in common, must be from his intent, and that intent appearing otherwise by his own words, to make it so, would be to make it so contrary to his intent.

Fisher v. Wigg. A copyhold was surrendered, "to the use of five, equally to be divided among them and their respective heirs and assigns ;" the Court was divided, joint-tenancy or tenancy in common ; but Lord Chief Justice *Holt* was of opinion it was a joint-tenancy.

To some purposes a joint-tenant may be said to divide, as by assigning his part ; and only one can forfeit his part ; so that the subsequent words do not directly destroy the word "survivor."

[18] It must have been the intent of the deviser, that in case one died in his life, then to the survivor ; else not, but to be equally divided ; the words import this.

The heirs at law are very remote relations ; the primary original design of the deviser was, that the heirs at law should have no part of his estate ; and by the creation of trustees the descent was broke ; so that if they claim it, it is as a resulting trust.

The case of *Blisset and Cranwell*, in 3 *Lev.* 373, cannot be supported by the reasons there ; one is, that the last words control the former ; in different sentences that may hold, but cannot in the same individual sentence ; to suppose he has one intent at the beginning, and another at the latter end of a sentence, would be very odd.

It is said, the word "survivor," if not expressed, would be understood, and therefore it signifies nothing ; which is the greatest fallacy in nature ; if it had not been expressed it would have been implied ; and shall the expressing of what would have been implied unexpressed, make it, when expressed, signify nothing ?

The report in *Salk.* of *Blisset and Cranwell*, 226, is different from *Levinz.* *Style*, 211. *Tuckerman v. Jefferies*, 6 *Ann'*, to his two daughters, to be equally divided, after their deaths, to the right heirs of one ; these words, "equally to be divided," were not strong enough to make a tenancy in common ; but was determined to be a joint-tenancy, though there wanted the word "survivor."

To which it was answered, that the words "equally to be divided," in a will, had for these one hundred and fifty years created a tenancy in common. 2 *Ch. Ca.* 64. *Salk.* 226.

The case of *Tuckerman v. Davis* is answered, by observing that it was not given over till after the death of them two.

Joint-tenancy is in the nature of things extremely irrational, and therefore Courts of equity bear hard against it ; and even common-law Courts construe it tenancy in common, wherever possibly can ; it is extremely absurd, that one shall take all in disinheriton of the heir, because he happens to have a better constitution.

But let the words be ever so plain to shew his intent to disinherit the heir at law, if he does not do it consistent with the rules of law, it signifies nothing : here one of the persons dying in his life-time, though, if he had out-lived him, the heir would have been totally disinherited ; as it is, it is so much undisposed of ; and therefore the laws make [19] the provision to be to him who had a natural right, his heir at law.

These cases were cited (*Cro. El.* 729 ; *Moor*, 667 ; *Owen*, 127 ; 2 *Ventr.* 365 ; *Style*, 434) *Bale v. Coleman*, before Lord Chancellors *Cowper* and *Harcourt*.

King, Chancellor. In this Court this is to be considered as a real estate ; constructions of wills are the same in a Court of equity as at law ; the question is, what is the

intent? If the intent is contrary to the rules of law, the legal construction must prevail: where the words can possibly have any construction put on them, all must be preserved; but where are nugatory, as "survivors," and can have no manner of construction, must be rejected.

If both the nephews had survived, they had been tenants in common; and whatever would have been the construction if they had survived, must be so now, as the construction is to be on the words of the will; which cannot be varied by subsequent accidents.

If it had been to two and their heirs, and one had died, it would have been an immediate devise, and not by way of joint-tenancy.

The deviser designed as well that the nephews should both take, as the heir at law should be disinherited; and the intent must be as at the time of making of the will, unless contravened by accident, or act of God. Here by act of God one dies, so there is a determination of his intent, as to one.

This is a joint-tenancy for life, with different inheritances; and thus considered, it is a plain, easy, natural construction of the words, by which they will be all preserved; and by any other some must be rejected.

So decreed the whole to the plaintiff for life; and after his decease, one moiety to his heirs, and the other moiety to the defendant, and his heirs.

JORDAN v. FOLEY.

A woman entered into a bond, and after married, having brought her husband a very considerable fortune. The husband constantly paid the interest of the bond during the life of the wife; now a bill is brought against the husband for the payment of the bond, and 1 Ch. Ca. 295 was cited; and that having paid the interest was a taking of the debt upon himself.

[20] To which it was answered and resolved, that the husband is only chargeable for what is sued for and recovered in the life of the wife; this is the clear law of the land, and unalterable but by Act of Parliament; and for that reason no room for equity to interpose, let the wife have brought ever so large a fortune.

And no room for equity to arise from having paid the interest, for during her life was obliged to have paid both the bond and interest; and his paying one will not make him chargeable with the other. There was a case in Lord Keeper *Wright's* time, where a woman bought goods, after married, and these goods came to the hands of the husband, yet was not charged for them. He is not liable either in law or equity.

Bill dismissed, but without costs.

SOAM v. DANVERS.

June 5, 1725.

No new trial without Judge's opinion. Ante, pp. 13, 14.

Lord Chancellor declared, he would never grant new trial, without the Judge's opinion; and shall have greater regard to the Judge and Jury than affidavits; on which will never examine into the trial. (See ante, *Hill v. Hill*, in notis.)

CHRISTMAS v. CHRISTMAS.

[Rehearing.]

When agreement is reduced into writing, all previous treaties are resolved into that.

A woman having lands and a personal estate, before marriage conveys all her estate to her separate use, to which the husband was a party; and he covenanted that he would not interfere with it. On this estate so conveyed there was a mortgage for £300, which before these conveyances he verbally promised to discharge; during the coverture the mortgage was assigned over, and he covenanted thus, "That I or my wife shall pay it." The husband and she lived with great affection together, and he constantly received all the profits of this separate estate. He died, having never

paid off the mortgage, leaving children, which he had by a former venter, fortunes : these the wife maintained after his decease.

The wife brings her bill.

1st. That the effects of the husband should be applied to the redemption of the mortgage.

2nd. To have account of the profits of her separate estate received by the baron.

[21] 3rd. To have an allowance for the maintenance of his children after his decease.

It was decreed, that husband's effects should not be charged to redeem the mortgage, nor be accountable for the profits of her separate estate received by him ; and that the maintenance should be counterbalanced by the interest of their fortunes.

It was insisted in support of the decree, that whatever his promise was in respect of the mortgage, nothing is to be considered as his agreement but what is in writing. And that what he received was in a friendly manner ; she stood by and never opposed it, so may be considered as a gift : had they been on ill terms, it had been otherwise. And as to the maintenance, it is the standing rule of the Court not to break into the principal.

Chancellor. There is no foundation to charge him with the payment of the mortgage ; for by the Statute of Frauds, it is no charge unless reduced into writing ; all is at an end when there is an agreement in writing ; all the conversation before was only as previous steps ; this is the ultimate settlement of the whole affair, on mature consideration of everything ; as between him and the mortgagee, might be charged, but not by the wife.

Where baron and feme live amicably together, and the husband receives her separate estate, it shall be supposed done by her consent. As to the receipt of the separate maintenance, if live together amicably, shall look on it as done by her consent.

As to the maintenance, she has taken it upon herself, and it does not appear to me but the interest is sufficient for that purpose. Decree affirmed.

All depositions taken in the cause may be read at a rehearing, though not read at hearing ; aliter on appeal to the Lords. N.B.—On the rehearing, depositions taken in the cause, but not read at the hearing, were opposed to be read now ; but admitted to be read, as the constant practice of the Court, though in appeal to the Lords nothing is read but what was read below.

Ordered, that no application shall be made against the minutes after a week ; and no further time to be allowed to petition for a rehearing but within a week after that.

If a person entitled to costs die before they are taxed, they are gone. A bill was dismissed with costs, and the person who was entitled to costs died before they were taxed ; there is no relief to be had in this case.

[22] HILL v. FILKIN.

June 8, 1725.

[For previous proceedings, see 2 P. Wms. 6.]

Devise to a Papist who is under the age of eighteen, may conform any time under the age of eighteen and a half, to prevent the disability created by 11 & 12 W. 3, c. 4.

Anne Stephenson, a Papist, devised lands to be sold, and the money which arose from the sale to Frances, to be paid at the age of twenty-one, or day of marriage, which should first happen. Frances was a Papist at the time of the devise, and at the time of the death of the devisor ; and also at the time of her marriage, which was solemnized according to the rites of the Church of Rome ; but conformed to the Church of England, according to Act of Parliament, before the age of eighteen, as was found on several issues directed for that purpose : the heir at law insists on her being a Papist at the time of the devise and death of the devisor ; and therefore that she is incapable to take by the 11 & 12 W. 3, c. 4.

The clause in which is as followeth :—" If any person educated in the Popish religion, or professing the same, shall not within six months after he or she shall attain the age of eighteen take the oaths of allegiance and supremacy, &c. Every such person shall, in respect of him or herself only, and not to or in respect of any of his or her posterity, be disabled and made incapable to inherit, or take by descent, *devise* or limitation, in possession, reversion or remainder, any lands, tenements or hereditaments in England ;

and that during the life of such person, or until he or she do take the said oaths, &c., the next of his or her kindred, which shall be a Protestant, shall have and enjoy the said lands, &c., without being accountable for the profits, by him or her so received during such enjoyment thereof as aforesaid, &c. And every Papist, or person making profession of the *Popish* religion shall be disabled, and is hereby made incapable, to purchase either in his or her own name, to his or her use, or in trust for him or her, any lands, &c. And that all and singular estates, terms, and any other interests or profits whatsoever out of lands, from and after, &c., to be made, suffered, or done to, &c., for the use and behoof of any such person or persons, or upon any trust or confidence mediately or immediately, to or for the benefit or relief of any such person or persons, shall be utterly void and of none effect, to all intents, constructions and purposes whatsoever."

It was argued for the next Protestant heir, that the words of the Act are to be so taken, that what is not in the first clause is in the second ; and then the question will be, whether [23] a person, professing the *Popish* religion at the time of the devise, be capable of taking.

An infant educated in the *Popish* religion, of so tender years as not to be capable of *professing* any religion, shall be within the first clause, which is only a qualified disability ; but where can profess, as here is done, in the most solemn manner, by marriage according to the rites of the church, which with them is a sacrament, shall be within the second clause, which is an absolute disability. In *Roper* and *Ratcliff's* case it was controverted, whether a devise was a purchase ; and held it was, in opposition to descent, and there no distinction of ages taken ; and there also resolved, that a Papist can no more take money devised out of lands than lands themselves. Lord *Macclesfield* was of opinion, that if the infant was of such an age, that could profess a religion, it was within the second clause, if not, within the first ; the second clause is general, and the first will be operative to infants of tender years.

On the other side it was argued, That the design of the Act was to draw persons to conform, and to hinder Papists from enlarging their possessions ; the first are infants, which are treated with great lenity and tenderness, and allowed till eighteen and a half to forsake their errors, before they grow rigid and hardened ; the others, who are adult persons, are treated in a different way, out of necessary policy to prevent an increase of Papists' possessions ; if the construction on the other side were to prevail, an infant of five years old might be within it ; for there can be no rule to know when children are capable of professing a religion ; it would vary according to the degree of their respective understandings ; this would be creating a forfeiture by an infant. "Devise" in the first clause could have no operation, if it were to be taken in the manner contended for ; "purchase" is not to be taken in a legal but a vulgar construction, as appears in the case of Lord *Derwentwater* before the Lords ; he was a tenant in tail, and suffered a common recovery to settle his estate ; it was strongly insisted he took as a purchaser, but the Lords considered it only as a settlement of his own estate, and not as a purchase.

Chancellor. These are not two but one clause ; devises in the case of *Roper* and *Ratcliff* were construed purchases, and justly, else the Act had been eluded ; yet not so as that all devises are to be considered as purchases, as to incapacitating. [24] If a devise be made to one under eighteen and a half, if conforms within the age of eighteen and a half, shall have the estate ; both parts of the clause are general, all who are not included in the first part are in the second part ; for if the second part extends to all purchases, the first part must be absolutely repealed, as to devises ; and the words of Acts of Parliament must be construed so as to be consistent, and not to destroy each other ; here it appears has conformed ; so plainly within the first part of the clause. So bill dismissed with costs.

HAYWARD v. COLLEY.

On appeal the whole cause is open ; *aliter* on rehearing, only so much as is petitioned against. Ante, p. 14.

The rule of Court is, that on appeal the whole case is open ; but on a rehearing, only so much as is petitioned against ; if all do not petition, only to the petitioners it is open.

DUKE OF CHANDOS v. TALBOT.

Wife cannot put in a separate answer, without order. [S. C. 2 P. Wms. 371.]

Separate answer put in by the wife alone, without order of the Court for that purpose, is irregular.

In an injunction cause, if either P. or D. dies, the Court must be moved to revive within a stated time, or the injunction will be dissolved. In an injunction cause, where it abates by the death of either the plaintiff or defendant, the rule is, that the Court shall be moved to revive within a stated time, or the injunction be dissolved.

Where there is a demurrer, cannot have injunction till that is argued. On a demurrer, it is the settled rule of the Court, cannot move for injunction, for this reason ; till the demurrer be argued it is not certain that the cause is in Court.

A bond, which by interlineation after execution is not a good bond at law, shall not charge an estate as a bond in equity. A bond was put in suit against an executor, who pleaded *plene administravit*, that he was a bond-creditor himself, and had paid himself ; on the trial it appeared there was an interlineation of fifty, after the bond was executed ; so at law the bond was entirely void. Now application was made, that though the bond be void at law, that it may be considered as good in equity for what it was really given.

Chancellor. This at most can be a charge by simple contract, for you yourselves have destroyed its being as a bond, so it is as if it never had been ; so can be no bar to the payment of a debt of a superior nature.

[25] LYSONS v. VERNON.

June 24, 1725. [Inner-Temple Hall.]

A jointure made of houses then in lease at a small rent, but computed as worth so much more, which they would be when the lease expired, and covenant to pay quarterly a sum of money to amount to the computed value ; that money shall be paid as a sum in gross, and not liable to taxes.

A jointure was made of several lands and houses which were reckoned at £108 per annum ; but being then in lease the rent reserved was only £17, 12s. per annum ; but would be worth £108 per annum, when the lease expired, which it would do in five years. The husband covenants, that she should be paid £22, 12s. quarterly, to make the present rent up £108.

Several quarters' rent were in arrear, so bill is brought for the payment of them, with interest from the time the several quarters' rents respectively became due ; which it was insisted was reasonable, because, this being for maintenance, for want of it, would be obliged to take up money at interest, or to buy goods on credit, for which must therefore give an advanced price, very probably much superior to the interest. Payment of interest was not much disputed on the other side ; but strongly insisted on, that a deduction for taxes should be made out of the quarterly payment of £22, 12s. which was given to make up the rent £108, which the houses would be in five years ; which rent, as it would then be liable to taxes, so should this sum which the husband charges himself with the payment of, instead of the tenant, so she should receive it as if it had been from the tenant, and then had been liable to taxes : this is not to be considered as a personal covenant, but really a settlement of the houses ; and if the lease had expired in the husband's life, she really would have had the houses, which would have been liable to taxes ; the design was to put her in as good a condition before the rent was advanced, as if it had been actually advanced, but not in a better.

Chancellor. I know nothing what was the intent ; I see here a specialty, whereby a man obliges himself to the payment of £22, 12s. quarterly, for which I do not find he paid any taxes, so can allow none : and this being a personal covenant for the payment of sums in gross, interest must be allowed from the time each respective sum became due.

[26] PIGGOT v. MORRIS.

Legacy devised to A. to be paid at the age of twenty-one, or marriage, which shall first happen, so as such marriage be with the consent of B., if not, devise over : A. marries without consent, and dies before twenty-one ; the legacy is gone.

One Sands made his will, and gave his four daughters particular sums of money, and then in the will says, " All the rest and residue of all my personal estate not bequeathed, to my four daughters, Judith, Sarah, Elizabeth and Anne, equally ; and I order the several sums before given to my daughters, and likewise their several parts of my personal estate, and what other money may become due to them out of my personal estate, *shall be paid them respectively at their age of twenty-one or marriage, which shall first happen, so as such marriage shall be with the consent of my brother Brown, if he be then living ; and if any of my said three daughters (N.B. one was then married) shall happen to die before her or their respective age or marriage, as aforesaid, in such case I give the legacy of her or them so dying, as aforesaid, to and between the survivors of my four daughters equally.*"

One of the daughters married in the life of Brown without his consent, and died before the age of twenty-one, leaving issue.

Her representative brings a bill for this legacy.

It was insisted, that this was a vested legacy, and that the condition is only annexed to the time of payment, which is not a condition precedent but subsequent, which being to defeat an estate, is to be taken as strictly as possibly it can. Legacies are governed by the rules of the civil law ; and by that law, conditions in restraint of marriage are void ; in respect of legacies, this and the spiritual Court have a concurrent jurisdiction ; and therefore, for the sake of uniformity, must be governed by the same rules, else the right would be variant according to the Court in which the suit was instituted ; such devises as these, within the intent of the testator, are not meant as punishments, but monitory restraints, to take proper advice in an affair of so much consequence as marriage ; and not to tend to the destruction of the person whose interest he appears so solicitous for. It is very observable, that in the devise over there is no consent required ; here it does not appear she had notice of the will, which is necessary, else she might act contrary to it, without knowing she did wrong. It is absurd to say she should conform to the terms imposed on [27] her, without knowing what they were ; for obedience ever implies a previous knowledge of the duty.

On the other hand it was argued, that the arrival at the age of twenty-one, or marriage with consent, must be a condition precedent. " As aforesaid " are words of relation, and if they do refer, they refer as much to age as marriage, and then there is a devise over ; and no case can be produced, where there is a condition with a limitation over, where that has not been held good, and must be pursued, or a forfeiture will arise : it may be allowed, that by the civil law, that a condition absolutely in opposition to marriage may be void, and the devise be absolute ; but not where it is only a conditional restraint ; and marriage may be had, and those restrictions observed. A condition not to marry *at all* is void by their law, as marriage is looked on as a sacrament ; but where only a partial restraint, as not to marry a widower, or a person of a particular name or complexion, the condition is good by their law. Swinburn, 243.

But admitting the condition was void by their law, it does not follow it is void by ours ; for their rules are no further rules than they are received ; as by the ecclesiastic law, interest is not given for legacies, because with them it is usury, but here interest is given ; they are not used here as being ecclesiastic rules, but our rules ; so though they may happen to be their rules *ex accidenti*, they are followed only as being ours ; and therefore quite immaterial to insist on their rules ; must show the usage in this Court.

And by the constant practice of the Court, and various cases, where a personal legacy is given on a condition and limitation over, if the condition is not pursued, it is a forfeiture, and no relief can be had ; for there a third person's interest is concerned, and no room for a Court of equity to relieve ; for it would be doing an actual injury to another person. *Cray and Wilson*, May 1706. Personal legacy given on condition to marry with consent, else given over ; on appeal to Lord Cowper, held to be a forfeiture, because given over ; so *Ashton v. Ashton* ; *Hyde v. Livian*. The condition indeed in the case of *Fleming v. Walgrave*, 1 Ch. Ca. 58, was plainly void, because the person who was to give consent was to receive benefit by not doing it.

As to not having notice of the condition in the will ; every one is obliged to take notice of a condition, where no person is obliged to give notice of it ; as was resolved in the case of *Porter v. Fry*.

[28] *Chancellor*. This is not to be considered under the notion of a forfeiture ; it is merely a legacy given, and two days of payment appointed, with a devise over ; and the person dies before the time the legacy grew due ; so decreed that, she dying before marriage with consent, or twenty-one, an account to be taken of her part, and that that, and the improvements of it, be paid to the surviving sisters.

COPPIN v. COPPIN.

June 25, 1725. [*Inner-Temple Hall.*] [S. C. 2 P. Wms. 291.]

A. sells an estate to B. who pays part of the purchase-money ; he dies making A. executor, who is his heir at law : A. may retain out of the personal estate for the purchase-money, though thereby creditors suffer.

One Coppin lived at Aleppo, where he failed, and got his debts compounded at £10 per cent., and had releases in full. He after went into Persia, where he acquired a considerable estate ; and having a mind to have some land in England, he wrote to his brother John, the defendant, to look out for the purchase of an estate of about £300 per annum value ; who informed him by letter, that he had an estate of his own to dispose of at about that value, for which he would take twenty years' purchase, at which rate it amounted to £5400, to which the brother in Persia by letter agreed, and conveyances were made to him, but remained in the hands of the vendor the defendant ; only £1200 part of the purchase-money was paid. He makes his will, in which, after having given several legacies, he says, " Whatever else shall remain in money, land or goods, I give to my brother John Coppin, whom I ordain sole executor, only out of that he must pay what I owed at Aleppo to my creditors, who were so kind to compound their debts at £10 per cent., which remainder of those debts shall be paid without interest. I now order and appoint my executor to pay those debts, three years from this date, out of the residue." This will signed only by two witnesses, so not good to pass lands by the Statute of Frauds, on which the brother insists, and claims by descent, and not by the devise ; and being executor insists to retain for the residue of the purchase-money of that estate he sold his brother, out of the personal estate.

It was insisted, that the vendor having the writings in his hands, will be looked on as having the estate in his hands as a pledge for the payment of the purchase-money ; and that if the vendee had died leaving no personal estate, the vendor would be entitled to payment out of the real estate, and could not be compelled to deliver the deeds till [29] payment, for which the estate is security ; and then this brings it to the common case, that where a particular debt charges both real and personal estate, and another charges only the personal, the debts shall be so marshalled that all shall be paid ; and though the creditor cannot have his security restrained, yet if he has recourse to the personal estate, whereby the personal estate is exhausted, the other creditors will stand in his place to affect the real.

But besides this, it has been always held, that suffering lands to descend is a satisfaction for a debt due ; as it would be unnecessary to put a person to the trouble of a particular disposition, since the creditor receives the same benefit by its not being done, as if it actually had.

It was insisted, that the compounding creditors should be considered, not as legatees, but creditors, and have a priority of payment. Legacies are mere acts of bounty, which flow from the munificence of the testator, and which the legatee had no right to demand ; these compounded debts were ever debts in honour and conscience ; though by the intervention of the release could not be legally compelled to pay them, yet in conscience he was bound to do it. It is the same as a debt barred by the Statute of Limitations ; where if a man orders all his debts to be paid, those barred by the statute shall be paid too, for they are debts in conscience ; and the statute does not bar the right but the remedy, which the party may, or may not, make use of.

To this the *Chancellor* said, he would not consider debts barred by the statute, by such a declaration set up again.

Which declaration, I believe, gave occasion to the case of *Blackway v. Earl Strafford*, *postea*.

To which it was answered, as this is a debt, it must be paid out of the personal estate, as that is the proper fund for debts. Suppose only articles had been entered into, and the vendor dies before conveyance executed, the heir shall be obliged to convey, though the executor shall receive the money. To make the real estate chargeable in his hands as a deposit, would be running foul of the Statute of Frauds; as it would be charging the land without such solemnities as by that is required. The deeds remain in his hands not as vendor, but agent for the vendee.

As to the second point, the compounding creditors are not to be considered as debts, but as legacies; for if considered as debts, it would be putting them on an equal foot with the real, legal subsisting debts of the testator; it would be putting it in the testator's power to create a new [30] set of creditors (whose right was absolutely barred by their own act), to participate of that fund which the law has made liable to debts; which suppose it were exactly sufficient to pay the debts, if these compounding creditors are to be brought in as debts, then the whole of the debts could not be paid; so it would be putting it in the testator's power to take away that right which the law has established.

But the testator is so far from considering them as debts, that they are to be paid after all other legacies; for no time being appointed for the payment of the legacies, they are immediately payable; and these not to be paid till three years, and that out of the residue.

Chancellor. On reading the bill, the compounding creditors only pray to be paid *pari passu*, as the legatees, so can decree no more than they ask; and then the direction of the will must take place, by which are to be paid after the other legatees: what creates the intricacy of this case is the defendant's being in so many different capacities, vendor, heir, executor and agent for his brother; though the person be the same, the capacities are different, and must be considered as if in several persons. If vendee dies before all the purchase-money paid, the vendor may come against the executor for the money, though the heir is to have the benefit of it: suppose yet a stronger case; vendee who has paid part of the purchase-money dies, makes an executor, and the vendor is heir at law, the vendor will have the residue of the purchase-money against the executor, though it be so much for his benefit; and that is the case here; so must have the residue of the purchase-money.

WITHRINGTON v. BANKS and COSTESWORTH.

June 29, 1725. [Mr. Baron Price, in the absence of the Chancellor.]

Mortgagee restrained from cutting of timber, unless his security be defective; but what is cut down to sink the debt.

Lord Withrington, a papist, married the daughter of Sir Francis ———, who brought him a real estate; by her he had issue the plaintiff, whereby the lord became entitled to be tenant by the curtesy; after, in the year 1712, a fine was levied and mortgage made and settled in trustees, that they on payment of the mortgage-money should reconvey to Lord Withrington an estate for life, without impeachment of waste. Lord Withrington is attainted of treason, and his estate vested in commissioners for the [31] benefit of the public. Mr. Withrington puts in his claim to the reversion, free and discharged of committal of waste, which claim was allowed by the commissioners; who conveyed to the defendants all Lord Withrington's estate, with all privileges to the estate belonging.

The defendants also buy in the mortgage, and cut down a considerable value of timber off the estate, on which the bill is brought to restrain the cutting down any more timber; and that the money arising from the sale of the timber so cut down should be for the benefit of the heir.

For the plaintiff, the heir at law, it was argued, that by the constant rule of the Court, tenant for life is, out of the annual profits of the estate, to keep down the interest affecting it, as the income of the estate is so much higher by the debt not being paid off; for if the debt were to be paid off, the tenant for life would be obliged to pay a proportion of the debt, which is now settled to be one third, and the reversioner the other two thirds.

The mortgagee in fee, after forfeiture, may cut down timber at law, as the legal estate

is in him ; but now in this Court, unless it be a scanty security ; in which case this Court will not restrain a just creditor from his legal privileges ; but if it be an ample security, will restrain the cutting of timber ; for as the mortgagee is only a trustee for the mortgagor, the timber when cut down must be applied to ease the estate, and not for his own benefit. But to have the debt diminished by the sale of timber (which solely belongs to the reversioner), would be to make his particular estate discharge a debt to which the tenant for life was in proportion liable. Suppose the value of the timber cut down was equal to the debt on the estate, and to be applied to the discharge of it ; in that case the tenant for life would be no more charged with the payment of the interest of the money, which the law bound him to, and the reversioner would have paid the whole debt, when the law only charged him with a part ; and this by the single act of the mortgagor, who by this means would rescind the settled rules of property, on that head, established with great justice and equality in this Court ; the tenant for life and the mortgagee here being one and the same ; this is a piece of artifice to diminish the charge on the tenant for life, and throw it on the reversioner.

Mr. Baron Price. Mortgagee in fee, at law, may commit waste, but never in equity ; unless it appears the security is defective, [32] which is not here ; all conveyed by the commissioners of forfeited estates is tenancy by the curtesy, for have decreed that the reversioner shall have it free from committal of waste. Lord Withrington, being a papist, could take no larger an estate under the fine than he had before ; that he might take as large has been determined.

Decreed that account should be taken by the Master of what is cut down, and that applied in the first place to the payment of the interest, and then to the sinking of the mortgage ; and injunction to stay any more felling.

SAVILLE v. SAVILE

July 1, 1725. [Mr. Justice Tracy, in the absence of the Lord Chancellor.]

Where two provisions are made, and the second sum is less than the first, shall not be looked on as a satisfaction, but to have both.

A marriage settlement was made of lands, which are covenanted to be worth £4000 per annum, and a covenant to purchase other lands of the value of £1000 per annum ; a term of one hundred years is limited to trustees, in trust that if shall happen shall have issue daughters, and should happen to die, not having issue male who should live to twenty-one, or happen to die before twenty-one, leaving no issue male, then out of such profits, issues, rents or sale, to raise the sum of £16,000 ; if shall be but one daughter, as aforesaid, who lives to twenty-one or marriage, to have the whole £16,000 ; if should have more daughters, they to have a proportionable part of the £16,000. In the settlement there was also a clause to enable him to charge the £1000 per annum (to be purchased), by any deed or will, with any sum or sums of money for any children.

He had a son and a daughter, and by his will charges the £1000 per annum, with £3000 for her, and also with £5000 if she did not receive so much out of the Bank's estate (something having been left her by one of that name).

The son dies before the age of twenty-one, without issue male ; the daughter brings her bill for the £16,000 by the settlement, as also the provision by the will.

It was insisted, she should not be entitled to the £16,000, and also the £8000, for the enabling clause in the settlement, to charge the £1000 a year for *any* children, must necessarily be restrained to younger children, though the expression be general ; else this absurdity would follow ; supposing he had only a son, it would be giving him a power to give the son money out of his own estate, so must be meant younger children, and then it will stand thus ; if £8000 be settled for younger children, and if no elder son, £16,000, if she comes of [33] age in the life of her brother, will have £8000, but if her brother dies after, will not be entitled to both, for is entitled to a different provision, *viz.* £16,000, and nothing is more certain, than that a person shall not have two portions or provisions ; and so was the case of *Thomas and Kemis* ; two different sums were to be raised out of different lands, and at different times, and also different maintenances ; yet decreed only one should be raised, which was affirmed by the Lords. So the case of *Copley v. Copley*, before Lord Harcourt.

On the other side it was said, they made no dispute that a double provision should

never be. where only one was intended ; but this was not a double provision, but only one provision under the same settlement, part of which was certain, the other contingent, and both designed. It was certainly in his power to have charged the £1000 per annum, with any sum for children ; and £16,000 was charged for daughters, pursuant to settlement ; and if he had a power, and the words are of sufficient extent to do it, shall not by any forced construction be restrained.

The £8000 is certain, the £16,000 is on a contingency, which happened after the £8000 was to be received. And it is very observable, that in the case of double portions, there is no instance where the second provision is less than the first, that ever it has been held a satisfaction ; for a partial satisfaction has never been admitted, as appears by the common case ; if a man owes a sum of money, and gives the same person a less sum of money by will ; that neither goes in satisfaction or diminution, but will have both.

Tracy, J. If there had been no children but daughters, and he had exercised his power over the £1000 per annum, that never could be as part of the £16,000 : in all the cases cited the second sum is more or at least equal to the first provision. So decreed both sums to be raised, and that the £16,000 should be raised with interest and costs from the death of the brother.

She was above the age of twenty-one ; it was formerly referred to a Master, to see what she had received out of Bank's estate.

[34] WESTERN, Executor of WESTERN, v. CARTWRIGHT, Executor of CARTWRIGHT.

[Same day in the afternoon, before Lord Chancellor.]

Stated accounts after a great length of time not set aside against executor, though fraud.

John Mathew made his will in the year 1679, being possessed of several houses, and mortgaged interests, and seised in fee of three fourths of a wharf and sugar houses ; and left his estate to be equally divided between his sons James, John, Olive, and his daughter Anne (Olive died in the life of the father), and made Mortimer and Cartwright his executors, and empowered them to improve the estate for his children, and gave them £20 a-piece for their trouble ; and that they should account quarterly, and if so, £40 per annum should be allowed them ; the testator dies in 1680, and Cartwright took upon him the management of the estate in 1681. In 1692, Mathew Western, father of the plaintiff, applied to Mr. Cartwright to have leave to make his addresses to Mrs. Anne Mathew ; and he had leave so to do, but obliged him to give bond, that he and his future wife should sign his accounts, and covenant not to ravel back into them : in 1693, the marriage was had, and in pursuance of the bond signed the accounts ; and since signed several accounts to which the bond did not extend, but have incurred since ; James died in the year 1698, and left his fortune between his brother John and Anne his sister, of which Cartwright had the management ; Mr. Cartwright soon after John came of age, and was out of his apprenticeship, told him his brother and sister had examined and signed his accounts, and desired him to do so too ; on which he at once signed nine several accounts.

In Trin. Term 1708, John Mathew brought his bill against the defendant's testator ; to which bill Western the plaintiff's testator was made defendant ; the bill charged among other concealments, that in the year 1687, he had made a lease of the wharf at an under rent, the benefit of which was to himself ; and that, in the year 1695, all the wharfingers laid all the wharfs together under one common management, with liberty for all such as were concerned in interest to subscribe in ; he subscribed in as tenant at will, not as belonging to the infants ; on which a considerable profit was made ; to have the benefit of which was the end of the bill.

To this bill Cartwright pleaded several stated accounts, and denied fraud.

[35] Western, the plaintiff's testator, by his answer swore that he examined into the account, and that he had the books ten days before him, before he entered into the bond. In the year 1712 the cause came to be heard, and Lord *Harcourt* declared, that if any inconvenience should happen to Cartwright, by going into an open account, it was his own fault, being by the will to account quarterly ; and that it appeared, that John was drawn in by his brother's signing, and that it was a notorious fraud and breach of trust ; and decreed an open account, and to account for the profits of wharfage subscribed.

Lord *Macclesfield* was of the same opinion, 1718, and decreed payment of what was due on the foot of the account, with interest.

The present bill is brought to be let in on the foot of the account.

For the plaintiff, that he was a common trustee for them all ; this is a plain consequence of the other case, for the same account cannot be deemed an honest and fair account as to one, and fraudulent as to another equally concerned in interest ; it would be construing the same account fraudulent, and not fraudulent at the same time : in numberless instances, the very obliging to give bond has of itself been sufficient to open the account. And no weight can be laid on the plaintiff's father not having desired to open it ; for he supposed the account just and fair, and now he has found otherwise ; neither will his having looked over the account be any argument ; for all that could appear there would be faults in the calculation, or miscasting ; by looking over that could not discover omissions, or fraudulent transactions ; and where there is fraud, no length of time can bar ; as was resolved in the case of *Lord Warrington v. Booth*, in the House of Lords.

To which it was answered, that the present case is by no means like that of Mathew's bill, for there he was a young man just come of age, and drawn in to sign the accounts which he had never examined, therefore were very properly opened ; but here there was a man of full age, who on mature consideration, and examination of them, signed them, and signed several others on the same foot after ; of the justness of which he was so well satisfied, that he never attempted to impeach them ; and it would be highly unreasonable to go to do it now against his executor, at this great length of time, who may be perfectly ignorant of all the transactions ; it is certainly true, that no time will bar, [36] where there is fraud ; but that must be understood where the fraud is concealed ; for if it be known (as the whole affair was here), it certainly may.

As to the lease being made in trust for himself, it was made for the whole body of wharfingers, who had thereby an equal benefit with him ; and the profit thereby was not supposed to be very considerable, as he parted with one of the shares without a premium.

Lord Chancellor. There is a great deal of difference, where a trustee makes a lease for himself in trust, or where he happens to be concerned with a great many others, and a lease is let to one for the benefit of them all : as this is opened I see no fraud ; this was a project for the common benefit of wharfingers, and it has happened to succeed ; without some such expedient the rent must have sunk ; and is it not reasonable, that the person who run the hazard should have the benefit ? Here are several stated accounts by men of perfect ages and understandings, and a great length of time hath passed ; to have a bill brought now against the executors of a man who is gone out of the world, would be very wrong : this Court has gone great lengths in relieving against the Statute of Limitations, and run into all the inconveniences designed to be avoided by the legislature. Here it appears Western knew of the wharfingers' affair.

Pen I remember signed several stated accounts, and brought a bill to open them as fraudulent, but the Court would not relieve.

It is much better for the public that one man should suffer than all the world be in uncertainty ; people should come in a reasonable time. I do not say accounts are conclusive ; but it would be very hard to put a man's executors, who knew nothing of the matter, to answer.

And if it be a fraud, and he knows of it, I do not see but may be barred as soon as another.

EDEN v. FOSTER. (Commonly called the Case of Birmingham School.)

[S. C. 2 P. Wms. 325. See *Att.-Gen. v. Governors of Foundling Hospital*, 1793, 2 Ves. Jun. 42.]

July 3, 1725. [*Lord Chancellor, Lord C. J. Eyre, and Lord C. B. Gilbert.*]

Governors are appointed of a charity, and lands given to them, whether are not visitable.

King Edward the Sixth founded Birmingham School, and appointed twenty governors, and gave several lands to the governors ; whom he appointed *gubernatores pos-*

sessionum et reddituum, and gave them a power of making statutes by the advice of the Bishop of Lichfield.

[37] 28 Nov. 1723. Lord Chancellor *Macclesfield* granted a commission to inquire *per sacramentum, juratores et testes, aut aliis viis aut modis, ad inquirendum, examinandum, faciendum et exequendum cum effectu*; and that any four of the commissioners should have the power of making statutes.

Exceptions were taken, before Lord Chancellor *Macclesfield*, to the decree of the commissioners; which being overruled, the legality of the commission was now solely in question. For which purpose two points were insisted on.

1. That no commission could go; and if there could,
2. That the present commission was improper and illegal.

This must be founded on the 29 Eliz. c. 6, or 43 Eliz. c. 4, or on the common law. It is not founded on either of those; as this proceeds in a different manner than directed by either of those acts, so does not derive under them.

If not, it must depend on the king's visitatorial power by common law. The king has certainly a visitatorial power of royal foundations, by being founder, either by his charter, or by commission, if he has not parted with it. It must be admitted, that there are no express words by which he appoints a visitor, but there is an implied appointment of a visitor, as he has appointed governors, who are in the eye of the law visitors: so that by making governors, he has parted with his visitatorial power, which would have existed in him, if he had not appointed governors. That the appointment of governors is the appointment of visitors appears from 10 Coke [1], *Sutton's Hospital's* case, it is so expressly said; so Rolle's Abridgment (2 Rol. Ab. 231), "If a lay hospital be erected, and no visitor appointed, and there are governors appointed, those governors are visitors"; and this is to be considered as Rolle's opinion, who else would have put a *quære* to it, as he does in cases where he is not satisfied; and to this observation C. B. *Gilbert* agreed.

It has been a dispute, that if the governors misapply, whether a commission may not go; and so in 1616, in Duke, the case of *Sutton Coldfield* (Duke, 68); but in Duke, in the case of *Chelmsford*, 1649 (Duke, 84), there being governors who misapplied, a commission sent to examine was set aside, and a bill ordered to be brought on the foot of a trust.

If a governor be a visitor, then it is to be considered, if there be a visitor, whether a commission can go; and it is plain it cannot, because the *Chancellor* has only the power of a visitor, which is parted with by such a constitution of a visitor before. Co. Litt. 96. So the Reg. 40 and 41, the king cannot visit because another person was visitor. But [38] supposing the power of granting a commission, whether well executed; this is a commission to inquire, which cannot be good. 12 Co. 91. The commission does say, if find anything amiss, may do as they think right; but this is not restrained to the laws of the kingdom, to which *Magna Charta* confines them; and though they should not act against law, they have a power so to do; and whether a power given to them, by which they may act contrary to law, consistent with that power, be a good power in its creation, can admit of little debate; the power given must be good or bad in itself, and not depend on the execution of it; which would be to make a present power depend on a future act: by the constitution, the governors are to make statutes with the approbation of the Bishop of Litchfield; by this commission, any four may make statutes without his approbation, or agreeable to the statutes so made, which are to be inviolably observed.

On the other side it was said, this commission is not founded on any act of parliament, nor could it have been; for in 43 Eliz. there is a particular exception of Ed. VI. foundations; but this is maintainable by the common law; for wherever the crown, or other person, founds a college, there by the very foundation there is an inspection; and the power of the king depending on the foundation is the same, and no other than that of a common person, though the king may exercise it by his chancellor, or by commission. What they allege is, that particular visitors are appointed, and rely on the clause constituting governors, but without any visiting words, and cite Coke, *Sutton's Hospital's* case: but it is very observable, there was a private act of parliament, and next a charter, with a power of visiting, with negative words, that none else should; so that what Coke says, that the poor not being incorporated, and the governors being so, that they should have a visiting power is merely explanatory; and that not being the case in hand, is an extrajudicial opinion.

Where a general corporation is founded, as a town erected into a corporation, that concerning the public is under the general law.

But where a private corporation, as a college (4 Mod. 124), that is under those particular laws the founder establishes (if not against the law of the land); this distinction is laid down in Raymond, 106; and a college is within the same reason as an hospital. Reg. 40 is against visiting an hospital of the king's foundation. In F. N. B. 42, the word is *omnia*; and as [39] Coke's extrajudicial opinion is contrary to these, little regard should be had to it; and without relying on authority, from the nature of things, the design of visiting is solely to prevent a misapplication of the revenues; and to have the persons, who are to be visited, visit themselves, would be absurd and vain, and would be the same as to say, should not be visited at all.

If a private person founds, and appoints trustees, yet he may visit; and the reason is very strong, for else might destroy those charities he had created. But if there are negative words, and he declares he will not visit, no visitatorial power remains; but those words must be very plain to show his intent; because the nature of the thing is so strongly against it, that the persons, in whose hands the money is, and whose interest it is to misapply it, would be unaccountable and irresponsible; so that the words should be very plain to show so unreasonable an intention; if they are so, no more is to be said, but *stet pro ratione voluntas*.

Besides, to construe those governors to be visitors, would be contrary to the fundamental rules of law, that the king's grant should not be taken to a double intent; for they may be governors without being visitors.

It does not at all follow, because from part of the body being incorporated, that they are not visitable; great part of both universities are no part of the corporation, nor vested with any possessions; the fellows yet have a governing power as to their dress, &c., which is a visitatorial power, yet they themselves are to be visited; they may visit those under them, but that will not exempt themselves from being visited.

The governors are the only persons capable of misapplication, so the greatest reason in the world they should be visited.

The power given the governors is a restrained power, it is to be with Bishop of Litchfield's consent; and as they, by law, of themselves might have made laws, this is a restraint on the general power the law gave them.

Where persons are appointed governors, and have a bare authority, under that denomination may be visitors; but where an interest is given them, and they have the estate, they are only as trustees for the founder, and liable to be visited.

2. As to form of the commission.

No particular form is required; any that is not contrary to law is good; and as to saying this is a general power, [40] and not restrained to act *secundum legem terræ*, so that under it might act illegally; but where a general power is given, it is ever to be understood as circumscribed by the law of the land; for it can never be intended to be an authority to act illegally. At common law to admit such a commission, would be wrong; but this is a private foundation; here the words are the same as in the commissions of *oyer and terminer*.

Though by the charter particular persons are to make statutes, as there are no negative words, the king may give them statutes when he thinks proper.

The power of the founder is as much *lex terræ*, by Magna Charta, as trials by juries are.

Such sort of commissions have frequently gone where the governors were incorporated, as here.

Winburn School.	6 April, 12 Car. I. [1636].
Plymont School.	12 Car. I. [1636-37].
Bethlem.	19 Car. I. [1643-44].

The Court gave no judgment then; but said it would be an odd construction, that where lands were given to the governors, to suppose a visiting power was designed them, that is, that they should be checks on themselves in respect of the lands; though they may have a visiting power, as to the school, by being governors.

Order to be attended with precedents, and to give judgment next term. At which time, as I was informed, the commission was held good, and that the governors were to be visited.

PUGH v. RYAL.

July 5, 1725. [*Lord Chancellor.*]

Lease is made of lands belonging to a charity to the nephew of the clerk at a great under-value, he sells it to the clerk; the lease set aside as fraudulent, but under-leases made by him held good, and the rent to be paid to the charity.

The trustees of the charity of St. Mary Overees in Southwark made a lease of nine houses to the nephew of their clerk, under the rent of £5 per annum, for sixty-one years, in which was a covenant from the nephew to rebuild five of them. The nephew in consideration of £100, which was proved to be paid, assigns over his interest to the clerk of the charity; who makes a lease of five of the houses for forty years, under the yearly rent of £5 with covenant from the tenant to rebuild them, and also received a fine of £20, so that he had four of the houses for nothing immediately, and a reversion for twenty-one years of the other five houses, after the expiration of the lease he had made.

[41] The Court looked on the payment of the £100 only as a colourable transaction between the clerk and the nephew considering the nearness of the relation between them; and considered it as an imposition by the clerk on the trustees; so set aside the lease; for the clerk is supposed to know the true value of the estate, every thing being under his management. But the lease made to the under-tenant to continue, and the rent to be paid to the trustees.

It appeared the clerk had rebuilt one of the four remaining houses; so the Court by consent set the £20 he had received, and the profits he had made, against his expenses; else would have ordered an account of his receipts and expenses, and the estate to stand a security for what he had laid out.

STEPHENS v. CRAVEN.

Depositions of a person who was a defendant, and struck out, and examined, whether to be read.

The depositions of a person who was made a defendant, and struck out, and examined as a witness, were offered to be read; and the case of *Coke v. Gaugh* was cited, where it was so done.

Chancellor. I will not do it till I see that case. I have no great reverence for the rule, but if it be a rule, I must pursue it.

CRULL v. DODSON.

July 8, 1725. [*Lord Chancellor.—Rehearing on the Petition of the Defendant.*]

Bargains relating to stock are within the Statute of Frauds; and, if earnest not given, are *nuda pacta*.

The defendant was a broker, and had £5000 South Sea Stock of the plaintiff's in his hands, who told him he would sell when stock came to £200. The defendant when the stock was risen beyond that price, told him he had sold £1000 of it to one at £200 per cent. and £500 to another, who was his partner, and the rest he had taken himself at that price; and entries were made in his books accordingly, but in such a manner, that it looked as if done after the rise of stock, and only designed as an evidence, in case of a dispute. The plaintiff insisted, that at the time of the pretended sale stock was at £300, and insists on that price. The affair was left to arbitrators, and £4000 deposited as a security for so much as should be due: the arbitrators did nothing; so a decree was for the £4000, against which the defendant petitions.

[42] The Court was of opinion it was a fraudulent transaction; and that on the sale, if such there was, he should have taken earnest; for it has been determined here, that such a bargain is within the Statute of Frauds, and without earnest, only *nudum pactum*. The decree should have been to account for the £5000, and the produce of it; but as the plaintiff acquiesces under the decree; and it is reheard on the petition of the defendant, can do no more than affirm the decree.

RAWSON v. TURNER.

July 9. [*Lord Chancellor.*]

Any person interested may except to a decree made by commissioners of charitable uses, though refused to appear before them.

Rawson was summoned to appear before the commissioners, but never appeared; and now he takes exception to the decree of the commissioners.

Chancellor. The Act says, any person concerned in interest may except.

APPLEYARD v. WOOD.

July 12, 1725. [*Lord Chancellor.*]

A will of a copyhold does not require three witnesses; but whether a trust relating to copyhold declared by will does, *qu.*

A surrender was made of a copyhold estate to trustees, to the use of the will; a will was made with only two witnesses to it.

It was admitted, that a will of a copyhold estate does not require three witnesses; but this is a devise of a trust relating to lands, so within the very words of the Statute of Frauds, the heir controverting the surrender and the will: this point was not determined, but two issues ordered.

Though the *Chancellor* seemed to be of opinion, that the devise of a trust must ensue the nature of the estate, and not make it be necessary to have three witnesses, as the copyhold might be devised without three witnesses; this may be a question to be determined when the issues are tried.

PAKENHAM v. BLAND and HOSKINS.

July 13, 1725. [*Lord Chancellor.*]

On money received, promissory note is given by a person who had money owing him, the note is assigned; it shall not be looked on as a receipt in the hands of the assignee.

Pakenham had a running account with Bland a banker, in whose hands he had £3000. Bland paid him £1000, for which Pakenham, instead of a receipt gave him a promissory [43] note, who assigned it to the defendant Hoskins; Bland became a bankrupt; Hoskins sued the note; and on the trial, Pakenham not being able to prove that Bland at the time of the assignment, was a bankrupt, Hoskins recovered; now bill is brought for an injunction, and to have a discovery, whether the assignment was not made after the time it bore date.

It was insisted, that though this was a promissory note, it should be considered only as a receipt, he having at that time money in his hands, and could not be imagined he intended to be liable on the note at the same time that so much money was due to him; and if so, the £1000 should be taken as so much money paid and deducted out of the £3000, so should come in for his distributive share of £2000 of the bankrupt's estate, and not be a creditor for £3000, and pay the £1000 note: no proof was made of bankruptcy at the time of the assignment, only that he could not pay it, but never kept out of the way.

Chancellor. That does not amount to an act of bankruptcy; and if people are so careless to give notes instead of receipts, it is more fit they should suffer, than innocent people who know nothing of their transactions. Bill dismissed.

SHEPHARD v. BEECHER.

[Approved, *Burgess v. Eve*, 1872, L. R. 13 Eq. 458; *Phillips v. Foxall*, 1872, L. R. 7 Q. B. 679. Distinguished, *Lloyd's v. Harper*, 1880, 16 Ch. D. 307.]

July 20, 1725.

Shephard bound his son apprentice to the defendant, and entered into a bond of £1000 penalty, the condition of which was, that he should faithfully discharge his duty as an apprentice. To be relieved against the bond is the end of the bill.

In the year 1715, there was a deficiency of £203 in the son's accounts ; which the father then paid, and wrote to the defendant, that he should trust his son sparingly, and call him often to account ; the apprenticeship expired in 1719. In 1721, accounts were settled, when it appeared the son was £2762 in debt.

It was insisted, the bond should not be put in force, as the deficiency arose from his own neglect, in not pursuing the father's directions. But suppose it should, not for more than the residue of the £1000, after deducting the £203, else it would make the bond be a larger security than what it was given for.

[44] To which it was answered, as the father had entered into security, no letter of his, or directions, can diminish or retract it ; and the master had a right to the service, be the danger what it would, that the father the security should thereby sustain.

On the payment of the £203 no indorsement was made on it, so remains a security for £1000, and by not being indorsed off, may be looked on as a new agreement on the bond ; may have benefit at law, and should not be taken from us ; as the father is thereby bound at law and in conscience to take care of his son : if the father had paid a deficiency more than what the bond would have extended to, equity would not have relieved him, and obliged to refund ; so if equity would not interpose there, neither should it here, where have the law of our side.

But the *Chancellor* was of opinion, that as the security intended was not to exceed £1000, the £203 should be deducted ; else it would make the bond be a larger security than it was originally given for, and be to pay the £203 twice over.

DEGG v. Earl MACCLESFIELD.

[See the Wills Act, 1837 ; 7 Wm. 4 & 1 Vict. c. 26, s. 27.]

July 21, 1725.

Where a person has a power of revocation and limiting new uses, granting to new uses will be a good execution, if has no other lands.

If a man has a power of revocation, and of limiting new uses, and he grants to new uses, that has been over and over determined to be a revocation ; but if he has other lands, then there is something for the words to operate on, and will not be a revocation. If a man has lands over which he has a power of revocation, and other lands, if he gives all his lands, that will not amount to a revocation, in respect of the lands over which he has a power ; because the words may be satisfied as to the other lands.

CHANCY v. WOOTTON.

[S. C. sub nom. *Chancey's Case*, 1 P. Wms. 408 ; 2 Eq. Cas. Abr. 354. See *Lord Chichester v. Coventry*, 1867, L. R. 2 H. L. 96. See also 2 Wh. & T. L. C. (7th ed.) 376.]

[*Rehearing on Equity reserved.—Lord Chancellor.*]

A man indebted by bond to his servant gives her £500 for her long and faithful service ; though the legacy is more than the bond, yet shall have both.

A man indebted to his servant by bond £100, and also for wages which amounted to £15, makes his will, gives to the defendant, " in consideration of her long and faithful service done me, the sum of £500, to be paid her six months after my decease " ; he gave her also several particular household goods, and gave to Chancy, " all my estates in trust to sell, and thereout to pay off the incumbrances, and all my debts, and the said several legacies above given, [45] and all the rest to Chancy," whom he made executor. That this shall be considered as a satisfaction, and not be paid the debt and have the legacy : it was argued, that the constant rule is, where the legacy exceeds the debt, for so much shall be a satisfaction, and for the residue a gift ; where it is exactly equal it is a payment ; as this is the rule of the Court, under the knowledge and influence of which men are supposed to act ; to give it another construction, would be defeating people's wills, which they make on a supposition that the law is so, as has been often determined ; and men should be just before they are generous.

To which it was said, a legacy ever and necessarily imports a bounty ; to give a

man what he *owes* is an absurdity in terms, it was what he had a right to before ; all said on the other side, is no more than that a man should be just before he is generous, which is certainly so, where he cannot be both, as where are not assets ; but that is from the nature of the thing, and the impossibility of being both, and not from his intention. He appoints all his debts and legacies to be paid ; if this should be held a payment of a debt, it would destroy his intent as a legacy. 1 Salk. 155, is in point.

Chancellor. It is established on the foot of his intention, that if the legacy be more than the debt, it is a satisfaction ; because to be supposed a man should be just before he is generous ; but do not see why one moral virtue should exclude another ; but that is quite out of this case, for here is an express declaration of his intention, "for her long and faithful service," and then orders all his debts and legacies to be paid ; whatever debt he owes, or legacy he gives, is to be paid ; to do otherwise would be contrary to the will. So decreed the payment of the legacy, and also what he owed her.

MOZENE, &c., Creditors of ABRAHAM.

Bankruptcy clerk of a commission, in the presence of the person at whose instance he sued out the commission, no other person being by, opened a scrutore, and took out several papers, and made a pretended sale ; ordered to be examined on interrogatories, and pay the real value of the goods, and be removed from the clerkship.

Metcalf, by order of Eliot, sued out a commission of bankruptcy, to which he was clerk ; Abraham was found a bankrupt ; Metcalf in the presence of Eliot, no other person being by, took away a scrutore and opened it, in which were all the papers of the bankrupt, and made a [46] pretended sale by an appraiser, no creditor being by : on petition for that purpose, he was ordered to be examined on interrogatories, as to the real value of the goods, and pay the real value, and all costs occasioned by this irregularity ; and all the goods not disposed of to be delivered over ; and removed from the clerkship.

WOOD['s Case].

One cannot be both clerk and commissioner.

Johnson was both clerk and commissioner to a commission of bankruptcy, by which means had fees for both, and thereby four commissioners were always present, including the clerk, whereas three are sufficient.

On petition he was removed.

COMBS['s Case].

Commission not sat on three months superseded.

A commission was taken out, and not sat on till three months after.

Chancellor. It plainly shows it was done to protect the estate ; the commission shall be superseded for example-sake, that such things should not be practised.

WISE['s Case].

Bond given to the father-in-law of the future husband defeasanced, not to be put in suit unless misfortunes should happen to the husband ; fraudulent.

Bond was given to the father-in-law of the future husband for £500, payable at a day certain, but defeasanced not to be put in suit, but for security of the daughter, in case any misfortunes should happen to the husband, to be paid before other creditors.

Chancellor. This is a fraudulent bond on the face of it to disappoint creditors. (See post, *Proctor v. Warren*, p. 78.)

WHITLOCK[*'s Case*].

Person under age buys goods ; when he comes of age cannot be a bankrupt in respect of them. Action will lie against commissioners for finding a man a bankrupt if he be not so.

A person being under the age of twenty-one bought goods, and after the age of twenty-one committed an act of bankruptcy, in respect of those goods, on which a commission issued. Lord Chancellor *Macclesfield* doubted, whether he might not be a bankrupt ; but the *Chancellor* [47] was clear of opinion he could not ; and said, if commissioners find a man a bankrupt who is not so, action will lie against them.

FREAK[*'s Case*].

Cannot be a special return to a commission of lunacy.

Special return was made to a commission of lunacy, which was filed.

Chancellor. He must be found either mad or not mad ; if the return had not been filed, it had been no return ; but since it is filed it must be quashed, and an *alias* commission go.

FRANKLIN[*'s Case*].

Aug. 4, 1725. [S. C. 2 P. Wms. 299.]

Commission of review is discretionary, and refused where the end was to bastardize issue.

A marriage was had, and after a second marriage, by which was issue, and none by the first ; both the marriages were had in Ireland. Sentence was in the Consistory Court in Ireland for the marriage, which sentence was reversed by the delegates there.

Now application is made for a commission of review.

Which was objected to ; for that though commissions of review had frequently gone, in respect of sentences relating to wills in Ireland, that was because the law here and there, as to them, are both the same, but it is not so in respect of marriage.

Lord Chancellor. By the 32 H. VIII. c. 38, where there is issue, a marriage shall not be set aside for *præ-contract* ; that still is the law of Ireland, though altered here by 2 & 3 Ed. VI. c. 23, and though 2 Ed. VI. is repealed by 1 P. & M., yet it is revived by 1 Eliz. c. 1.

But though the law be different, if a commission should go, they must judge by the Irish laws.

A commission of review is not of right, but gratuitous and discretionary ; that it is so must have been for some reasons, to re-examine where were visible hardships. The only end aimed at here, by granting the commission, is to bastardize the issue, which shall never advise the king to do ; if there had been no issue, had been very different ; let them enjoy the good fortune of their legitimacy.

[48] POPPING[*'s Case*]. On RHODES's Will.

Commission of review granted pending an indictment of forgery of the same will.

Sentence was had for the will ; and after Rhodes was indicted for forging it ; pending which indictment, on suggestion of subsequent discoveries as to the forgery, and that the sentence was wrong, apply for a commission of review.

Which was opposed, as not being proper till after the trial of the indictment, for it would be disclosing the king's evidence ; and if sentence should be had against the will, might influence the jury on the indictment.

On the other side it was said, it was the constant course to grant a commission of review, where only one sentence, or where one of the delegates dissents ; and it would be very hard to have the commission depend on the success of the indictment, as the law is very tender in fixing a crime on a particular person ; but in the Spiritual Court the only question will be, whether it be forged or not.

Chancellor. Here are subsequent discoveries, and they say, besides that, the first

sentence was wrong. The cause has been but once heard, and it would be very hard not to grant a commission of review ; and no occasion to wait the issue of the indictment, that depends on its own circumstances and particular niceties.

On appeal may bring new matter ; aliter in review, unless be a clause to receive it. On appeal may bring new matter, but in review must proceed *ex eisdem actis*, unless there be a clause to receive new matter, which was added here.

Doubted whether should not pay costs of the trial before the delegates, as in granting a new trial : but Sir *Nathaniel Floyd* informing the Court that it is never done on review ; no costs.

LANNOY v. LANNOY.

Husband has a large fortune come to him in right of his wife, part of which was in the stocks, which he has transferred to himself and his wife jointly ; they shall survive to the wife.

Mr. Lannoy, on his marriage with Mr. *Frederick's* daughter, settled £500 per annum on her ; he after surrendered some copyhold estates to the use of his will which he made, and gave the copyhold to his wife ; her father, a freeman of London, died, whereby she became [49] intitled to one fifth of one third of his personal estate ; and £1500 was reported due to Mr Lannoy in right of his wife. Several specific securities were transferred to him and her jointly ; Mr. Lannoy after levied a fine, and made a new settlement, and increased her jointure £300 per annum, but never altered his will. Bill was brought to make the securities, which were transferred to the husband and wife, part of the personal estate of the husband.

Chancellor. The settlement is a revocation of the will, for such lands as are comprised in it ; but the copyhold is not, and therefore passes by the will.

The stocks undoubtedly belonged to the husband ; the only question is, whether he has not done something to alter that. A husband may purchase to himself and his wife ; here he takes to himself and his wife, which is the same thing ; there is a considerable accession of fortune to the husband ; and as this came by her, it would be very hard by equity to take from her what the law gives her. So for so much of the bill as sought to make the stocks in their joint names the estate of the husband, to be dismissed.

TURNER v. TURNER.

Subpœna for costs may be taken out either against the infant or *prochein amy*.

Infant brought a bill by his *prochein amy* ; a trial at law was directed, in which was nonsuit, and the bill dismissed with costs.

The register informed the Court, that the course in such cases is to give costs generally, but may have a *subpœna* against either.

ELDRED v. CHILD.

Aug. 7, 1725. [On appeal from the Rolls.]

A will was suggested to have been burnt, and that examined in the Spiritual Court, will not examine into it here.

Phœbe Wallis, being possessed of a personal estate, made her will 1723, and thereby gave all to the plaintiff ; the will was destroyed in her lifetime, and after died ; plaintiff insisted it was done by the defendant, and the defendant, that it was done by the testatrix ; this matter was litigated in the Spiritual Court, and administration granted to the defendant, as next of kin. Now bill is brought to set up the will, as being a fraud, for which can have no remedy in the Spiritual Court, as have no transcript of it ; and insisted, that if it was destroyed in the life of the testatrix, [50] could have no remedy there ; *aliter* if after ; and cited Swinburn, 263 ; so insisted to have issue directed to try, whether it was destroyed by the testatrix. But the Chancellor was of opinion that the Ecclesiastical Court had jurisdiction, and have no occasion to come here ; for if it were destroyed by the defendant, are not without remedy, for might bring action. So affirmed the decree.

WILLSON v. DABBS.

De Term. Sanct. Mich. October 30, 1725.

Decree was had by default, and a petition for rehearing ; the person in possession of the decree did not attend at the rehearing ; bill dismissed with costs as to the petitioner. Ante, 6.

MACARTE v. GIBSON.

Whether executor to be allowed interest for money paid by him before he received any of the testator's.

Money was due to the testatrix, which was out at interest ; the executor laid out considerable sums of money of his own in payment of the testatrix's debts, before any money came to his hands, as he suggested. Decree was for the payment of the money, and that he should have all just allowances ; it was insisted, he should have interest for the money so laid out.

Chancellor. If interest be a just allowance, Master will allow it ; if not, except to his report. Though I will not say that in no case executor shall have interest allowed, yet [51] shall be extremely cautious of doing it, for money expended before he receives out of the estate ; for I very well see the consequence of it.

The Master informed the Court, that he never allowed interest, unless [there] was a particular order for that purpose. So the Court reserved the consideration of interest and costs till after the Master's report.

THOMAS v. PUDDLESBURY.

Nov. 9, 1725.

A long Exchequer annuity deposited in a person's hands as a security, could not be subscribed in the year 1720, for had it not as a trustee, but for a particular purpose.

A. had a long exchequer annuity for ninety-nine years, which was settled on the husband for life, remainder to the wife for life, remainder for provision for children ; and had liberty, by decree of the Court, to borrow £300 on it, which was done, and this placed in B. the lender's hands as a security till payment with interest. B. subscribes it into the South Sea Stock in 1720. A. brings his bill for a reconveyance ; it was held, he could not be considered as a trustee, as he had it only for a particular purpose, and had no authority to subscribe. So decreed to account for the profits, and to reconvey on payment of principal, interest, and costs.

RICHARDSON v. MITCHELL.

Nov. 10, 1725.

If a person answers, he must answer the charge in the bill, though what he answers might have been good by way of plea.

Bill brought to set aside a purchase, and to have a discovery of the site and profits of the estate. Defendant by answer insists, that he is a purchaser, and that he is not obliged to make a discovery : to which exception was taken for not answering ; and that exception allowed. In support of the exception the case of *Stephens v. Stephens*, before Lord *Macclesfield* ; bill was brought for a discovery of the rents and profits of an estate, which he claimed by will from a common ancestor : defendant says, he is entitled to the estate ; and therefore till the right is determined, he was not obliged to give account of rents and profits. Lord *Macclesfield* said, this might have been good by way of plea, but having answered, must answer the charge of the bill. So lately the case of *Edwards v. Freeman* ; bill brought for account, the defendant controverted the right, and said, was not obliged to give an account before that was settled ; and your Lordship was of opinion, that having answered, the charge of the bill must be answered. So resolved here. (See *Floyer v. Sydenham*, ante in notis, page 2.)

[52] CLERKE v. JACKSON.

Settlement before marriage in bar of dower and thirds, but not to extend to household goods ; at the time of the settlement had an hospital, and household-goods there ; of these shall have thirds. But the decree reversed in the House of Lords.

A man before marriage settles £300 per annum on his wife, in bar of dower, thirds at common law, or what she might claim by custom ; provided *this shall not extend to any legacy he shall give her, nor to all or any household goods, or utensils of household stuff, plate, jewels, linen, &c., which he should have at the time of his decease.*

At the time of making the settlement he was under a contract with the commissioners of the navy, to take care of wounded sailors ; for which purpose had an hospital properly furnished for that use, 700 pair of sheets, bedding, &c., proportional, all which things were made use of in that house, and nowhere else.

Wife brings her bill for her share of these goods, as being household stuff, and her husband's at the time of his death, so clearly within the description.

To which it was answered, that though these things are within the letter taken in full latitude, yet they are not within the intention ; which was in respect of such household stuff, which he employed for his own domestic use, and not in the way of trade, as this was : suppose had been an upholsterer, these words would carry all his stock in trade, though never could be the intention.

But the *Chancellor* declared—

That as they were clearly within the letter, and that it was not certain what was intended, he would not recede from the words ; there is a certainty on one side, and an uncertainty on the other ; therefore it is safest to follow the letter, within which they are.

So decreed for the wife—

But on appeal to the House of Lords, this decree was reversed.

WEBBER v. TAYLOR.

Nov. 15, 1725.

Modus to pay a sum of money, but if in another person's hands, money or tithe in kind ; ill.

Bill was brought to establish a *modus*, which was laid thus : for payment of such a sum of money, but if in the hands of any other person, to pay tithe in kind, or the money, at the election of the parson.

Modus not to be established without trial, if desired. [53] *Lord Chancellor.* Will never establish a *modus* against a parson, without a trial at law, if he desires it ; but this *modus* is clearly ill, for a *modus* cannot be desultory.

BLACKLOCK v. BARNES.

Nov. 17, 1725.

If mortgagee lets the estate, that shall be always supposed the value, unless he shows *otherwise.*

If the mortgagor makes proof that the estate was let at such a price, while in the hands of the mortgagee, that shall be deemed the rate at which it was let the whole time, unless he shows the contrary, which is in his power, as being let by him.

HARNARD v. WEBSTER.

Trustee to be only charged for actual receipts ; mortgagee for what he had or might have received.

Trustee, though he acts, not to be charged as a mortgagee for what he had or might have received, but only for his actual receipts ; for he might have moved for a receiver.

PAXTON[’s Case].

Particular charge must be answered, and not generally which includes that particular.

If a man gives a general answer, and a particular question be asked which is included in the general ; yet he must answer it particularly, else it may be demurred to, for that may be a matter of judgment. A man is not obliged to answer any question which may subject him to a penalty ; any thing else material he must.

HUET v. Lord SAY and SEAL.

Devisee cannot revive, but must bring an original bill in nature of a bill of revivor.

Bill of partition brought by several persons, one dies, who devises his part to a plaintiff, and makes him executor ; he brings a bill of revivor, to which it was demurred.

Said that bills of revivor, and bills in nature of bills of revivor are very different : a bill of revivor can only be by the heir, as to the realty, and by an executor, or administrator, as to the personalty ; on bill of revivor the estate continues the same as before abatement, but here, in case of a devisee who is a purchaser, the estate is altered, [54] and a purchaser can never revive ; 1 Ch. Ca. 174. And an answer must be put in, and publication pass, though possibly may have benefit of orders, &c.

Demurrer allowed.

But leave given to amend the bill, and revive as executor ; and an original bill, in nature of a bill of revivor as devisee, was thought the most proper method.

YATES v. COMPTON.

[S. C. 2 P. Wms. 308. Followed, *Palmer v. Crawford*, 1819, 3 Swans. 487.

Distinguished, *In re Mabbett*, [1891] 1 Ch. 715.]

Nov. 19, 1725.

Devise to executors to sell, who renounce, executors need not be made parties.

Devise made to executors to sell, and the money thence arising to purchase an annuity for B., the executors renounce ; bill is brought against the heir at law, to which the executors are not made parties, which was made an objection ; but it was answered, the estate descends to the heir at law, and he is only a trustee to the use of the will, since the executors renounce ; so no occasion to be parties : and so was it held.

THORN v. PITT.

De Term. Sanct. Hill. Feb. 9, 1725.

Ante, p. 21. Cannot revive for costs, though taxed.

Bill was dismissed with costs, which were taxed ; bill of revivor was brought singly for costs, to which it was demurred ; in arguing the demurrer, that though the constant rule be, that where a bill is dismissed with costs, cannot revive for that, that must be taken to be where they are not taxed, and liquidated to a [55] sum certain, for then it becomes a duty ; and though the bill be dismissed, it is not so much out of the Court, but the party, in consequence of such dismissal, is liable to the process of the Court by subpoena, attachment, &c.

Chancellor. It is a rule that, unless in account, where both parties are actors, cannot revive ; I know no instance, where revivor in such a case as this ; it is very odd, but the rules of the Court must be observed.

Demurrer allowed.

RAKESTRAW v. BREWER.

[S. G. 2 Eq. Cas. Abr. 162, 601; Mosel. 189; 2 P. Wms. 511. See *Rajah Kishendatt Ram v. Rajah Mumtaz Ali Khan*, 1879, L. R. 6 Ind. App. 159; *Kinsman v. Rouse*, 1881, 17 Ch. D. 104,—50 L. J. Chan. 486,—44 L. T. 597,—29 W. R. 627; *Leigh v. Burnett*, 1885, 29 Ch. D. 235. See also on point of lapse of time, Statute of Limitations, 3 & 4 Wm. 4, c. 27, ss. 16, 28.]

De Term. Sanct. Trin. July 12, 1726. [Rehearing.]

If mortgagor continues in possession of any part, shall redeem the whole.

A person who had chambers in Gray's Inn mortgaged them in 1687, but continued the possession till 1700, at which time an order of the Bench was made, to deliver possession of the mortgaged premises to the mortgagee, into part of which he entered, but as to other part the mortgagor continued possession till 1708, at which time he died (and then the mortgagee had possession of the whole), leaving the plaintiff an infant, who came of age in 1714; in 1721, the mortgagee being a benchler, got eleven years added to his term by the society. Bill was brought to redeem in 1726, at which time mortgagee offered £20 to be rid of the plaintiff's claim.

Decree was made at the Rolls to redeem, and also to have the renewed term conveyed on payment of the consideration-money, with interest from the time.

[56] It was admitted, that where a mortgagee is in possession twenty years, and no interest paid, the mortgagor shall not be admitted to redeem; but where he is in possession of any part, the computation of that time shall never be admitted to affect him, but only from the time the mortgagee was in possession of the whole, and shall be admitted to redeem; and not only the mortgaged term, but also any renewed term shall go along with it; and this Court has gone so far, that if a trustee or mortgagee gets a new term, after the old one be actually expired, yet it shall be a trust; for it is supposed to have proceeded from having had the original term; and though there be nothing in fact in having a tenant-right, yet as such regard is had to it in the estimation of the world, it will be looked on as the occasion of the lease.

This case was endeavoured to be differenced from those general rules, as this renewed term was granted as a favour on the foot of his being a Benchler, and not as mortgagee; and the plaintiff was utterly incapable of having it, since by the rules of the Society, none can have chambers but those who are members of the Inn.

Lord Chancellor affirmed the decree.

Nothing is more clear, or a more established rule, than that if the mortgagor is in possession of any part, he shall be admitted to redeem the whole; for part he may, as being in possession, and part he cannot separately, so shall the whole; if mortgagee be in possession twenty years, and no interest paid, there shall be no redemption allowed. In this case the mortgagor was in possession of part till 1708; from 1708 to 1714 the plaintiff was an infant, so that is accounted for; and from that time it does not amount to twenty years; then as to the renewed term, it has been always a rule, that such renewals are to be redeemed with the principal, as an excrescence out of it, and to go with it.

And though the plaintiff by the rules of the House is not capable of chambers, it shall be to him or his appointee.

This being a dispute concerning Gray's Inn, the *Chancellor* obliged them to show that the Benchers would not determine the matter, but had given leave to go to law; this regard was to be had to all the societies of law, that all their disputes may be terminated among themselves. Lord Keeper *Wright* refused to hear a cause of this nature, and sent it back to the Benchers. In the present case the Court determined the right, and ordered that the Benchers should settle what was due for principal, interest, and costs, and to take account of the several receipts and allowances.

[ANONYMOUS.]

[57] *At the Rolls.*

Money left to trustees, who therewith purchase land, this shall go to the *cestui que* trust, having declared it done in pursuance of the trust.

A man makes his will, and appoints *B.* executor, and orders certain money to be laid out on land security, for the benefit of *C.* *B.* calls in money, and therewith

purchases land, which he says was done in pursuance of the will ; B. dies, not leaving assets to pay his own debts ; the land thus purchased shall be for the use of C.

GRENON v. RAWSON.

Oct. 19, 1726.

Deed-poll is made for an annuity, and after charges his estate for the payment of it, he shall have security, and not restrain the deed-poll.

A man makes a deed-poll for the payment of an annuity of £15 per annum ; and after by his will subjects all his real and personal estate to the payment of it ; grantee brings bill for the arrears, and to have part of the estate set out for security for the payment of it ; to which it was demurred, and the demurrer overruled ; and decreed payment of the arrears with costs, and that the Master should settle the security for the future payment of it.

Mr. Mead in this case said it was frequently done ; and cited *Mr. Trevor's* case, where a bond of the penalty of £5000 was given for the performance of the marriage contract ; there it was insisted, they should abide by the penalty ; but the Court was of another opinion, and decreed the completion of the agreement ; for the bond was not given as a satisfaction for that, but as a further security to enforce it.

BLACKWAY v. the Earl of STRAFFORD, administrator *cum testamento annexo* of JOHNSON.

[S. C. 2 P. Wms. 373 ; 2 Eq. Cas. Abr. 579 ; 6 Bro. P. C. 630. See *Burke v. Jones*, 1813, 2 V. & B. 275 ; *In re Stephens*, 1889, 43 Ch. D. 39.]

Will made for the payment of debts, those barred by the Statute of Limitations shall be paid.

Sir Henry Johnson owed the plaintiff a simple-contract debt in the year 1696. In 1719, at which time he owed several other debts, he made his will, and appointed all his just debts should be paid out of his personal estate, and by sale of part of his real estate. The defendant, the Earl of Strafford, takes out administration *cum testamento annexo* ; the plaintiff brings his bill for the payment of this debt, to which the defendant pleads the Statute of Limitations.

[58] It was insisted, that the plea was good, for that the law extinguishes the debt ; after six years the remedy is gone ; and a right without a remedy is an absurdity ; there can be no reason to suppose, that when he orders all his debts to be paid, that he meant to call those debts which the law does not call so. Had there been no other debt but this nominal one, or had it been particularly named, then these words might have compelled the payment of it ; because the words of the will could not else be satisfied ; but here they may.

E contra. The debt is not extinguished by the Statute of Limitations ; and if a trust be created, it sets it up again ; this has been looked on as the constant justice of this Court : Salk. 154. Though the remedy be gone, the duty remains, and this admits of a plain proof ; if six years incur, a promise after will make him liable, which proves that the debt is not gone, but only the remedy ; for if it were, there would be no consideration for the promise, and it would be *nudum pactum* : besides, in other cases it is no new thing, that there should be a right without a remedy ; if an infant contracts a debt (not for necessities), if he promises after he comes of age, that will make him liable. There was a case before Lord Cowper of *Stagers v. Welby*, in which it was decreed, that a debt barred by the statute should be paid, he having by will ordered all his debts to be paid.

Lord Chancellor. The statute is not an extinguishment of the debt, it is subsisting in conscience, else it could not be set up by a promise ; if there be a promise, it is not as a new one, but a re-continuance of the old ; it is true, as to the manner of payment, that cannot be altered by his will ; bond-debts will be first paid (vide *Coppin v. Coppin*, 28) ; and if in such a case as this (without charging the real estate), if there had been a residue after payment of debts not barred by the statute, these would have a right to be paid after those which were not barred. I have no difficulty, but you may look

into the case of *Stagers v. Welby*, where you say it was pleaded. And after, on examining that case, it was found so to be.

[59] BELL v. SPEREMAN.

De Term. Sanct. Mich. October 24, 1726. [Motions.]

Receiver commits waste. and discharged by all parties concerned in interest ; attachment will not go for so doing.

A., at the instance of all parties concerned, was by the Court appointed receiver ; after, in the midst of vacation, he commits waste ; all parties concerned serve him with a paper, discharging him from being receiver on that account ; motion for attachment, for turning him out who was appointed receiver by the Court.

Chancellor. Though the general proposition may be true, that attachment is to go where a person appointed receiver by the Court is turned out ; but it may be otherwise when attended with these circumstances. So denied the motion.

TEASDALE v. TEASDALE.

Oct. 26, 1726.

Father, supposing his son tenant in fee, stands by and lets his son make a settlement, which he had not power of doing according to his real title ; yet shall make good the settlement.

A son who was only tenant for life, though by the father looked on to be tenant in fee, makes a settlement on his intended wife for her jointure (in which was a covenant), with the knowledge and consent of his father, who was a witness to the deed ; he saluted and wished the intended bride joy : the marriage was had ; the son dies, and makes his wife executrix, leaving a personal estate of the value of £3000. The father, after the decease of the son, discovers that the son was only tenant for life, and that the fee was in himself ; on which title he had verdict, and judgment at law. The wife of the son brings bill to be relieved.

[60] For the plaintiff it was said, that a multitude of cases have been adjudged, that where a party is privy to the transaction, he shall take no advantage of it ; for it is a fraud, and would be doing an innocent person an injury : 1 Vern. 136, *Hobbs v. Norton* ; and in Lord *Macclesfield's* time, *Watts v. Creswill*, a purchaser relieved against a mortgagee who appeared to be privy to the purchase, though he was an infant.

E contra, it was insisted, that this case was very different from the cases cited ; for there they appear to have been cognizant of their titles, and concealed them, but here he did not know of his title, and therefore cannot be said to conceal it : and further in this case it appears, that the father had another estate, which he knew he had in fee, for the settling of which he had an adequate consideration ; so extremely plain he would have so done in respect of this, had he known his own title.

Lord Chancellor. I shall make no difference, whether he knew of his title or not at that time, considering the near relation of father and son ; it is plain, it was thought the son had the fee ; and had it been known it was in the father, it would have been insisted on that he should have joined, else the marriage would not have been had ; as he knew of the settlement, he shall not take advantage against it.

Then it was insisted, that she should be obliged to have recourse to the covenant against the personal estate ; and that it would be very hard to make a person suffer for ignorance of his title, when she may have ample satisfaction against the personal estate ; whereby equal justice will be done, and she will have the fruit of her agreement.

But the *Chancellor* said he would complete her jointure, for that was what was intended to be had, and would not oblige her to have recourse to the covenant.

N.B. By the settlement the husband was made tenant for life, and the wife tenant in tail, which the Court would not decree, but ordered an usual jointure to be made on her ; viz. an estate for life, impeachable of waste.

LETHULIER v. CASTLEMAIN.

Oct. 27, 1726.

On bill for a trial at law for the bounds of a manor, each side must give notes of the bounds they claim ; and if jury find different, to be indorsed on the *postea*.

Bill brought to have trial at law for the bounds of a manor.

[61] Mr. *Talbot* informed the Court, that in the case of the Bishop of Durham, which was parallel to this, it was ordered, that each side should give a note to the other of what each claimed as their bounds ; and if the jury find bounds different from the note given by either side, that those different boundaries should be indorsed on the *postea* : and so it was ordered here ; only it being a trial at bar, it was to be indorsed on the *habeas corpus*.

Same order made Nov. 4, 1726, between *Hughes v. Grames*.

ROBINSON v. SAVILE.

[See 55 Geo. III. c. 192, and The Wills Act, 7 Wm. IV. & 1 Vict. c. 26, s. 3.]

Oct. 28, 1726.

Person mortgaged a copyhold estate for the payment of debts, and after devises his estate for payment of debts, interest was paid after his decease ; foreclosure decreed.

A person mortgaged his copyhold estate ; after he makes his will, and devises his estate for payment of debts ; the interest of the mortgage was paid after his decease. Bill brought for a foreclosure.

Lord Chancellor. Though a devise of a copyhold is void at law, without a surrender to the use of his will, it will pass in equity, if it be for payment of debts ; but that is if no third person be injured ; but if there be assets, they shall be first applied ; and here by the payment of interest, it is an admission there are assets ; and therefore decreed a foreclosure.

KEECH v. SANDFORD.

[S. C. 2 Wh. & T. L. C. 693.]

Oct. 31, 1726.

Lease of a market devised to a trustee for the benefit of an infant ; lessor, before expiration of the lease, refuses to renew to the infant ; trustee takes it himself, shall be obliged to convey to the infant, and account for the profits.

A person being possessed of a lease of the profits of a market, devised his estate to trustee in trust for the infant ; before the expiration of the term the trustee applied to the lessor for a renewal, for the benefit of the infant, which he refused, in regard that it being only of the profits of a market, there could be no distress, and must rest singly in covenant, which the infant could not do ; there was clear proof of the refusal to renew for the benefit of the infant, on which the trustee gets a lease made to himself. Bill is now brought to have the lease assigned to him, and to account for the profits, on this principle, that wherever a lease is renewed by a trustee or executor, it shall be for the benefit of *cestui que use* ; which principle was agreed on the other side ; though endeavoured to be differenced, on account of the express proof of refusal to renew to the infant.

[62] *Lord Chancellor*. I must consider this as a trust for the infant ; for I very well see, if a trustee, on the refusal to renew, might have a lease to himself, few trustees would be renewed to *cestui que use* ; though I do not say there is a fraud in this case, yet he should rather have let it run out, than to have had the lease to himself. This may seem hard, that the trustee is the only person of all mankind who might not have the lease : but it is very proper that rule should be strictly pursued, and not in the least relaxed ; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que use*. So decreed, that the lease should

be assigned to the infant, and that the trustee should be indemnified from any covenants comprised in the lease, and an account of the profits made since the renewal.

HUGHES v. GAMES.

By custom, with consent of the homage, new copies may be granted ; Q. whether good custom without.

In this case it was admitted, that a lord by custom may make new grants of part of the manor to hold by copy ; and a case was cited to that purpose.

Lord Chancellor. In the case cited such grants were made with consent of the homage ; the question here is, whether there be a custom to do it without the homage, and that must go to law ; and then it will be by them considered, how far a custom to make such grants, without the homage, be a good custom,

It was said, Lord Chief Justice *Pemberton* had a copy in this manor.

COLE v. RUMNEY.

Nov. 7, 1726.

Bill by executor dismissed with costs out of assets ; which, if deny, to be examined on interrogatories.

Executor brings a very frivolous bill, which was dismissed with costs out of assets ; ordered to be examined on interrogatories, if deny assets. So done in another cause the next day.

[63] GIBSON v. SCUDAMORE.

[S. C. 2 Eq. Cas. Abr. 773 ; Mosel. 7 ; Dick. 45. See *Att.-Gen. v. Ailesbury*, 1887, L. R. 12 App. Cas. 682.]

[*Nov. 7, 1726.*]

Person obliged to lay out trust-money to be settled on herself for life, remainder to the heirs of A. ; she buys lands not of the value of the trust-money, and devises those lands to B., who is heir-at-law to A., and also her own right heir ; and gives several legacies, which could not be paid if the devise were not to be taken as part satisfaction ; and for that reason so decreed.

Mrs. Scudamore in the year 1699, leaves to Mrs. Prince the sum of £8784 in trust to be by her invested in lands, and to settle the same on herself for life, and then to the heirs of Lord Scudamore ; a decree was had against Mrs. Prince, to lay out the money in lands, and to settle the same according to Mrs. Scudamore's will in 1699. Mrs. Prince purchases lands to the value of £3300 and makes her will, whereby she devises to Miss Scudamore (who is heir-at-law to Lord Scudamore), and her heirs, this land which she had purchased, and gives several legacies, and devises all her personal estate also to Miss Scudamore, after payment of her debts and legacies.

Miss Scudamore was heir-at-law also to Mrs. Prince ; the question here was, whether this estate purchased and devised of the value of £3300 should be considered as part of the trust-money of £8784 ; if it should, there would be assets sufficient to pay the legacies else ; so whether this is to be considered as a particular devise, or a devise in satisfaction of the trust.

That it should be considered as in part satisfaction of the trust, it was argued, that it is the constant justice of this Court, that if a father, who is obliged to settle lands, suffer lands of equal value to descend, it shall be deemed to be as a completion of the settlement, and done in satisfaction of it ; here Mrs. Prince leaves this estate which cost £3300 to the same person, and in the same manner as she was prescribed to do it. It is the intent of the person who makes a will, that every part of it should take effect ; which cannot be here, unless it be in part satisfaction of the trust which she was obliged to perform : here Miss Scudamore is Mrs. Prince's heir-at-law, and if it had not been devised to her, she would have had it without the will ; so by giving it her, must be taken to be a satisfaction of what she was obliged.

On the other hand it was said, this cannot be said to be a satisfaction, because satisfaction must be to go in the same way as the thing to be satisfied; the will is to have it settled on the right heirs of Lord Scudamore, this is to the heirs of Miss Scudamore; and though Miss Scudamore is right heir to him, yet it may so happen that the right heir of Miss Scudamore, may not be right heir to Lord Scudamore; [64] for under the will of Mrs. Prince it may go to the heirs of the part of the mother; and what is a satisfaction must exactly square with the conditions of the thing for which it is to be a compensation.

There is no proof of its being purchased with the trust-money.

Lord Chancellor. We will take it, it is not bought with the trust-money. The case is, a person under obligation to lay out money, and to settle the estate on herself for life, and the fee on the defendant, *devises* an estate to her in fee, which is the estate she was to have conveyed to her; for her estate for life ceased by her death; as it will be impossible to make good the legacies left by her will, unless the estate be taken to be given in part of the trust, equity should construe it so; else she would be inconsistent to give legacies which could not be paid; it would be to suppose her to act in an illusory manner in the most serious act of her life. That the will may be satisfied, I must take this designed as part satisfaction. Besides, as Miss Scudamore is her heir-at-law, it seems to speak, that as she left it her by devise, that it was her intent to satisfy part of the trust; for if she had intended it as a bounty, it would have had that effect if she had made no devise at all. We do not always here consider what the strict intent of the party was, but consider what is equitable and just; and then suppose the party meant that, and so decree it; else I am sure nine in ten of our decrees could not be supported; if this be not considered as a part satisfaction of the trust, the will cannot be performed, and for that reason must be taken so to be; there are a thousand cases in this Court, where the leaving a person a legacy, to whom money is due, is a satisfaction; and that is this case. Whether she takes as heir to Lord Scudamore, or to her and her heirs, will be the same thing as to this.

[ANONYMOUS.]

Under pretext of seizing bankrupt's effects, got him taken in an action; it is an abuse of the process of the Court.

Two persons having authority to seize the effects of a bankrupt, broke open a closet, where the bankrupt was, to search for them; two officers came soon after them and took him in an action, and threw him into the Counter, where he was served with several other actions in custody; it was ordered that they at their own costs should procure him to be discharged out of custody, or to stand committed, being an abuse of the process of the Court.

[65] GARDINER v. PAINTER.

Nov. 12, 1726. [*Appeal from the Rolls.*]

Mortgagor makes a settlement of the mortgaged premises after marriage, and after mortgages again, the second mortgagee having notice of the jointure; yet the jointure being voluntary is void as to him, being a purchaser.

A man who had mortgaged his estate marries; after marriage makes a settlement on his wife of the mortgaged estate, which was recited to be in consideration of a portion paid; and then he mortgages it a second time; it appeared, that the second mortgagee had notice of the jointure at the time of the mortgage. There were no articles previous to the settlement, nor any money proved to be paid after marriage.

She brings her bill to be let into her jointure, on payment of one-third of the money due on the first mortgage, without being obliged to redeem the second mortgage, as having had notice of the jointure.

Decree at the Rolls, that she should not be let into her jointure, without redeeming both.

In support of the decree it was said, this is a settlement after marriage, and volun-

C. v.—8

tary ; and therefore by all the rules of law and equity it is fraudulent against purchasers, be the purchase with or without notice ; to which the *Chancellor* said, to dispute that is to debate whether two and two make four.

On the other side it was said, the jointure was made in consideration of a portion, and therefore for valuable consideration ; a settlement may be made after marriage, and not be fraudulent against purchasers ; as if a marriage be had, and after a sum of money is paid, and a settlement made in consideration of that, it will be good.

Lord Chancellor. That would be as a new agreement for a valuable consideration, and for a sum of money to which he had not been entitled unless he had consented to the making such a jointure, and would be good against purchasers ; but if he makes a jointure in consideration of money which he was then entitled to, it is voluntary ; and it can never be a question, whether a voluntary settlement be good against purchasers.

Decree affirmed.

[66] Dr. BETESWORTH v. DEAN AND CHAPTER OF ST. PAUL'S.

[S. C. 2 Eq. Cas. Abr. 26 ; 1 Bro. P. C. 240. See *Tailby v. Official Receiver*, 1888, 13 App. Cas. 552.]

Nov. 16, 1726.

Lease made before disabling statute of 13 Eliz., with covenant to renew for ninety-nine years, shall not be obliged to renew for the term allowed by the Act.—But this reversed in the House of Lords.

In the tenth year of Queen Elizabeth, the Dean and Chapter of St. Paul's made a lease to the Master and Fellows of Trinity Hall in Cambridge, of the land on which Doctors Commons is now built, for the term of ninety-nine years, to commence after the expiration of a lease then in being, in trust for the Doctors in Commons, under the yearly rent of £5 and the Doctors giving their advice to the Dean and Chapter gratis, and new building the houses and residence of the Doctors there. In the lease there was a covenant for renewal for ninety-nine years, on surrender of the old lease, and payment of £20, in which future renewed lease there was to be the like covenant of renewal on surrender *toties quoties*. Afterwards the Act of 13 & 14 Eliz. was made, by which ecclesiastick bodies are restrained from making leases in corporation or market-towns for above forty years. The houses were burnt down in the great fire 1666, and under the act for settling of property the lease renewed. The lease being now near expiring, bill is brought on behalf of the Doctors in Commons, against the Master and Fellows of Trinity Hall in Cambridge, to oblige them to surrender up the lease to the Dean and Chapter of St. Paul's, and to procure a lease from them for forty years in trust, and with the same covenants as in the former lease.

This case was argued 16th Nov. 1726, after the *Chancellor* called to his assistance Lord Chief Justice *Raymond*, his Honour the *Master of the Rolls*, and Mr. Justice *Price* ; and on 13th March, 1726-7, the Court delivered their opinion.

It was argued against the renewal, that this was an entire covenant, and could not be apportioned ; the Act of Parliament intervening is a repeal of the covenant. So is *Salk.* 198.

On the contrary it was insisted, that the Act of Parliament is not a total, but a partial disability ; and even at law, if the thing itself cannot be done, it shall be done as near as the persons are capable. *Litt. Sect.* 352. So here, though the covenant be for a lease of ninety-nine years, and the Act incapacitates them from making a lease for above forty, yet equity will interpose, and oblige them to do what is reasonable ; that is, comply with their covenant as [67] far as is in their power. According to the rules of law, if mortgagor does not pay the money at the time, the estate is gone ; yet in equity, on payment of principal and interest, shall be admitted to redeem, and that is the mortgagor's own fault. Nothing is more frequent, than that a covenant may be abridged by consent ; this is done by Act of Parliament, in which every one's consent is included. There are many cases where the thing contracted cannot be done, yet it shall be done as far as possible ; as if A. has a power to make leases for twenty-one years, and he makes a lease for thirty-one, this is certainly a void lease at law ; yet in this Court will be good for twenty-one years. 1 Chan. Rep. 23, *Pawsey*

v. Bowen. Suppose a man has a term, and agrees to assign his term of ninety-nine years; when it comes to be examined, the term is found to be but for fifty years; yet in equity he shall be obliged to assign that term. As to the case in Salk. 189, where it was resolved, that if a man covenants to do a thing, which at that time was lawful, and an Act of Parliament makes it unlawful, the covenant is repealed; that is certainly so; but that is only where it is totally unlawful; but if a covenant were to deliver ninety quarters of wheat in France, and an Act of Parliament should after say, no one shall export above eighty, he would be obliged to deliver eighty; for should fulfil his covenant as far as is in his power.

Mr. Justice Price was of opinion no lease should;

The *Master of the Rolls*, that a lease for forty years should be made; but I did not hear their reasons.

Lord Chief Justice Raymond. This lease was in its original creation a good lease, as if made by any other person who had the whole fee, and might bind themselves by bonds and covenants, as any natural persons might have done; though the case of Bishops might be different, because they could not do so without their Deans and Chapters; but Deans and Chapters have the whole fee, covenant would lie at law; but had it been brought at law, it must have been for the whole term; it has been said, that *omne majus continet in se minus*; but the rules of contract must be observed, they are intire and cannot be apportioned; they must be intirely destroyed, or intirely subsisting. 1 And. 235, pl. 252. The contract he has entered into is what he is obliged to perform, and that only. 5 Co. *Ford's case*.

[68] If a person makes a contract, it must be exactly pursued, or shall never recover. If a person were to contract for two sorts of corn, if he lays it generally, will be nonsuit. So that I conclude, before the Act, covenant could not have been brought for a forty years lease; because the action must be brought on the covenant made, and no other, for that is the only one to be performed.

Statutes of 13, 14, 18, & 43 Eliz. by the preambles and mischiefs recited, are long and unreasonable leases, *saving* to any lease hereafter to be made on surrender of a former lease; this saving was of absolute necessity, for by the *proviso* it appears there had been covenants for renewal; and without this the leases to be made after the Act could not have been for longer than twenty-one years, and the former covenants could have been of no effect: by the penning of the statute concurrent leases are plainly admitted of. 1 Ven. 246. All these statutes are to be construed one into another. Hob. 269, *Crane v. Taylor*; for which case see Winch, which may be right, but not for the reasons assigned in Hob.

Since the Statute, I am of opinion, no action at law would lie for the breach of the covenant; for by the Statute it is now not a legal covenant.

There are cases, that leases not warranted by the Statute shall be good while the head continues; and so is Co. Littleton; but Hard. 326 is, that it is not good in case of corporations aggregate; though it is good in respect of sole corporations, as bishops. I cannot conceive how they should be good in respect of corporations aggregate, during the continuance of the head, for a manifest prejudice may thereby arise; because, as the members of the corporation are fluctuating and changing, other persons may become members during the continuance of the lease, who were not concerned in making it, and would have been intitled, had it not been made; but that is not the case of corporations sole; for as they are intitled to the whole profits, nobody can suffer but the person who made the lease, and he has no reason to complain, as it is his own act.

And as cannot recover at law on this covenant, for that very reason cannot recover in equity.

Where damages are to be recovered at law, for the breach of a covenant, equity will compel a specific execution of such act, for the not doing of which the law gives damages, and that for this reason; as an adequate compensation is to be made on the covenant, the *quantum* [69] of the damages may be very uncertain; and therefore to prevent that uncertainty, equity will inforce a specific execution of the thing.

I take this to be a certain clear rule of equity, that a specific performance shall never be compelled, for the not doing of which the law would not give damages.

The covenant to oblige them to make a lease for ninety-nine years is gone; and damages cannot be recovered for part of a covenant; and therefore am of opinion equity cannot interpose.

Lord Chancellor. I take no proposition to be more clear, than that if a man had

covenanted to do an act, which by an Act of Parliament made afterwards he would be disabled from doing, that works a release ; but were there any doubt, the *proviso* makes it very plain. Can it be said, it would be a breach of covenant not to do a thing which an Act of Parliament says, when done, shall be void. The reason why specific performances are in this Court, is, because the lien is subsisting at law, and the law can only give damages, which may not be adequate ; but here the lien is gone ; this cannot be said to be a purchase, for a purchase is where it is mutual ; this is only to renew if lessee pleases, and is merely a personal covenant ; action at law cannot be for a lease for forty years, for the breach must be assigned according to the covenant ; and to bring it for forty years would be to make this a new covenant. And I cannot oblige them to make a lease for forty years. Bill dismissed.

But this decree was reversed by the Lords.

[ANONYMOUS.]

Nov. 17, 1726. [*Chancellor.*]

No new relator in information, without consent of the *Attorney-General*.

Information filed in the name of the *Attorney-General*, at the instance of a relator ; no other relator to be without the consent of the *Attorney-General*.

BURROWS v. JEMINEAU.

[S. C. Mosel. 1 ; 2 Eq. Cas. Abr. 524 ; 2 Str. 733. See *Ogden v. Saunders*, 1827, 12 Wheaton (U.S.A.), 365 ; *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 234.]

Nov. 22, 1726.

Sentence of a foreign court who have jurisdiction, and the persons are within it, is conclusive.

Bill of exchange was drawn in London, payable by A. at Leghorn, who accepted it, and was indorsed by several persons. By the law of Leghorn, if the drawer fails the acceptor is no further bound to pay than he has effects [70] of the drawer's in his hands ; to which purpose there was sentence in the Court of Leghorn, which was read here ; the acceptor came into England, and action was brought against him ; injunction was had ; and now bill brought to make the injunction perpetual. In support of the injunction it was said, that the law-merchant was an universal law, that it extends to all trading people, and not to be circumscribed by local or municipal laws ; and if it were not so, it would be destructive to trade and commerce, that the acceptor, on whose credit others indorse or take the bill, should not be liable : but it appears, by the depositions of several eminent merchants, that it is not the law of Leghorn ; but if it were so, that may be taken advantage of at law, and be only a conditional acceptance.

To which it was answered, that where a foreign Court has jurisdiction, and the persons are within it, the sentence of that Court must bind ; and by that particular must be guided without regard to what the law is in other places.

Lord Chancellor. Here is a sentence by a proper Court who have jurisdiction of the cause, and the persons are within it. I can have no regard to what merchants say is the law of Leghorn, since I have the sentence of the Court here, by which I do think myself bound. I remember in some of the reports in Charles 2nd's time, a man killed another in Portugal, and was indicted for it here on the statute ; he pleaded a trial and acquittal there, and held a good bar. [That case is cited 3 Mod. 194.] There are many cases in Roll's Abridgment, of sentences of foreign admiralties carried into execution here ; had I been to try it, I should have admitted it as evidence. I remember when I was Recorder of London, I asked Lord Chief Justice *Holt*, whether I should oblige them to plead a sentence of a foreign admiralty, or admit it to be given in evidence ; he said, whatever defeats the promise may be given in evidence on *non assumpsit*. It is every day's experience, if sailors bring action for their wages, a sentence in the admiralty will conclude them ; because the Court had a proper jurisdiction, and they have made their election : I should think it a proper defence at law, but different men may

have different opinions ; there may be little niceties and formal objections at law ; here we come to the real justice of the case. So perpetual injunction, but without costs.

[71] TOWNSEND v. LAWTON.

[S. C. 2 P. Wms. 379.]

Trustee not compelled to suffer recovery, unless for marriage, and to re-settle the estate.

Bill brought to compel a trustee to suffer a recovery.

Lord Chancellor. In *Winnington's* case it was done on account of marriage, and to re-settle the estate, in the same manner, which I would also do ; but this is for an alienation, so on quite different foundations ; I will not take away the remainder-man's chance, let the trustee do it, or let it alone.

Duke of DEVONSHIRE v. ATKINS.

[S. C. 2 P. Wms. 381.]

Nov. 25, 1726.

Aaron Kinton had a lease for three lives from the Bishop of London, which he assigned to trustees, to renew out of the rents and profits *toties quoties*, and that he should receive the profits during his life ; and then settled on several other persons for life, and after to his own executors and administrators ; he after became receiver to the Duke of Devonshire, and became indebted to him by simple contract ; and after makes his will, and devises this leasehold estate ; a bill was brought before Lord Chancellor *Cowper*, 3 Geo. I., who decreed the lease should be considered as personal assets, and subject to the Duke's debt, which case and resolution is in 2 Vern. 719, but the devisees not being made parties to that decree, the same question is now in dispute.

It was insisted, that before the Statute of Frauds this was a descendible freehold, and the heir considered as a special occupant, and not liable to simple-contract debts. This is a freehold lease ; and notwithstanding the words, " to his executors and administrators," the estate is the same, and shall go according to the legal limitation, *viz.* to his heirs, and the trust created should be conformant to the estate concerning which the trust was.

The Statute of Frauds gives power to devise an estate *pur autre vie* ; if no devise had been, it had gone to the heir as special occupant, and not subject to simple-contract debts ; and the power given by the statute to devise is making the devisee a special occupant ; for it is a particular designation who shall be so, and therefore as such, not to be liable to simple-contract debts.

[72] *Lord Chancellor.* This is not within the statute, because it is a trust ; it is in trust to him for his executors and administrators, and that must be a personal estate ; it is in nature of a special occupancy in the hands of the executor ; being a trust for him and his executors, and therefore not within the statute.

So decreed, as Lord *Cowper* had done before, to be liable to the debts.

BILSON v. SAUNDERS.

De Term. Sanct. Mich. Oct. 26, 1727. [In the Exchequer.]

Legacy to bear interest from a year after the death of the testator.

A legacy was left to an infant, the testator having a great deal of money in Bank-stock, the executor was residuary legatee ; the bill was brought for the legacy, and question was, whether it should bear interest, and from what time.

Chief Baron Pengelly, and Hale, Baron. It is a certain rule, that where the fund is certain, as when charged on land, it shall bear interest ; because it plainly appears the rents are received ; so the fund on which it is charged produces a profit here ; it is equally certain, and therefore should bear interest, Salk. 415 ; *Small v. Dee* ; and should be from the testator's death.

But this was opposed by Carter and Comings, Barons ; that it should only bear interest from a year after the testator's death ; for as legacies are to be paid after debts, the executor has that time to inquire ; till which are not payable, so not to bear interest ; to which it was agreed.

[73] A difference was offered to be made, that as this was a legacy to an infant, it could not be safely paid, and therefore should not bear interest.

To which it was answered by the *Chief Baron*, that it might be safely paid into the hands of an infant, having proper evidence of the payment, as in *Wentworth, Exec. 313*. And per *Carter* ; may be paid into the hands of the guardian, having evidence ; but if takes security from the guardian, which should prove defective, there, as does not rely on the security the law gives, must depend on that taken at his peril.

HORNSLY v. HORNSLY.

De Term. Sanct. Trin. July 2, 1729. [Chancellor.]

Where legacies are left to two, with a survivor in case of death ; if one dies in the life of the testator, the legacy is not lapsed, but shall survive.

A man makes his will, and gives £600 to his son John, to be paid with all convenient speed ; and gives £500 to his son George, to be paid in convenient time ; and appoints his real estate to come in aid of the personal ; and goes on and says, " But in case either of my said sons happen to die before they have received all, or any part of their legacy, then the remaining sum or sums shall go and be paid to the survivor."

One of the legatees died in the life of the testator. Bill is brought by the survivor for the legacy left to the deceased.

In this case there was no defence.

The *Attorney-General* said, it had been frequently determined, that if a legatee dies in the life of the testator, and there be a survivor created, it shall not be considered as [74] lapsed, because there was a survivor created, but be looked on as an immediate devise, and the survivor shall receive both.

And so it was decreed.

It was insisted, as it was charged on land which produced profit, should bear interest from the testator's death.

Chancellor. The testator has prevented that, by appointing it to be paid in convenient time. So must bear interest only from the usual time of payment of legacies.

BAKER v. ROGERS.

July 3, 1729. [Chancellor.]

One tenant of a manor cannot bring bill to quiet him in a customary right which is common to the other tenants.

Bill brought by one tenant of a manor, suggesting a custom for the tenants of the manor of A. (of which he was one) to cut turfs in the manor of B. To quiet him, and to have issue directed as to the right, was the end of the bill.

Solicitor-General for the defendant.

The bill is totally improper and inconsistent with the nature and end of such bills, which is, that where several persons have one and the same right, in which they are disturbed, on application to this Court, to prevent multiplicity of suits, to which each of them are entitled to on their several rights, issues will be directed, and one or two determinations will establish the right of all parties concerned on the foot of one common interest ; but in all those bills, either all parties join, or a determinate number in the name of themselves and the rest prefer a bill ; but in this case only one person brings the bill on the general right, and not on the foot of any particular distinct right : these kind of applications were admitted to prevent expense and multiplicity of suits ; and if this method should take place, would be liable to as many bills as might be to actions of law, so would totally frustrate the end of them, and run into greater inconveniences than those designed to have been avoided ; as suits in equity are more expensive than at law.

Attorney-General contra, for plaintiff, admitted the rule ; but said, the plaintiff was the only person interrupted, and therefore the others cannot be made plaintiffs ; and to make them defendants, would be only bringing them into Court to pay them costs.

[75] *Chancellor* admitted the rule laid down by the solicitor ; and said, that what the attorney said was not suggested in the bill.

So bill dismissed with costs.

SEPALINO v. TWITTY.

July 11, 1729. [*Rehearing.*]

Difference between a voluntary deed never out of the party's hands, and by him cancelled, and such a deed which he had or should have parted with.

A., tenant for life, without impeachment of waste, with power to make a jointure on any wife, not exceeding £100 per annum for each £1000 brought by her, and so rateably for any lesser sum ; remainder to trustees to preserve contingent remainders ; remainder to the first and every other son in tail male ; remainder over. A. married a woman whose fortune does not appear what, or any ; the husband and wife part by consent ; a deed is drawn between the husband and wife, and remainder-man and trustees, with covenant to settle £30 per annum, for a provision for the wife during the separation, and for a provision for her after the husband's decease ; in consideration of which she is to claim no thirds, or any thing of the husband's estate, under the Statute of Distributions : the husband executes this deed, and sends it into the country to be executed by the remainder-man, who returns the deed, perfected by him to the husband, who does not deliver it to the trustees ; the wife makes application for it, but cannot get it ; but has money paid to her in pursuance of it ; after the husband cancels these deeds in presence of the remainder-man ; the wife, after the death of the husband, brings a bill against the remainder-man, for the benefit of this covenant from the death of the husband ; which is so decreed by his Honour the *Master of the Rolls*. Now comes here an appeal.

Solicitor-General against the decree.

He said, if the deed be on valuable consideration, it is immaterial whether the deed were ever out of the party's hands, because it is on a consideration which is reciprocal ; and if in such case the deed be cancelled, yet the Court will oblige the terms of it to be complied with ; but if the deed be voluntary, and preserved in the party's own hands, the sealing will not compel the execution of it ; and if the party destroys it, the Court will not interpose ; for shall be considered only as done to prevent accidents, in case does not change his mind ; which he has power to do, while it is in his custody ; and here it does not appear to have ever been in the trustees' hands.

[76] Mr. *Lutwich* said, he remembered a very strong case to that purpose ; a person made a voluntary deed, and kept it in his custody, the person who was to be benefited by it got the key of the box where it was kept, and took a copy of it ; after the person who made the deed cancelled it ; and the Court was so far from compelling the execution of such cancelled deed, that injunction was granted to prevent recovery at law on the copy ; and declared, that taking away the deed, or getting a copy of it, was a fraud on the party, of which no benefit should be taken.

Lord Chancellor affirmed the decree ; and said, that the law was certainly so in the cases mentioned ; but here, after the execution of the deed, it was returned to the husband, who should have delivered it over to the trustees, which was intended to have been done, as they were made parties ; and shall you now take advantage of his not doing what he ought to have done, and what you intended he should ; tho' it be not proved to have ever been in the trustees' hands, you might have examined them, and cleared up that ; nothing is to be presumed in your favour after such a transaction as this. This is a deed submitted to, and acquiesced under, and under it the wife has received money ; and as by it she was to have nothing under the Statute of Distributions, she must abide by that.

N.B.—An order in a former cause between the same parties, was read at the Rolls, and an interlocutory order in that cause was offered to be read here, without an order for reading it first had ; which was opposed : depositions between the same parties in another cause are not to be read without order ; for cannot tell which are designed to be read, so no opportunity of contradicting them ; and this is liable to equal inconveniency, for this interlocutory order may be destroyed by subsequent ones.

Chancellor said, the former cause was taken notice of by reading an order made

in it ; and tho' may not read depositions, yet the Court may read its own acts, and be informed of them.

— v. DU RHONE

July 11, 1729. [Chancellor.]

Where the same hand is to pay which receives, it is an actual payment.

A. and B. were two merchants who had running accounts with each other ; A. buys African stock in trust for B., afterwards B. agrees to give A. £200 to take [77] £3000 stock at £175 per cent., to be paid six months after ; B. being considerably indebted to A., A. makes B. debtor in his book for the £200, but does not give him credit for the £5250, which was what the stock amounted to. A. has a statute of bankruptcy taken out against him ; then comes the statute for registering all contracts made in the year 1720, in part or in the whole unperformed.

Question was, whether this £5250 should be allowed in the account of B. as against the assignees.

Chief Justice *Raymond*, and Baron *Cummings*, assisting the *Chancellor*.

It was determined that this case was not within the statute for registering contracts ; for it was a contract executed and performed ; for B. being indebted to A. at that time, the money for which the contract was shall be looked on as paid, and be an actual discharge ; so it is in all cases where the same hand is to pay which is to receive ; it is *eo instante* a payment. *Hob. 10, Fryer v. Gildridge* ; and so it would be at law ; here no entry is made in his book, but no advantage shall be taken of that ; for what he should have done, will in equity be looked on as done.

It has been attempted to be differenced by his becoming a bankrupt ; but the law is very clear, that the assignees are exactly in the same place as the bankrupt, and stand in his place to every particular, and any agreement entered into shall bind them ; and though there may not be the same remedy against them, that is not from the nature, but the necessity of the thing ; for he shall make an adequate and complete satisfaction, as far as his fortune will admit of in the hands of the assignees.

DUFFIN v. FURNESS.

July 14, 1729. [At the Rolls.]

Money given by a person just before his death, not fraudulent to creditors.

A man, being much in debt, six hours before his decease gives £600 for the benefit of younger children ; this is not fraudulent as against creditors ; tho' it would have been so of a real estate, or chattel real ; tho' the Court would not have taken it to be so *pro confesso*, but would have directed an issue to try it ; and so it was done in Lord *Sommers's* time, and on issue directed, determined fraudulent before Lord C. J. *Holt*.

[78] PROCTOR v. WARREN.

De Term. Sanct. Mich. October 25, 1729. [Chancellor.]

A man has a term originally transferred to his daughter-in-law, and after grows indebted, this shall not be fraudulent as to debts after contracted.

A. having leases for years, in consideration of the surrender of which, and a fine of his own proper money by him paid, had leases for years made to himself for life, remainder to his wife for her life ; remainder as to one of the terms to his daughter ; remainder of another of the terms to his daughter-in-law ; this was done in the year 1717 (at which time money was owing to his daughter-in-law, which he received), and after, in the year 1723, he enters into a bond, and died without assets.

It was insisted, this was assets, and voluntarily settled, as a citizen of London may in his life-time give away what he pleases, and the custom will not affect it ; but if he

makes a settlement, reserving an estate for life, or an interest to himself, this will be fraud as to the custom.

To which it was answered, that the cases are by no means parallel ; that on the custom must be clearly fraud, for it is a settlement made by a freeman to take place after his death, at which time the custom must attach ; which must be in fraud of the custom, to prevent its operation, for he could not do it by will, and this would be doing it in another shape, and the persons intitled to it had a right to it at that time ; but this is done six years before a debt contracted ; if a debt had been then contracted, might have been another consideration, or if he had after sold this estate ; the question is now not between purchasers, but creditors. But even suppose this had been a real estate voluntarily settled, and he had after entered into a [79] bond, a Court of equity would not have assisted that bond against the settlement ; this cannot be in fraud of a debt after contracted.

Lord Chancellor. It would be very extraordinary to subject this to debts not then contracted ; but I do not know that it has ever been determined, that a man indebted, minding to provide for his children, has an estate originally conveyed to them, that that should be subject to debts. But that is not the present case, for here is proof that this daughter had money owing to her, which was paid to the father-in-law.

So not made subject to debts.

CLAVERING v. CLAVERING.

[S. C. 2 P. Wms. 388 ; Mosel. 219. Followed, *Spencer v. Scurr*, 1862, 31 Beav. 337 and *Elias v. Snowdon Slate Quarries Company*, 4 App. Cas. 466.]

Nov. 10, 1729. [*Chancellor.*]

Mines different from pits. May sink in pursuit of the oar ; *aliter* of pits.

In this case it was said by the *Solicitor-General*, that there was great difference between pits and mines ; for if a mine be opened, as one may work the mine, is not obliged to pursue the vein of oar under ground ; but may sink pits in pursuit of it, as many as he thinks proper, which be necessary to come at the oar ; and so the *Lord Chancellor* said it had been resolved before Justice *Powel*, on great consideration, and consulting and examining the most able miners.

[80] *EVLYN v. EVLYN.*

[S. C. 2 P. Wms. 659.]

De Term. Sanct. Mich. October 26, 1730. [*Chancellor.*]

Remainder-man not to have the personal estate exonerate the real.

Hæres natus, or *factus*, may have the personal estate applied in exoneration of the real, but not a remainder-man ; for the first comes to discharge the estate which descended to him, or was given him by the same person who owned both real and personal estate ; but in the other case the remainder-man is a stranger, and does not claim the estate from the same person who owned the personal estate.

HARVY v. WOODHOUSE.

Oct. 27, 1730. [*Chancellor.*]

A. who had confessed a judgment to B. in trust for C. sells ; B. makes A. executor, whereby cannot recover at law ; equity will not assist against the purchaser.

A. enters into a judgment to B. and C., which is defeasanced to the use of D., and in the defeasance A. covenants for himself, and his heirs, to pay to D., the *cestui que* trust, and her heirs ; afterwards A. sells part, and the other part descending to the heir, he married and had children ; B., one of the trustees, dies ; C. the surviving trustee makes A. the conusor of the judgment executor ; D., the *cestui que* trust, brings

C. v.—8*

bill against the executors of A., the heir at law and the purchaser, for relief, not being able to recover at law, the conusor being made executor ; but no relief.

Chancellor. Tho' it be a mere accident and slip, that by the conusor's being made executor, yet equity will not interpose or give any assistance to affect a purchaser ; recover at law as you can.

[81] JACKSON v. JACKSON.

Nov. 4, 1730. [*Chancellor.*]

Livery supposed after great length of time.

A deed of lands in two different counties by way of feoffment, and livery and seisin of the lands in one county indorsed ; the deed was made 1657.

Decreed that tho' no livery appeared of the other lands, yet by reason of the possession, and great length of time, equity will suppose and supply it ; it had been much stronger on the other side, had the livery been indorsed of lands in one county in the name of both ; it would have been an implication that none was of the other, since one was designed for both.

ROGERS v. ROGERS.

[S. C. 3 P. Wms. 193.]

De Term. Sanct. Trin. June 1 & 5, 1733. [Chancellor.]

A. by will made heiress and executrix to sell and dispose as thinks fit to pay debts and legacies ; no resulting trust to the heir at law.

William Rogers makes his will in these words : " I do constitute and make my well beloved wife, Anne Rogers, sole and whole heiress and executrix of all my lands, tenements, goods and chattels whatsoever, real and personal, the same to sell and dispose of as she shall think fit, to pay my debts and legacies of this my last will and testament " ; and gives the heir at law £5. Question whether there be not a resulting trust to the heir at law, being said to be for a particular purpose.

[82] To make it a resulting trust were cited 2 Chan. Ca. *Culpepper v. Austin*, 2 Vern. 425, 571, 644, and the case of *Lodder and Lodder*, 1733, which was this : John Lodder gave all his lands to his son Charles for ninety-nine years ; remainder to trustees to preserve contingent remainders ; remainder to his first and every other son in tail male ; remainder to his son Francis, with the same limitations ; and for want of such issue, to his kinsman Robert Lodder, and his heirs, in trust to pay all and every of his daughters £5000. Makes no further disposition after raising the portions ; this held a resulting trust to the heir at law, who was the daughter, and intitled to £5000 after two estates-tail.

On the other side.

She is made sole heiress and executrix, so that she is substituted in the room of him who actually is so ; so that if there should be a resulting trust to the heir, by the word *pay*, yet she must have it, because by the will made heir. An heir at law is never considered as trustee ; and here she is put in the place of one who is so ; this is on a will, and the case of deeds and wills is very different ; for there may be a resulting trust on a deed, for that imports a consideration, and the consideration is the occasion of making it, and can be for no more than is mentioned, the rest is undisposed ; but on a will it is different ; that does not imply consideration, but a benefit ; and here he describes her with regard and affection, which plainly shows he intended her a benefit, which she could not have, if the construction of a resulting trust should take place ; all the cases where it is a resulting trust, are, where a particular trust is declared, and not having disposed of the whole part remains, which must go to the heir : the case of *Culpepper and Austin*, 2 Chan. Ca. is on a deed, which does not import a bounty, as does a will ; a use may arise, but not on a will : the case of *Lodder v. Lodder* was an express trust.

Decreed no resulting trust. The case in 2 Vern. 247, is in point ; the resolution of which is in Equity Cases Abridged, 273.

Reports of CASES ARGUED and DETERMINED in the HIGH COURT OF CHANCERY, during the time of the Late LORD CHANCELLOR KING. [1726–1731.] Collected by WILLIAM MOSELY, Barrister-at-Law. 1793.

[1] DE TERM. S. MICHAEL. 1726, IN CUR. CANCELLARIÆ.

Peter (Lord) *King*, Lord High Chancellor; *Sir Joseph Jekyll*, Kt. Master of the Rolls; *Sir Philip York*, Kt. his Majesty's Attorney General; *Charles Talbot*, Esq. his Majesty's Solicitor General.

CASE 1.—BURROUGHS & al', *Plaintiffs*; JAMINEAU & al', *Defendants*.

[S. C. Sel. Cas. T. King, 69; 2 Eq. Cas. Abr. 524; 2 Str. 733. See *Ogden v. Saunders*, 1827, 12 Wheaton (U.S.A.), 365; *Ellis v. M'Henry*, 1871, L. R. 6 C. P. 234.]

[Nov. 22, 1726.] *In Court, Lord Chancellor.*

Sel. Cas. in Chan. 69, S. C.—By the laws of *Leghorn*, if the drawer fails before the bill is accepted, and the acceptor has no notice of it, he is not obliged to pay the bill, unless he has effects of the drawer in his hands, and then he shall answer only for their value.

The sentence of a foreign court is binding in our courts, and a perpetual injunction was granted to an action brought on two bills of exchange, the acceptance having been vacated in the court of *Leghorn*. 1 Vern. 21; 2 Chan. Cas. 74; Carthew, 32; 1 Chan. Cas. 237; Nels. Fol. Rep. in Can. 186; Swinb. part 1, sect. 6, n. 8, 9; Nels. 8vo. Rep. in Can. 103.

One tried for a murder beyond seas, pleads in bar a trial in *Spain*, and an acquittal. This is a good plea. Show. 6.

Skinner, a merchant in *London*, on the 22d of *January* 1713, drew two bills of exchange on the plaintiffs at *Leghorn*, one for seven hundred pieces of eight, the other for eight hundred, amounting in the whole to £317 *Sterling*, payable to the defendant and company, or order, three months after sight; the defendant inclosed them in a letter to his co-partners at *Leghorn*, who indorsed them over to *Nevil* and *Bouciere*, and they indorsed them over to *Langlois* and company, and the plaintiffs accept them the 19th of *February*; the 11th of *February* *Skinner* stops payment, of which the plaintiffs have advice, by letter bearing date the said 19th of *February*, which coming to their hands before the bills became due, they refuse payment, and it being the law of *Leghorn*, that the acceptor of a bill must either pay it or go to prison without bail or main-prise, or if he has any objection to the payment, he must bring the money into Court, and prosecute the suit at his own charges: The plaintiffs accordingly brought the money into Court, and cite *Langlois* and company to appear, and upon hearing the [2] cause, the acceptance was vacated against the defendants, and all the indorsees and negotiators of the bill; and the money deposited was returned to the plaintiffs; for by the laws of *Leghorn*, if the drawer has failed, before the acceptance of the bill, and the acceptor at that time has no notice thereof, he shall not be obliged to pay the bill, unless he has effects of the drawers in his hands, and then he shall be only answerable for their value; now it was impossible the plaintiffs, when they accepted the

bills, should know *Skinner* had failed, because the letter which advised them of it, bore date the same day with the acceptance, and they had no effects of *Skinner*, but he was indebted to them £275. Soon after the plaintiffs came into *England*, upon which the defendant brought his action against them in the Court of Common Pleas for the £317, and the plaintiffs file this bill for an injunction, which was granted till the hearing of the cause, upon the plaintiffs giving judgment with a release of errors. And the cause now coming on to be heard, the *Lord Chancellor* decreed a perpetual injunction against the defendants, and that they should acknowledge satisfaction upon the judgment, for his Lordship declared, as the cause had received a determination in a proper judicature, that should be binding there: And to prove that our Courts have always a regard to the sentence of foreign Courts, he quoted a case, where one being tried for murder committed beyond the seas, on the statute of *H. 8*, pleaded in bar, that he had been tried in *Spain* and acquitted, and the plea was allowed: And his Lordship further said, that our Courts of Admiralty, every day put in execution the sentence of a foreign Admiralty certified to them.

Though *Langlois* and company, being the last indorsees, had the sole property of the bills, and were therefore made the only parties to the suit at *Leghorn*, yet the sentence made the acceptance void against the now defendants and all others.

The *Lord Chancellor* allowed this would have been a proper defence at law, yet would not dismiss the bill, because the plaintiffs had given a judgment with release of errors, and a difficulty might arise at law, as the plaintiffs in the action, are not the persons against whom the sentence was given in [3] *Leghorn*, and his Lordship said, that this foreign judgment might be either pleaded to the action, or given in evidence, as if a seaman brings an assumpsit for wages, the defendant may plead in bar, a sentence of the Admiralty, or give it in evidence upon non assumpsit, because it defeats the promise.

The defendants council insisted, that by the general custom of merchants, an acceptor is at all events liable, and that it would be very prejudicial to trade, if merchants in one place, should have greater advantages than in another, and be a great detriment to subsequent indorsees, that a sentence of divorce in *Italy* has been refused to be received in evidence here, because they proceed there by a different law: and that it was adjudged in *Bland's* case, that stopping payment is no act of bankruptcy.

Case 2.—BEECHER *versus* GUILBURN. [1726.]

In Court, Lord Chancellor.

If one partner borrows from the other on note, he shall pay interest, tho' he had more money in the stock than he borrowed.

If one co-partner borrows money of the other on his note, he shall pay interest for it, though he had more money in the stock than what he borrowed; for the stock is only to be employed in augmentation of the trade, for their mutual benefit, but neither of them can make use of it, for their own private advantage.

Case 3.—HARPER & al', *Plaintiffs*; JOHN LEE, an infant, by his guardian LAMBETH, & al', *Defendants*. [1726.]

In Court, Lord Chancellor.

I give all my houses, leases, tenements, and goods whatsoever to my wife for life, and then to my nephew all my books and all my mathematical rules. By this devise the nephew is intitled after the death of the wife to the books and mathematical rules and instruments only.

If the testator leaves all his relations twelve pence a-piece, or twelve pence and no more, his executors shall have the surplus not disposed of by his will. See post, case 12, case 26, case 32, case 157; 2 Vern. 247, 361, 425, 673, 736, 675, 648, 104, 148; 1 Vern. 473, 30; 3 Salk. 82, cas. 1; Chan. cas. 196; 5 Mod. 247.

Thomas Lockwood made his will, *inter al'*, in these words, 'I give and bequeath all my houses, leases, tenements, and goods whatsoever, to my dear wife *Margaret*

'Lockwood, for term of her life : and then to my nephew *Harper Lockwood*, all my books of geometry, architecture and surveying, and all my mathematical rules and instruments : and as to any person who may have any claim, or demand, as related to me, I give them twelve pence each ; and I make *Margaret Lockwood* my executrix.' *Thomas Lockwood* died, and *Margaret* proved his will, and took upon herself the execution thereof, *Harper Lockwood* devised all [4] his interest under the will of *Thomas* to the plaintiffs, and died, *Margaret* assigned the lease now in question, part of the premises devised to her to the defendant *Lambeth*, and others, in trust, for herself for life, remainder to *John Lee*, the defendant, and soon after died. Two questions arose upon the will of *Thomas Lockwood*.

First, what passed to *Harper Lockwood* ? And the Lord Chancellor was of opinion that *Thomas Lockwood* having devised in general all his houses, leases, tenements, and goods whatsoever to *Margaret* for life, and that *Harper Lockwood*, after her death, should have such a parcel of his said goods, viz. His books and mathematical instruments, and the words bearing that plain meaning, that he was intitled only to the said books and instruments. The counsel for the plaintiffs argued, that *Harper Lockwood* was executory devisee after the death of *Margaret*, of all the houses, leases, &c. And that a (,) comma, and an (and) were wanting after the words (then to my nephew *Harper Lockwood*), and that the will should be read thus, viz. I give all my houses, &c., to *Margaret* for life, and then to my nephew *Lockwood*, and all my books, &c., which latter clause they construed as an additional immediate devise ; and that *Margaret* herself understood the words in this sense, because she delivered him the books and instruments immediately after the death of the testator.

Secondly, allowing the lease did not pass as an executory devise to *Harper Lockwood*, to whom the residue of the said term should go after the death of *Margaret* ? And the Lord Chancellor declared, that *Margaret* as executrix was intitled to it by law, and that she having assigned over the whole term in her life-time, it belonged to the defendant *Lambeth*, as surviving assignee, and that his title could not be divested by the next of kin, for they were debarred from claiming the residue by the express words of the will, by which the testator gives them twelve pence a-piece as was adjudged by the House of Lords, the 8th of March 1706, in the case of *Vachell* versus *Bretton*, where his children brought a bill against his executors, for an account of the surplus of his personal estate not disposed of by his will, whereby he gave to his daughter A. all his goods and plate, £1500 to his son B., [5] and 10s. and no more to his son W., and 10s. and no more to his wife's daughter P., and made C. and D. executors, and gave them £100 each, but made no disposition of the residue, and an account was decreed, because the leaving them particular legacies did not debar them of their title to the residue, but this decree was reversed in Parliament in favour of the executors title at law, because the testator by express words had barred W. and P. of any claim to the surplus by leaving them 10s. and no more.

Case 4.—ANONYMOUS. [1726.]

[See Wills Act, 7 Wm. 4, & 1 Vict. c. 26, s. 7.]

At the Rolls. Eodem die.

Sir Th. Jon. 210 ; 1 Sid. 102 ; 1 Vern. 255, 326. A woman may make a will at twelve, a man at fourteen. 2 Vern. 469 ; Comb. 50 ; Swinb. part 2, sect. 2 ; 34 H. 8, ch. 5 ; Co. Lit. 89 a ; 5 Co. 29. If an infant sues for a legacy, costs must be paid out of assets, and not out of the legacy.

The Master of the Rolls said that a woman may make a will of her personal estate at twelve years of age, and a man at fourteen, Went. Office of Executors, 212 ; and that when a legacy is given to an infant, the testator makes it necessary to come into this Court, for directions how to lay it out ; and therefore this application ought to be considered as an incumbrance on his estate, and the costs must be paid out of his assets.

[6] Case 5.—GREENWOOD'S Case ; PIDDINGTON *versus* MAIN. [1726.]*At the Rolls. Eodem die.*

By the custom of *London* a freeman may devise over the orphanage part of his sole orphan, if a son, on his dying before twenty-one, if a daughter, on her dying before marriage or twenty-one, tho' the orphan should make a will.

1 Chan. Cas. 199, *contra* ; 2 Ventr. 341. Custom of *London*, though certified, may be made out by precedents. But see the next following case.

The *Attorney-General* produced from the city-books, the note of a case, of the orphan of *Nicholas Clerk*, which was referred to Sir *George Treby* the Recorder in 1679, by the Lord Mayor and Aldermen, to certify the custom : who certified, that it appeared to him by several precedents, that by the custom of *London*, a freeman of the said city might devise over the orphanage part of his sole orphan, if a son, on his dying before twenty-one, if a daughter, on her dying before twenty-one years of age, or marriage, and that a will made by the orphan, in case the freeman had so devised it over was void. And Mr. *Lingard* the Common Serjeant read three other precedents, one in the 4th of *H.* 5, another in the 18th of *H.* 8, and a third in the 1st of *Ph.* and *M.*, and said, that Sir *Heneage Finch*, Recorder of *London* in the reign of King *Charles I.*, was of the same opinion, and that this was a reasonable custom, and very consistent with the custom of the orphanage part ; whereby a sure provision was secured for the children of freemen, which this custom did not deprive them of, but only upon the contingencies before mentioned, gave the preference to the father's appointment, in prejudice of the representative, or legatee of the orphan. And the *Master of the Rolls* decreed accordingly. It was adjudged by Lord Chancellor *Macclesfield* in the case of *Blundel and Barker*, and by the last Lords Commissioners of the Great Seal, in the case of *Lewin and Labin*, that tho' the custom was not proved in the cause by the proper certificate, it might be made out by precedents, as was done in this case. 2 Chan. Cas. 117.

[7] Case 6.—ANONYMOUS. [1726.]

At the Chancellor's House.

A certificate, that it did not appear, whether there was such a custom or not, if not good.—Lord Chancellor would not determine the custom of *London* from the city books, because the law had appointed a proper trial. See the next preceding case.

An order being made in the city of *London* to certify a custom, they returned, that it did not appear whether there was such a custom or not, and the Lord Chancellor was of opinion, that this was an insufficient return, and made an order on them to make a new return in a fortnight's time, and declared if they did not, he would fine the city. The council argued, that this amounted to a certificate that there was no such custom, that in the case of *Atkins and Waterson*, the city certified, that they could find no instance of the custom referred to them, but submitted it to the determination of the Court, and Lord Chancellor *Cowper* declared that this amounted to a certificate that there was no such custom. In this case the city sent their books for the inspection of the Court, but the Lord Chancellor said he would not determine the custom from precedents, and cases, since the law had directed in what manner the said customs were to be tried.

Case 7.—GIBSON, and Ux. & al', *Plaintiffs* ; MARY SCUDAMORE an infant, by her guardian DIGBY, and COTES, *Defendants*. [1726.]

[S. C. Sel. Cas. T. King, 63 ; 2 Eq. Cas. Abr. 773 ; Dick. 45. See *Att.-Gen.* v. *Ailesbury*, 1887, 12 App. Cas. 682.]

In Court, Lord Chancellor.

Sel. Cas. in Can. 63, S. G.

If one covenants to stand seized to the use of his son in tail, with remainders over, and suffers the lands to descend, this is an equitable performance of the covenant. 1 Chan. Cas. 301 ; Nels. Fol. Rep. in Canc. 290, 294 ; 2 Vern. 439, 558, 709, 638.

Jane Scudamore devised the residue of her personal estate, after payment of her debts and legacies, to her daughter *Mary Price*, in trust, to invest the money in a pur-

chase of lands to be settled on the said *Mary Price* for life, remainder to Lord *Scudamore* and his heirs. *Jane Scudamore* died, and the surplus of her personal estate amounted to eight thousand pounds. Some time after Mrs. *Price* laid out three thousand pounds on a purchase of lands in *Norton*, Lord *Scudamore* died before any estate was purchased with the trust money, leaving *Mary Scudamore* the defendant, his only daughter and heir. Mrs. *Price* by her will bequeathed several legacies to the plaintiffs, and made *Mary Scudamore* (who was also her heir) executrix, and devised the lands in *Norton* to her in fee, and also the residue of her personal estate after payment of debts and legacies, and appointed the defendant *Cotes*, executor during the minority of *Mary*. The plaintiffs, [8] who were the legatees, filed their bill against *Mary Scudamore*, and *Cotes*, for a payment of their legacies, and that the estate devised by Mrs. *Price* to *Mary* might be considered in equity for the value, as a satisfaction of the eight thousand pounds, that by this construction, all the parts of the will would be satisfied, and there would be assets sufficient to pay all her debts and legacies, with a residue to Miss *Scudamore*, that Mrs. *Price* being intitled to the estate to be purchased for her own life, and *Mary Scudamore* to the remainder in fee, as heir of Lord *Scudamore*, this devise of the *Norton* lands to the said *Mary* in fee, is an equitable execution of the trust for the value of the said lands. If one covenants to stand seized to the use of his son in tail, with several remainders over, and he permits the lands to descend to him, this is a performance of the covenant in equity; because the son may settle the lands according to the limitations, that by making *Mary Scudamore* residuary legatee, it is plain Mrs. *Price* thought there would be a surplus, whereas if the said devise is not taken as part of the trust money, the assets will not be sufficient to pay the legatees five shillings in the pound.

There was no mention in Mrs. *Price*'s will, that she devised those lands to *Mary*, in part satisfaction, or that they were purchased with part of the trust money; nay it appeared from Mrs. *Price*'s books, that the trust money stood out on mortgages, and other securities, after the making the said purchase, yet the Lord Chancellor finding this the only way to satisfy all the clauses of the will, decreed that the real estate so devised should be taken as a satisfaction *pro tanto*, and that the £3000 and interest from the death of Mrs. *Price* should be deducted out of the £8000. (2 Vern. 177, 255, 258, 298, 478, 498, 348, 115, 110, 555, 448, 484.)

His Lordship declared that it was now settled in equity, that if the debtor leaves his creditor a legacy equal to his debt, that shall be taken as a payment. And that specific legatees shall not abate in proportion with pecuniary, on a deficiency of assets. (Nels. 8vo. Rep. in Can. 38. A legacy equal to a debt, is considered as a payment. 1 Salk. 155, cas. 5, 508, cas. 4. Vide post, case 68, case 159. Specific legatees shall not abate in proportion with pecuniary. 2 Chan. Cas. 171; 2 Chan. Rep. 155; 1 Vern. 31; 2 Vern. 688; 1 Chan. Rep. 133; 3 Chan. Rep. 54; Nels. Fol. Rep. in Can. 303.)

[9] If the petitioner sets forth in his bill, that he resides in another kingdom, or upon affidavit of his living abroad, the Court will make an order, on a motion, for the plaintiff to give security to a Six-Clerk to pay the costs, before the defendant be obliged to answer his bill.

Case 8.—JOHN CARRICK, son and heir of ANNE ERRINGTON deceased, THOMAS LORRAIN, and JANE his wife, JOHN ROBSON and MARGARET his wife (which said ANNE, JANE, MARGARET, and FRANCES ERRINGTON one of the defendants, were the four sisters and coheirs of EDWARD ERRINGTON deceased), *Plaintiffs*; THOMAS ERRINGTON, WILLIAM ERRINGTON, FRANCES ERRINGTON spinster, RICHARD RIDLEY and NICHOLAS FENWICK, Esqrs. and CHRISTOPHER SOULBY, son and heir of RALPH SOULBY (which said Mr. RIDLEY, Mr. FENWICK, and Mr. SOULBY, were only trustees of the estate in question), *Defendants*. [1726.]

[S. G. 2 P. Wms. 361.]

In Court, Lord Chancellor.

Edward Errington, being cousin, and heir at law to *William Errington* an infant, before he came into possession of the estate in question did in the life-time of the said infant, by indenture dated the 15th of *October* 1714, covenant to levy a fine of the said estate to Mr. *Ridley* and Mr. *Fenwick* and their heirs, and by another indenture, bearing date the 19th of the said *October*, it was declared, and agreed, that the said

fine should enure, to the use of the said *Edward Errington* for life, without impeachment of waste, remainder to *Ralph Soulby* (the defendant *Soulby's* late father) and his heirs, to preserve contingent uses, remainder to the first, and other sons of *Edward Errington* in tail male; remainder to *Thomas Errington* for his life, without impeachment of waste, and from, and after the determination of that estate, then to the use of the said *Ralph Soulby* and his heirs, for the life of the said *Thomas Errington*, in trust, to preserve contingent uses, and estates, remainder to the first, and other sons of *Thomas Errington*, in tail male; remainder to *William Errington* for life, without impeachment of waste, remainder to trustees to preserve contingent uses, remainder to the first, and other sons of the said *William Errington* in tail [10] male, with remainder to the said *Edward Errington* in fee. The said fine was accordingly levied, and the said infant died in the year 1716, without issue. Whereupon the estate descended on the said *Edward Errington* as his heir at law, who entered, and became seized thereof; and being desirous to supply any defect which might be in the said settlement, he by indentures of lease and release, bearing date the 21st and 22d of April 1718, and by fine thereupon levied, in consideration of £200 therein mentioned to be paid him by *Ridley* and *Fenwick* (but which was really the money of *Thomas Errington*, which *Edward* was indebted to him by bonds), and for other considerations therein mentioned, did grant, and convey, the estate in question, to *Ridley* and *Fenwick* and their heirs, to the use of him the said *Edward Errington* for his life, with remainders to his first, and other sons in tail male; remainder over to *Ridley* and *Fenwick*, and their heirs; who by indenture executed the same day, but dated the day after, declared that the £200 was the proper monies of *Thomas Errington*, and that their names were made use of, in trust only, for *Thomas Errington* and his assigns for his life, without impeachment of waste, and from and after the determination of that estate, then to the use of the said *Ralph Soulby* and his heirs during the life of the said *Thomas*, in trust to preserve the contingent uses and estates, remainder to the first, and other sons of *Thomas* in tail male, remainder to *William Errington* for life, without impeachment of waste, remainder to trustees to preserve contingent uses, remainder to his first, and every other son in tail male, remainder to *Edward Errington* in fee. The first of September 1719, the said *Edward Errington* died without issue, and thereupon *Thomas Errington* entered upon the estate in question, and in or about Michaelmas term 1719, the plaintiffs exhibited their bill against the defendants, thereby *inter al'* charging, that *Thomas* and *William Errington* were papists, and therefore by the statute of 11 & 12 of Wil. 3, ch. 4, sect. 4, were disabled to take by purchase, any interest in lands, and that the said *Edward Errington* was infirm, and weak in body and mind, and not sensible when he executed the said several conveyances; and that the £200 consideration money was not paid, but inserted only in the said indenture of release to colour the same, or if paid, that it was not a valuable consideration, and that the said deeds seemed to be gained by fraud and imposition, and prayed that they might be put into possession of the premises, or at least might be [11] at liberty to try their title at law without being prejudiced by the said deeds of 1718. *William Errington* by his answer insisted, that he was a protestant; and upon two former hearings, the Court declared that there was a gross imposition on the said *Edward Errington*, in obtaining the said deed of settlement, and therefore decreed that it should be delivered up to the plaintiffs to be cancelled, and that the receiver should deliver possession of the said estate to the coheirs of *Edward Errington*, but the said cause being re-heard on the 12th of November 1726, the Lord Chancellor did think fit, and so order, that the former orders should be reversed, and his Lordship declared, that he saw no cause to set aside the settlement. But then the question was, to whom the estate should go during the life of *Thomas Errington*? he being a papist, and having no issue-male. Whether to the right heirs of *Edward Errington*, or to *William Errington* the remainder-man? And the counsel for the defendant *William Errington* argued, That *Edward Errington* having by the said settlements conveyed away the whole estate, subject to the uses and trusts expressly declared, his heirs at law were thereby excluded from having any benefit of the estate, till after all the particular intermediate uses were spent, and therefore to raise a trust by implication, in favour of the heirs at law, during the life of *Thomas Errington*, out of the supposed estate of *Soulby* the trustee to preserve the contingent uses, was to give them a preference to the particular uses, to which they are expressly postponed by *Edward Errington* the grantor, who had an absolute

power over the estate. Secondly, Where an estate is limited to a person incapable of taking, the next remainder ought according to the rules of law to take place immediately; and consequently *Thomas Errington* being incapable to take by the said act, and having no issue, *William Errington* is entitled to be let into the perception of the profits, immediately upon the death of *Edward Errington* without issue, there being no intervening equitable estate to prevent him, for though the legal estate should be taken to be in *Soulby* to preserve the contingent uses (which possibly may never arise), yet since the trusts annexed to that estate are void to all other purposes, it ought not to be any impediment to hinder *William Errington* from enjoying the benefit of the estate, nor to have any further effect, than to preserve the legal interest in the trustee, for that contingent purpose, for which alone it can be good, viz. to let in the sons of *Thomas Errington*, in case he shall have any. As in *Lewis* [12] *Bowles's* case, 11 Co. 79 b. *Thomas Bowles* covenanted to stand seized to the use of himself and of *Anne* his intended wife for term of their lives, and after their decease to the use of their first issue-male, and the heirs male of such issue lawfully begotten, and so over to the second, third, and fourth issue-male, &c., and for default of such issue, to the use of the heirs male of the body of the said *Thomas* and *Anne* lawfully begotten, with remainders over. It was resolved that till issue-male, *Thomas* and *Anne* were seized of an estate in tail, and that then the estates should open, and they become tenants for life, to let in the son's remainder: nor ought the said legal estate to obstruct the limitations of the settlement in any other respect, much less to prefer the heirs at law of the grantor, to *William Errington*, contrary to the grantor's intent declared in the deed.

Thirdly, supposing there was a resulting trust during the life of *Thomas Errington*, yet that trust did arise upon the settlement in 1714 (which was good by estoppel), and *Edward Errington* had a power to dispose of that trust, which might very well, and did clearly pass by the subsequent settlement of 1718, and consequently, that trust estate being no ways necessary to preserve the contingent remainders under the settlement of 1718, will now vest in *William*, there being no body *in esse* capable of taking it before him.

But the Lord Chancellor decreed in favour of the right heirs of *Edward Errington*, and declared, that the act having made the trust for the benefit of *Thomas Errington* void, did for so much defeat the intention of *Edward Errington*; but that equity would see the rest of the settlement performed, as far as the rules of law would permit, that the limitation of the premises to *William Errington*, is by the express words of that settlement not to commence, or take place, until after the death of the said *Thomas Errington*, and on failure of issue-male of his body; neither of which have yet happened, and possibly may not happen, during the life-time of *William Errington*, and therefore in the mean time, *William* has no manner of right or title to the possession of the premises, or the rents and profits [13] thereof, and if the construction which *William Errington* contends for, should prevail, the limitation to the sons of *Thomas Errington* (if he should hereafter have any), would be thereby defeated, contrary to the express design of the grantor, for if a person is to take by purchase, and the estate is once gone over to the next in remainder before that person comes *in esse*, there is no instance of the estates being ever brought back again, tho' 'tis otherwise in case of a descent; as where lands are given to A. and the heirs of his body, remainder to B. in fee, A. dies without issue, B. enters, and A.'s wife is afterwards delivered of a son, the son shall take: He also allowed that if an estate is devised to C. for life, remainder to D., and C. happens to be a monk, that D. shall take immediately, but that this case is very different, for between the remainder to *Thomas Errington*, and the remainder to *William Errington*, there are several intermediate remainders that would be destroyed, and is easily distinguished from *Lewis Bowles's* case, for there the contingent remainder took effect whilst the particular estate subsisted (Carter, 190). He allowed that it was the intention of *Edward Errington* that his heirs should not take but as last in remainder, but that they took by a new title given them by the law, the profits of the premises during the life of *Thomas Errington* being undisposed of: Whereas *William Errington* had no title but by the settlement, whereby the grantor intended that he should not take the estate, while *Thomas* or his issue-male were alive. (Show. Parlm. Cas. 87; 2 Vern. 722; Cro. El. 422, Case 20.) (This decree was affirmed in parliament on Wednesday, May the 15th, 1728.)

The word purchase in the act of the 11 & 12 W. 3, ch. 4, is to be understood as it

stands in opposition to descent in a legal sense, and a devise of lands is within the meaning of the act, the words of which ought to be explained according to their sense in law, nay a real estate devised only by construction of a court of equity is a purchase within the act (post, Ca. 194), as where lands are devised in trust, to sell for payment of debts and legacies, and to pay the surplus money to a papist, because such a *cestuy que trust* may by a bill in chancery [14] compel the trustees to convey over to him upon his paying of the debts and legacies. Both which points were adjudged by the House of Lords in the case of *Roper and Radcliff*, where the decree of Lord *Harcourt* of the 27th of June 1712, was reversed.

Lord *Derwentwater* a papist being tenant in tail, previous to his marriage, suffers a common recovery to the use of him and his heirs, and afterwards, by lease and release he settles the lands to the use of himself for life, remainder to trustees to preserve contingent remainders, remainder to his first, and every other son of that marriage in tail male, with remainders over. Afterwards Lord *Derwentwater* is attainted of treason, and executed, and his son an infant put in his claim before the commissioners, which was dismissed by the opinion of four, against three, but this decree of dismissal was reversed on an appeal to the delegates 5 *Georg.* 1, by the opinion of four against Mr. Justice *Fortescue*, that Lord *Derwentwater* was not a purchaser within the act of 11 & 12 W. 3, ch. 4, for the recovery was not a new acquisition, but a modification of the family estate, and that the act could only be meant of new purchases. And Mr. Justice *Tracy* was of the same opinion, upon a case, that arose on a trial at the North assizes in 1707, which was referred to his determination.

Case 9.—HIDE, *Plaintiff*; WIGMORE & al', *Defendants*. [1726.]

In Court, Lord Chancellor.

The plaintiff was decreed to pay an attorney his bill, before the *Lord Chancellor* would oblige him to deliver up the title deeds, because the plaintiff enjoyed the estate under an appointment of the attorney's client, from whom he received them.

Nathaniel Hyde, the grandfather of the plaintiff, and *Alice* his wife, by lease and release convey certain lands to trustees and their heirs, in trust, for *Nathaniel* for life, and after his decease, in trust, to sell, and to pay the money, and profits till sale, to such child, or children, as *Alice* should appoint. *Nathaniel* dies, and *Alice*, in pursuance of her power, appoints, that the trustees, till a sale, should stand seized to the use of her son *Nathaniel* for life, remainder to the trustees to preserve contingent remainders, remainder to the first and every other son of *Nathaniel* in tail male, remainder to the heirs of the body of *Nathaniel*, with several remainders over, and that when the estate should be sold, other lands should be purchased with the money, and settled to the same uses. The plaintiff, as [15] daughter and heir of the body of *Nathaniel* the son, claims the lands under that appointment, and brings her bill *inter al'* against the defendant *Wigmore*, to have the title deeds, and writings of this estate that were in his hands, delivered up. The defendant *Wigmore* in his answer sets forth, that he received them from *Alice*, among other writings, as her attorney, and insists upon keeping them till he is paid a bill of £60 for fees and disbursements which *Alice* was indebted to him. And the *Lord Chancellor* thought this very reasonable, and decreed accordingly, because the plaintiff claimed under *Alice*, who might have appointed the estate, in favour of any other child as well as of the plaintiff's father. But the council for the plaintiff seemed very dissatisfied, and mentioned the case of *Brook of Oxford*, where his lordship declared, that an attorney, or solicitor, could keep only his clients deeds till his bill was paid, but not those of any other person, especially such as even his client on a bill would have been decreed to have delivered up.

Case 10.—ANONYMOUS. [1726.]

In Court, Lord Chancellor.

An executrix shall sign an inventory of goods, the use of which is devised to her for life, but shall not give security for them. See post, case 32.

If the use of household goods is devised to an executrix for life, she shall sign a schedule or inventory of them, but shall not be compelled to give security for them. Nels. 8vo Rep. in Canc. 155; 1 Chan. Cas. 75, 121.

[16] DE TERM. S. HILL. 1726, IN CUR. CANCELLARIÆ.

Case 11.—WILLIAM GARDINER Clerk, *Plaintiff*; JAMES COOK Clerk, EDWARD GRIFFITH Clerk, and JOHN GRIFFITH Clerk, *Defendants*. [1726.]

In Court, Lord Chancellor.

If an advowson is mortgaged, and the church becomes void, the right of presentation is in the mortgagor.

The 27th of *July* 1722, the plaintiff filed his bill against the said defendants, setting forth, That King *Charles II.* by letters patent under the great seal, bearing date the 20th of *November* 1672, amongst other things, granted to *John Lord Freshville*, the advowson, and right of presentation to the rectory of *Ecklington cum Kilwalmarsh* in the county of *Derby*, worth about £400 *per ann.* for thirty one years, from *Michaelmas* 1670. That *Lord Freshville* by indenture bearing date the 29th of *December* 1672, assigned over the said advowson to trustees, who, by indenture bearing date the 14th of *February* 1672, declared the trust for *Samuel Gardiner* doctor in divinity. That the 27th of *February* 1675, King *Charles II.* granted the said advowson of the said rectory to the said *Lord Freshville* for ninety nine years, in trust, for *Dr. Samuel Gardiner* the plaintiff's grandfather, his executors, administrators, and assigns, who enjoyed the same as rector thereof for his life, and the plaintiff's father *Samuel Gardiner* succeeded the said *Dr. Gardiner*, and was incumbent thereof during his life, and brought up the plaintiff a clergyman to succeed him in the said rectory.

That the 23d of *July* 1711, the plaintiff's father mortgaged the term in the said rectory (being about sixty three years to come) to the defendant *Cook*, a neighbouring clergyman, as a security for £300 which his father had before borrowed of him on his bond, and to indemnify him against a bond for £200 more, for which the defendant *Cook* was surety for the [15] plaintiff's father. That about *July* 1721, the defendant *Cook* pressing to have his money paid, the plaintiff's father procured the same, and acquainted *Cook* therewith, but he then declined receiving it, and desired it might not be paid in till the *Lady day* then next following, for fear he should be robbed, his house being old and ruinous; and the plaintiff's father being at that time ill of the sickness whereof he died, the defendant *Cook* promised, that whenever he should die, or immediately, if he would resign, that he would present the plaintiff, and renewed the same assurances to the plaintiff at his father's funeral. That the plaintiff's father on the 8th of *September* 1721, died intestate, and the plaintiff took administration to him, and thereby became intitled to the equity of redemption of the premises; and the plaintiff desiring to be presented, the defendant *Cook* insisted to have further security for the aforesaid £300, and for his indemnity against the aforesaid bond of £200 and interest; which the plaintiff was advised he could not safely do, without incurring the danger of simony, the church being then vacant: Upon which the defendant *Cook* privately, and without the previous knowledge of the plaintiff, executed an instrument for presenting the other defendant *John Griffith*, and *Cook* pretending that the right of presentation was in him, and that the plaintiff's consent was not necessary, but only matter of form, and the other defendants promising him their interest for the living of *Hitchinstoke* in *Hampshire*, which the defendant *John Griffith* then enjoyed, and which would become vacant by his acceptance of the other; and having first warmed him with liquor, they prevailed upon him to consent, before the Bishop of *Coventry and Litchfield*, to the presentation of the defendant *John Griffith*; tho' at first he positively refused, and was at last prevailed upon with great reluctance, by the threats of the defendant *Edward Griffith*, and for fear of being thrown into gaol for his father's debts, for which he stood bound; and which the defendants the *Griffiths* promised to pay off, if the plaintiff would consent to their proposals. That the defendant *John Griffith* has been since instituted and inducted into the said rectory; and afterwards the defendants continued their assurances for procuring preferment for the plaintiff till they apprehended his time for bringing a *quare impedit*, was expired, and then there was an end of all promises of that kind, the plaintiff therefore offered to pay the said debts of £300 and £200 and interest, and prayed that upon payment thereof, the defendant *Cook* might assign over the said rectory with the appurtenances to the plaintiff, for the residue of the said term of ninety nine years; and that the defendant *John Griffith* might resign the said rectory, that

the plaintiff might be presented thereto, and enjoy the same. To which bill the said defendants put in their several answers, and the cause coming on to be heard the 28th of *January*, the council for the plaintiff argued, that the [16] defendant *Cook* had no right to the said rectory any further than as a security for his principal and interest, and until there be a foreclosure, the right of presentation upon a vacancy (since such presentation cannot be applied towards satisfaction of the principal and interest secured by the mortgage) ought in equity to be enjoyed by the mortgagor, according to many precedents in the court of chancery, as *Sir John Hobart* versus *Serjeant Selby*. *Selby* the mortgagee had presented, but there was no institution, and Lord *Cowper* decreed, that the conveyance should be considered only as a security, and that he should withdraw his presentation, and present him that *Sir John Hobart* the mortgagee should nominate. And *Wood and Henchman* versus *Sir Bibye Lake and Crofts*. (2 Vern. 401, 549.) *Stanley* being tenant for life of the manor and advowson of *Adderley*, mortgaged it to *Sir Bibye Lake*, who entered before the church became vacant, then *Stanley* grants the next avoidance to *Wood*, the incumbent dies, and *Sir Bibye Lake* presents *Crofts* to the bishop, who refuses him institution, till *Wood* (being mis-informed by his council, that he had no right, but from no imposition practised on him by *Sir Bibye Lake*) (post, 542) consented thereto before the bishop; afterwards *Wood* presents *Henchman*, and they brought a *quare impedit*, and a bill in this court against *Sir Bibye Lake* and *Crofts*, and Lord *Harcourt* decreed that the mortgage should not be given in evidence upon the *quare impedit*, and that the defendants should pay costs (and the Lord Chancellor said in this case, if a *quare impedit* had been brought in time, he would have removed everything out of the way in the same manner. And they further insisted, that the defendant *Cook* always promised to present the plaintiff to the said rectory, till such time as the plaintiff refused to comply with terms, which were not proper during the vacancy thereof.

To which it was answered by the council for the defendants, first, that as to the pretended trust and agreement, that the defendant *Cook* should present the plaintiff upon the death of his father, the defendant *Cook* has positively denied it by his answer, and the plaintiff has not made the least proof whatsoever of it, and the mortgage deed plainly and expressly proves the contrary.

Secondly, That the defendant *Cook* by virtue of his mortgage had the legal right of presentation in him, 'with an express covenant and agreement entered into by the plaintiff's father, that the said defendant should present, as often as the rectory became void, and that if the right of presentation was not effectually assigned to, and vested in him by the mortgage deed, that then the plaintiff's father, his executors and administrators should from time to time present [17] such persons as the defendant *Cook* should nominate, and no others.'

This covenant in the mortgage deed is not good, being a collateral further security, for thereby the mortgagee would be intitled to the presentation, as well as to his money.

Jennings versus *Ward*, 2 Vern. 520. A. lends money to B. on a mortgage, and takes a covenant from B. by another deed, that if A. should think fit, B. should convey to A. so much of the mortgaged estate as should be of the value of the money lent at twenty years purchase. The Master of the Rolls decreed this covenant to be set aside as unreasonable. This is no further security of a valuable nature, and therefore differs from the case of *Jennings* versus *Ward*.

Thirdly, That the defendant *Cook* had no other security whatsoever for his money, but the mortgage of the said advowson, or right of presentation, in which the mortgagor had no interest, but a term of about sixty three years to come, when the mortgage was made, and which possibly one succeeding incumbent might outlive, and therefore it was highly reasonable, the defendant *Cook* should have the presentation, and that was the reason of those particular covenants, whereby contrary to the other cases (where a manor with an advowson appendant was mortgaged) the mortgagor became a trustee of the presentation for the mortgagee.

Fourthly, That the plaintiff himself consented before the bishop, to the defendant *John Griffith*'s being instituted into the said living.

This pretended consent was very unfairly obtained, for it is impossible in the nature of the thing to imagine, that such a consent could be a voluntary act, if he had been fully apprized of his right, for he was educated a clergyman, with a view to be provided for by this advowson, and he had no other dependance for a subsistence, and had no manner of consideration for consenting to an act, which would deprive him of his

bread, and the only prospect he had for his subsistence, save what was laid before him to delude him, besides there was a misrepresentation of the truth, the defendant *Cook* having told him, that the right of presentation was not in the plaintiff, but in himself, and that he had no occasion for his consent, and this was not in the power of the plaintiff to contradict, the defendant *Cook* having all the title deeds in his custody, the defendants likewise threatened to throw the plaintiff into gaol, and other threatenings were made use of to terrify him into a compliance, and at the same time it was insinuated to him, [18] that it would be more for his interest to comply, and as a further imposition he was heated with liquor to induce him to consent, and notwithstanding all those unfair practices, it appears, that at the time of this pretended consent, the plaintiff was in the greatest confusion and scarce knew what he said or did.

The defendants by their answers, have all denied that they applied to the plaintiff for his consent, or either threatened, or promised him any thing on that account, nor did they think his consent necessary; and when the bishop sent for him, he told him he would not institute the defendant *John Griffith* without his consent, and it is fully proved by the bishop, and his secretary, that the plaintiff did consent, and that no arguments were used by *Griffith* the father, or any body else to bring him to consent, and it is not credible that the reverend prelate should take the consent of a man in drink.

Fifthly, The defendant *John Griffith* was presented the 4th of *December* 1721. instituted the 14th, and inducted on the 23d of the same month, and the bill was not exhibited till the 27th of *July* 1722, so that six months were elapsed after the institution, and induction, before the bill was filed, and when the church has been full for six months, without any legal claim, or process, the wisdom of the law has thought fit to prevent any litigation, or disturbance after that time.

This was occasioned by the defendant's fraudulent practices, unfair representations, and delusive promises, and consequently this being a case of fraud, the objection is of no weight in a court of equity, as has been always held in the parallel case of the statute of limitations, and fines have been adjudged no bar on the same account; tho' these statutes were made for the good and quiet of the subjects in general.

The defendants by their answers have denied all those several charges, and the plaintiff has made no proof of them, and by the common law, if the church had been full but a day, the patron was barred, and the statute having enlarged his time to six months, there is no occasion to carry it further, and it would be of as ill consequence not to bring bills within the six months, as not to bring actions.

Whereupon the *Lord Chancellor* was pleased to order, that the plaintiff's bill, so far as it related to the defendant, *John Griffith*, should stand dismissed, with costs, because no *quare impedit* had been brought, nor the bill filed till seven months after institution and induction. Whereas the statute of *Westminster* the 2d Ch. 5 (which has been inviolably observed [19] since the making of it), allows but six months, and on this act his lordship grounded his decree, without considering the circumstances of the case, or by what misinformation, or fraud the plaintiff's consent was obtained; for the statute makes plenarty a bar against all mankind, even in case of a usurpation, if a *quare impedit* is not brought within six months, and his lordship said, no bill of this nature had been ever brought in this court, where a *quare impedit* had not been first brought in that time. And as to the defendant *Cook*, his Lordship ordered, and decreed, that the plaintiff should redeem on the common terms, otherwise his bill was to be dismissed. (2 Inst. 355, 360, 361; Clerg. Law, 504; Co. Lit. 119 b, 344 a, b; Woods's Inst. 160; Hob. 241; 7 Co. 26 a.) (This decree was affirmed in parliament, without debate, for the same reason, on *Friday* the 31st of *January* 1728-29.)

[20] DE TERM. S. TRIN. 1727, IN CUR. CANCELLARIÆ.

Case 12.—MOSES HAWKINS, GEORGE DAWES, sen. & al'. *Plaintiffs* ;
SAMUEL MASON *Defendant*. [1727.]

[S. C. 4 Bro. P. C. 7.]

In Court, Master of the Rolls.

There is a difference between making a man executor and expressly devising the residue to him, for in the first case, if he dies before he has fully administered, administration *de bonis non, &c.*, shall go to the next of kin of the testator, but in the other, it shall go to the next of kin of the executor. Carter, 125; Went. Off. of executors, 34; Dyer, 372; Plowd. 281; Shower, 26; Cro. Ca. 115; Swinb. Part 6, sec. 1, n. 4; Magna Cha. ch. 18; Perk. tit. Devise, ch. 8, fol. 97; Doct. and Stud. lib. 2, ch. 10; Bro. tit. Adm. n. 141, tit. Ex. n. 149; 2 Inst. 32; 17 Ed. 3, 73; 27 Ed. 3, 88; 29 Ed. 3, 13; Swinb. part 6, Sect. 3, n. 14, Sect. 20, n. 2. If the executor has a particular legacy, the residue shall go to the next of kin.

John Hawkins, a freeman of *London*, having only one daughter *Sarah*, the wife of the defendant, whom he had fully advanced in marriage, and no wife, made his will the 2d of *June* 1720, and thereby *inter al'*, devised to his brother *Moses Hawkins* and his heirs, a messuage, and house in *Berks*, £10 for mourning, and £100 south sea stock; and to his sister *Mary Dawes*, £100 south sea stock, and after her death his will was, that the said stock so given to her, should be divided to her children then living, and £40 to buy mourning for herself, her husband, her son, and her daughter, and gave to the defendant and his heirs two houses in *Wapping*, £500; and £10 to buy him mourning. And devised to trustees £1000 south sea stock in trust for his daughter *Sarah* to be at her disposal, and after several other legacies he gave and bequeathed the rest and residue of his real and personal estate to his daughter *Sarah* to hold the same during her natural life, and after her decease, he gave and bequeathed the same to her child and children born of her body for ever, in case such child or children should attain the age of eighteen, or be married, but in case they died before such age, or marriage, then in such case, he gave and bequeathed the said rest and residue of his estate as follows. To his brother *Moses Hawkins* and his heirs for ever all his messuages or tenements in *Houndsditch*, and *Woolpack Alley*, and to his kinsman *Moses Hawkins* and his heirs, the lease of his houses in the *minories* in *London*. And made his daughter *Sarah* executrix for life, and *Moses Hawkins* his [21] brother, and *George Dawes*, senior, his brother-in-law, executors, from and after her decease. *March* the 24th, 1720, the testator died, and *April* the 1st, 1721, the defendant's said late wife *Sarah* proved the said will, and she, and the defendant possessed themselves of the testator's personal estate, and *April* the 26th, 1722, the defendant's wife died without issue, and thereupon the said *Moses Hawkins* the brother, and *George Dawes* procured letters testamentary on the said will from the prerogative court of *Canterbury*, and *May* the 10th, 1722, the defendant took letters of administration to his said wife out of the said court, and this bill was brought by the executors, and legatees, against the defendant, for an account, and satisfaction of their legacies, and that the surplus undisposed of, might be paid to the executors, *Moses Hawkins* and *George Dawes*, senior, for after the death of his daughter without children, the testator has disposed only of part of the residue, *viz.* his messuages, and leasehold houses. And the defendant by his answer insisted, that he, as administrator of his said wife (the testator's only child living at his death), was intitled to the remainder of the testator's personal estate, which was undisposed of by the said will; and this cause coming on to be heard in the High Court of Chancery before his honour the *Master of the Rolls* on the 12th of *June* 1727, Mr. *Attorney-General* argued for the defendant.

This question must depend on the will, and intention of the testator. There can be no doubt, but that many cases may be mentioned, where executors may have the legal estate in them, and yet be considered in this court only as trustees. An executorship by the civil law (which is the rule in legatary cases) is said to be only a *fidei commissum*, and the legacies given by the testator are only so many special directions as to the disposal of this trust, and the whole estate vests in the executor till he assents.

If one makes an executor, and he dies intestate, before he has fully administered, the next of kin to the testator, and not the next of kin to the executor shall have administration *de bonis non*, but the next of kin to the executor shall have the administration, if the residue is expressly devised to him, which shows plainly that the law makes a difference between barely nominating a man executor, and expressly devising the residue to him, and executors have always been construed trustees, where it appears the testator intended to make them so, as where he devises particular legacies to them, which is an evidence that he intended them no more, for if by making them executors he designed them the whole, it would have been unnecessary and absurd, to have given them any thing in particular, which would be to give them all, and some, and then this is within the reason of those cases, for the testator has left *Moses Hawkins* £10 for mourning, and £100 south sea stock, and £100 to [22] *Mary*, the wife of the other executor, which vests in him as her husband, and £40 for mourning for herself, husband, son, and daughter, that is £10 a-piece, and the case of *Foster and Mount*, 1 Vern. 473, which was the first case of this nature, did not turn on a fraud, but on an implied trust, and in 1704, Lord Keeper *Wright*, in the case of *Coke versus Walker*, 2 Vern. 676, decreed the surplus to the next of kin, where £10 (as here) was given to the executor for mourning, but there is a further evidence in this case, that the testator, did not think, that by making them executors, he gave them any thing, for he has made his daughter executrix for life, and has also given her all the residue of his personal estate for life, which would have been wholly unnecessary, if he thought it had belonged to her as executrix. And the statute of distributions settles the succession of the next of kin, as the common law does of heirs in case of lands. And if a man devises his lands to his heir for life, he shall have the reversion by descent, so here since part of the residue, neither by express words or by implication, belongs to the executors, the next of kin must of consequence be intitled to it, as if he had died intestate.

Mr. Solicitor General. This question arose as a consequence of the statute of distributions, for it never was disputed till after that statute. The executor takes the whole in right of the testator, and therefore if he dies intestate, not his next of kin, but the next of kin to the testator shall have administration *de bonis non*, and though the executor has a power by law to dispose of the whole, yet what he has not disposed of, the law don't consider as his, but as the testator's, but if he is also residuary legatee, then his next of kin shall have administration, for then it belongs to him in his own right, and not in right of the testator, so that making him executor don't give him an interest in the estate, but only a power over it: Before the statute, an administrator, no more than an executor was obliged to distribute, and if the spiritual court went about to compel him, a prohibition lay, because till the statute, no body had a better title, which is the foundation a court of equity now goes on, but I allow that since the statute, if it appears from the will, or by proofs, that the testator designed the executor should have the surplus, he certainly must, for a distribution is founded on the testator's intention that his executor should not have it, one evidence of which is the giving him a particular legacy, as is done in this case, but they say here that only one of the executors has a legacy bequeathed to him, and that therefore both are not excluded from the surplus, but in this case legacies are given to both of them, to *Moses Hawkins* expressly, and to the wife of the other [23] executor, and what is given to the wife, is given to the husband, but also £40 is given for mourning, for her, and the husband, and the children, but in the case of *Darwell and Bennet*, 2 Vern. 677, quoted in the case of *Ball versus Smith*, 2 Vern. 675, a legacy to one executor excluded the other two from their share of the surplus, and it was decreed to be distributed. If the daughter here had a child or children, the whole residue would have been theirs, then in that case the executors could have taken nothing as such (Freem. 203, S. P.), and yet their authority as executors would have continued, and though this contingency did not happen, yet since it appears that in that case they were to have had a bare authority only, there is no reason to think he designed them more in any other case, and since he gave the residue to his sister expressly for life, he could only design to make her a nude executrix, and then when he appoints the others executors after her decease, he must be supposed to make them executors too in the same sense, suppose the executors had died before the daughter, their authority would have been determined, and they could have no interest. In case his daughter died without children, then he says he gives the rest and residue of his estate as follows, and names only two bequests, and drops the rest, which must therefore belong to his next of kin, but they say he has given her a legacy

of £1000 and the residue expressly for life, whereby he has shown his intention that she should have no more, but what the next of kin take is not by the intention of the testator, but by the statute of distributions, because the testator has not completed his will, whereas the executor can only take by the will, and intention of the testator.

Mr. Lutwyche for the plaintiffs. Though the learning is still very doubtful, when the surplus belongs to the executor, and when to the next of kin, yet there can be no question in the case before us. In the case of *Foster and Mount* the executors were strangers, and had £10 a-piece given them for their care and trouble, and Lord Chancellor *Jefferies* ordered the account to be taken before he made his decree, and the surplus on the master's report coming out to be £5000, he decreed it to the children, for it looked like a fraud; and the executors before that time were never questioned, because the law was for them, and no equity was against them, but many cases of this nature have indeed been determined since, though no certain rule is yet laid down, to know when an executor is excluded, no, not even the giving him a particular legacy, but the determination wholly depends on the circumstances of the case, and the intention of the testator, for in *Ball and Smyth's* case, 2 Vern. 675, a legacy was given to the executrix, and yet the surplus was decreed to her, but here nothing is given to them as executors, he gives them nothing out of that residue of which they were to be executors after [24] the death of his daughter, but only particular legacies out of his personal estate, so no implication against them can arise from thence, for by this will there are two residues, one devised to the daughter for life, and the other is a part of this first which the testator has made no disposition of after her death, but his intention is plainly against the defendant, by his will he gives the daughter the residue during her natural life only, how then does it appear that he designed her all, would not this be intending her all and some, and this will is no more than the making a provision for his daughter and her children if she had any, if not, for his brother, and brother-in-law; and then since the executors have the legal title in them, what equity is there in this case to take it out of them? Where a fee-simple is devised to the heir for life, he shall take the reversion by descent, because no body else has a title, but here the executor has the legal right to what the testator has not disposed of, here he has left his daughter a particular legacy, who would be intitled to the surplus as his next of kin by the statute of distributions, so may not we say, she has no title, because he has made a particular provision for her, in the case of *Somner versus Hooker*, particular legacies being given to the next of kin, as well as to the executors, the residue was decreed to the executors, for the implication was equally strong (see ant. cas. 3; post, case 26), that the next of kin were to have no more, as that the executors were not, and then the law, which is for the executors, ought to take place, and this is not a case where both the executors have legacies, for *George Davies* has no legacy, for the forty pounds are not bequeathed to him, and then if both the executors have not particular legacies, neither are excluded (post, cas. 32, cas. 157; 1 Vern. 473, contra). Dr. *Cotesworth* brought a bill against *Brangwin* his co-executor, for an account of the surplus undisposed of, and that it might be decreed to him, because the defendant had a particular legacy. But Lord *Cowper* was inclined to think that neither were excluded because both were not, but directed an account to be taken, and after a report made, the cause coming on to be heard before Lord *Harcourt* in 1711, he decreed that the estate should be divided between the executors. An executor in his life-time may do what he pleases with the estate, and if he leaves an executor, he will be entitled to the estate of the first testator, but if the executor dies intestate, an administration *de bonis non* must of course be granted to the next of kin to the testator.

Mr. Wills. The council for the defendant would collect the intention of the testator from the particular legacies, he has given legacies indeed to his brother *Moses Hawkins* immediately, but none to the other executor, but devises £100 to his wife for [25] life, and then to her children, which he seems to have done on purpose that her husband might not be excluded, from what he designed for him as executor; but supposing that legacies were bequeathed to both the executors, we are not within the reasons of the common cases, where the executorship and legacy are to commence immediately, because here the legacy is given absolutely, but the executorship only on a contingency, so that it might be the testator's intention that they should have these legacies at all events, and the residue on a contingency. Would they have only *Moses* excluded, that would be contrary to the testator's intention, for he designed he should be better provided for than the other executor; or would they exclude the other only, but no

case can be mentioned where the surplus was decreed from the executor, if he had no legacy left him. Or would they have both excluded, why then they must be trustees for the defendant's wife tho' the testator by express words has given her the residue only for life, he has also given her £1000 and to the defendant her husband £500, from whence it may be as strongly inferred, that he designed her no more, as that he designed the executors nothing further, and they are executors only of the residue, which is expressly devised to the daughter for life, &c., on a contingency. By their construction the next of kin will have nothing, but the residue will go over to the defendant who is a stranger, while the daughter was alive, who was next of kin, the executors had no title, nor if she had children, and the executors themselves are next of kin, when they come to be intitled.

Mr. Attorney General's Reply. In the case of *Foster and Mount*, the legacies were given to the executors expressly for their care and pains, but there have been many cases since, where legacies given to the executors generally, have debarred them of the residue, and those resolutions have turned upon the impertinence of the thing, of giving him a part, for whom he designed the whole ; yet I allow in particular cases, the surplus has been decreed to the executors tho' legacies have been left them, where the intention of the testator plainly appeared, or was proved, as in *Littlebury and Buckle's* case, 2 Vern. 677, and in *Ball and Smith's* case, in which there was evidence of kindness to the wife, which took off the presumption that the testator designed her no more, but in all other cases the executors have been excluded, but I allow that the question will principally depend on the construction of the will ; here they say the legacies are given *in præsentia*, but they are made executors only after the daughter's death, but this objection I think makes against them, suppose they had died in the life-time of the daughter, they could not have taken, nor their representatives, though [26] the contingency had after happened, and suppose she had left issue, they would have been executors, yet could have taken nothing, which shows plainly, that he designed them only an authority, and no interest ; and it imports nothing, that he has given the residue to the daughter for life, for that was done purely for the sake of her children, to make the legacy sure to them ; and if she had no children, he only gives particular parts over ; if he had made no executors, it must be admitted she would have had the residue, but the making executors will not alter the case, for they have only the legal interest in them, but they say this is different from the case of a reversion, which will descend on the heir, tho' the lands are expressly devised to him for life, because here the executor can take, but there no body else has a title, but suppose them *cestuy que* trust in fee, devises to his heir for life, in that case there is a trustee to whom the reversion in fee by law belongs, yet the trust of the reversion shall go to the heir, and in the cases of personal estate, the next of kin are as strongly intitled to the trust of the surplus, as the heir in the other case is to the trust of the reversion, and there are many precedents where the surplus has been decreed to the next of kin though they have had particular legacies devised to them, for they take by the statute, not by the intention of the testator, the executor wants the will to take by, but the next of kin do not. Here they say a legacy is left only to one executor, but in the case of *Darwell and Bennet* that excluded the other two from claiming the residue, and in the case of *Dr. Cotesworth and Brangwin*, the question was only between the executors, and it doth not appear that the next of kin were before the Court.

His Honour the *Master of the Rolls* declared, that by giving a legacy to one of the executors, neither of the executors were excluded, and *inter al'* decreed, that the executors were intitled to the surplus (which was about £2000), and that the defendant should account for the same. 2 Vern. 247, 361, 425, 673, 736, 104, 148, 648, 571 ; 1 Vern. 425 ; 3 Salk. 82, Cas. 1 ; 1 Chan. Cas. 196. (This decree was affirmed in the House of Lords, on Wednesday, March the 4th, 1729-30.)

[27] DE D. S. MICHAEL. 1728, IN CUR. CANCELLARIÆ.

Case 13.—ANONYMUS. [1728.]

At the Chancellor's house, Lord Chancellor.

A solicitor may take out a commission of bankruptcy for his fees, whilst his bill is under taxation by order of Court.

An order was made, that a solicitor's bill should be taxed by a master, and that all proceedings at law should in the mean time be stayed, and whilst the bill was under taxation, the solicitor sues out a commission of bankruptcy against his client. And on a petition to supersede the commission, this was adjudged to be no contempt, nor a sufficient cause to supersede the commission, because the order of reference extended only to bringing actions, and to common and ordinary proceedings.

Case 14.—JACOB *versus* the Earl of SUFFOLK. [1728.]

October the 22d, 1728. At the Chancellor's house, Lord Chancellor.

What is due for principal, interest, and costs on a mortgage shall carry interest from the confirmation of the report, and the principal shall bear interest from the date to the confirmation. 2 Vern. 392; post, cas. 139.

Lands were conveyed by the late Earl of *Suffolk* to trustees and their heirs, for payment of his debts, to be paid within six months after his decease, and on a bill exhibited by the creditors, the trust was decreed to be carried into execution, and the creditors were to come in before the Master, and prove their debts. The Master in about four years makes his report, and on a petition of several creditors to have what interest they should be allowed, ascertained, and from what time. The *Lord Chancellor* declared it as the practice of the Court, that where a Master reports what is due on a mortgage for the principal, interest, and costs, [28] that the whole aggregated sum shall carry interest from the time the report is confirmed, and that interest shall be paid for the principal, from the date of the report, till its confirmation. And that debts by simple contract though liquidated by the Master's report, will not bear interest, unless the creditors are unreasonably delayed, for though the debtor has provided an additional security for them, by making his lands chargeable with the payment of them, that has not otherwise altered the nature of them, so as to make them carry interest (like debts which originally affect lands) which they did not before, tho' 'twas urged by the *Solicitor Gen.* that on a mortgage, the interest when turned into principal, did not bear interest, from the nature of the lien, but only from being ascertained by the report, and that therefore it ought to hold so in debts by simple contract, and that here the simple contract creditors ought to have interest for their debts from the six months after the Earl's death, since he had provided for the payment of them in that time by sale or mortgage, and if a mortgage had been immediately made, the estate must have born the interest; or at least that they might have interest from the Master's report, when the several debts became certain, especially for that the creditors had been delayed for near twelve months by a dozen exceptions, which were all overruled, and cited a case where it had been done, and affirmed in the House of Lords.

Case 15.—*Ex Parte* GAZALET. [1728.]

[S. C. *sub. nom.* *Cazalet*, 2 P. Wms. 497.]

At the Chancellor's house, Lord Chancellor.

Quære, Whether a bond on a contingency can be proved before the commissioners of bankrupt before the contingency happens. 2 Vern. 101. *Quære*, Whether a bankrupt can plead his certificate to an action brought on a bond entered into before bankruptcy, on a contingency that did not arise till after he was cleared.

One previous to his marriage, entered into a bond to a trustee, of the penalty of £1600, conditioned, that if the marriage was had, and his wife survived him, he would

leave her £800, or if she died without issue in his life-time, he would pay back £100 of her portion to her father. The marriage took effect, and the husband afterwards becomes a bankrupt. And the trustee petitions to be let in as a bond creditor under a commission of bankrupt sued out against him. And the question was, whether this contingent demand should be considered as a debt, and proved before the Commissioners. And the only doubt with the *Lord Chancellor* was, whether if the contingency hereafter happened, the bankrupt might not plead his certificate to an action brought on the bond, and therefore he ordered it to stand over to the next day of petitions, to have that point spoke to, for his Lordship declared if the certificate was no bar, he would dismiss the petition, for the contingency might never happen, and though the husband was now a bankrupt, he might recover his credit, and be able to perform the condition if it ever arose, and it was said that it would be no bar, because the cause of action was subsequent to the certificate, and that it had lately been [29] resolved so in *B. R.* in the case of *Tully and Sparks*, where one brought an action on a bond that bore date before the bankruptcy, and set forth in his declaration, the condition, which was not broke till after the bankrupt was cleared, the bankrupt pleaded his certificate, and the plea was adjudged insufficient. Because at the time of the certificate, the obligee had no cause of action.

Mr. Mead insisted that such creditors on a contingency had been often allowed to come in under a commission by *Lord Cowper*, *Lord Harcourt*, and *Lord Macclesfield*, and their proportion of their debt was put out at interest in the name of the assignees, and the interest was paid to the assignees, and if the contingency happened, then the principal was paid to the creditor, but if it never happened, then it went to the assignees, in trust for the other creditors (2 Vern. 662). And he mentioned the case of *Green* (see post, Cas. 51), where the money due on a contingency was reserved in this manner.

Case 16.—*HILL versus WHITE & ux', & e contra.* [1728.]

At the Chancellor's house, Lord Chancellor.

Mr. Hill preferred a petition to his Majesty in his High Court of Chancery, praying a commission to review and rehear a sentence of the Court of Delegates in *Ireland*, and *Mrs. White* and her husband preferred a cross petition for a commission to review and rehear a sentence of a Court of Delegates in *England*.

Mr. Solicitor General for the petitioner *Mr. Hill*. Captain *White* privately married the daughter and only child of Lieutenant General *Sanchy*, without his privity or consent, and the mother of *Marcus Hill*, the petitioner, was sister to the General's wife. In 1719 General *Sanchy* died in *Ireland*, on a journey, in company with *Mr. Hill*, and being greatly disobliged at his said daughter's marriage, he a few days before his death, made his will, and appointed the said *Marcus Hill* sole executor, and residuary legatee, after payment of debts and legacies. In May 1720, the will was propounded in the Prerogative Court of *Canterbury*, and the probate was opposed by the counter petitioners, but in 1722, a sentence was given in favour of *Mr. Hill*, and the probate granted to him, and on an appeal the sentence was affirmed by eight of the Delegates, July 22, and no complaint thereof was ever made till this cross petition. And the testator leaving also considerable assets in *Ireland*, the will was likewise propounded in the Prerogative Court of that kingdom, and a probate was granted to the petitioner, and on an appeal the cause was heard before the Delegates, January 1723, on the same [30] evidence as in *England*, and they adjourned till the 7th of February following, and on the 18th of April, 1728, without being continued by adjournment, and without notice to the parties or their proctors, three Judges met (and no common lawyer among them), and reversed the sentence of the Prerogative Court, and granted letters of administration to *Mrs. White* the daughter: Wherefore we now prefer this petition to have the said sentence reviewed and reheard, and tho' a commission of review is not a matter of right, but of grace and favour (as was adjudged in the case of *Powis* and *Andrews*), yet it has never been denied upon good reasons, and we presume our cases are so very different that there are the strongest reasons for this petition, and none of any weight or moment for theirs. In *Ireland* there has been but one sentence against the will, and that given by only three Commissioners; nor are the fraud, and imposition on, and insanity of the testator, suggested by the cross petition, sufficient allegations, because they have been already under consideration of the Judges,

that gave the sentence, and they have adjudged them not sufficient to set aside the will. The sentence of the Delegates in *England* was conformable to the sentence of the Prerogative Court, and has been acquiesced under five years, and no precedent can be shewn where after so long an acquiescence, a review has been granted of a sentence of Delegates, who confirmed the sentence of the Prerogative Court.

Doctor Henchman. Numberless inconveniences would ensue, if a commission of review should be allowed after so great a distance of time. The executor Mr. *Hill* has paid the debts and legacies of the testator, all which are liable to be reversed and undone by this commission, they pray by their cross petition : And therefore there is always a time limited for the bringing of appeals. The civil law allows ten days, and we fifteen, and I have known an appeal disallowed that was brought on the sixteenth day ; conformable to which rule, the House of Lords have lately made an order, that appeals to their Lordships shall be brought within five years, and two years was the time allowed to petition his Imperial Majesty in, and this is now the law of the empire. All which rules are founded on a supposition, that the estate is in that time disposed of, and that the circumstances of the parties in such a course of years are greatly altered. The Court of Delegates in *Ireland* have proceeded in a manner new, and unprecedented, four years past between their first sitting on the commission, and their giving sentence. The cause was first heard in *January* 1723, before five Commissioners, and the last hearing was on the 8th of the same month, then they adjourned to the 7th of *February* then next following, then there was a discontinuance, then they met on the 24th of *February*, and there was no settled adjournment as to time or place, so [31] that the parties could not tell when or where to attend ; the next meeting was on the 9th of *April* 1726, another was on the 10th of *January* 1727, and on the 18th of *April* 1728 the sentence was given, tho' neither the council for the petitioner, or his proctor, was present as appears by the acts of the register. The Commissioners in *Ireland* refused to admit five witnesses, whose testimony was allowed in the Prerogative Court in *Ireland*, and by both the courts in *England*. In *February* 1723, the Commissioners in *Ireland*, met to give sentence, but could not agree till 1728. There is no quorum in the *Irish* Commission, and though they set forth in their petition, that all the three Delegates signed the sentence unanimously, that is of no weight, because by the tenor of the Commission, that is necessary to make the sentence good. In *Ireland* the Prerogative Court gave sentence for the will, and only three Judges of fifteen gave sentence in favour of the cross petitioners. In *England* the probate was granted by the Prerogative Court, and their sentence was confirmed by eight Delegates out of fourteen, and tho' here are not three conformable sentences on appeal (which are never impeachable), yet here are three similar sentences, and four years acquiescence, in which case no precedent can be shewn that a review was ever granted, and the daughter is not left unprovided for, but is seized, by the same title with the petitioner, of the moiety of an estate descended on her from her mother.

Dr. Strahan. No objection can be made to our petition. The most irregular steps have been taken by the Commissioners in *Ireland*, four years past, between taking the informations, and giving sentence ; five Judges were present when the informations were taken, and but only three when sentence was given, and the other Judges had no notice of their meeting, and where any of the Judges take upon them to give sentence without the rest, all the proceedings are null and void. Mr. *Hill's* proctor petitioned the Court, that the three would not proceed to sentence till the other two met, which was at that time granted ; and their reasons might have convinced the other three. As to Mrs. *White's* petition, no instance can be given where a review has been granted after five years acquiescence. Most countries now observe the Imperial law, where they vary from it 'tis in shortening the time as in *Holland*, 'tis restrained to a year, that property may not be unsettled after a long distance of time.

Dr. Brampston. The only foundation for this cross petition is the single sentence in *Ireland* where five witnesses were not suffered to [32] give evidence whose testimony had been objected to in the Prerogative Court in *England*, and allowed, and on an appeal the Delegates were of opinion they were good witnesses, and remitted the cause.

Dr. Palmer for the Cross Petitioners. This case is the first of the kind that I remember. The proceedings have been set out as if those in *Ireland* were subsequent to those in *England*, whereas both went on *pari passu*, this will, whereby an only child is disinherited, was made in *extremis*, the testator upwards of seventy years of age, his distemper a diarrhoea, which being improperly stopped, turned to a lethargy.

the will was made on the eighth, he died on the tenth of the month, 'tis said his intention by the will was to give several particular legacies, and the residue to Mr. Hill, whereas no legacies are given by the will, but by the codicil, which is more properly Mr. Hill's will, for thereby he promises by way of note subscribed by himself, that he would pay those several legacies; and the legatees who were the menial servants of the General, his groom and such like, having received and given releases for their legacies, were admitted witnesses to prove the will. Mr. Hill is a mere stranger in blood to the testator, nor could the displeasure he had conceived at his daughter's marriage be the cause of this pretended will in favour of Mr. Hill; for the deceased was afterwards reconciled, and very kind to her, and two wills were found in his study in *England*, by which nothing is given to Mr. Hill. As to the proceedings on the Commission in *Ireland*, the statute in that kingdom requires no quorum; and common lawyers are but of late years necessary in the commissions in *England*. And as to the length of time, Dr. Crawley was deprived for simony by the Delegates, and a review was granted by King William III. at about five years distance, and the sentence was reversed, and he restored to his archdeaconry, which Dr. Oldis had enjoyed in the mean time, nor is the King limited to any time. It is not necessary that the council or proctors should be present, when sentence is given, but 'tis very usual for the Judges after hearing to declare, We won't give the gentlemen who are of council any further trouble of attendance, and what they mention as irregularities, are common in these commissions, sometimes the Judges adjourn to a certain day, and then if none attend they are adjourned *sine die*, Mr. Hill is as much in fault as the cross petitioners; for if he thought the proceedings were delayed, he ought to have applied for a day, and the Register is to attend the Judges to sign a warrant for that purpose: And as to the objection that five Commissioners were present at the [33] informations. And that only three gave sentence, and that the other two might have been of a different opinion, this would have been no sufficient foundation for a review, tho' the five had been present, and the two had actually disagreed, as was adjudged by Lord Harcourt, in the case of *Tindar versus Hopkins*, three being sufficient to join in opinion, by the words of the commission. We pray a commission, because we have new witnesses to examine, and to new matter, which they do not suggest, and therefore we hope your Lordship will make a favourable report of us to his Majesty.

Mr. Attorney General. This is such a will, as a Court would allow the probate of with great reluctance, an inofficious testament, in which no notice is taken of the daughter his only child, and would be void by the civil law, and there were two wills found both made in her favour. The testators leaving assets in both kingdoms, makes this a very particular case, but I must observe to your Lordship that this will was made in *Ireland*, and witnessed there, and in that kingdom they might give sentence on the credit of the witnesses, where they were best known, and their characters could be easiest found out, and this indeed appears to be the fact from the complaint of the petitioners, that five of the witnesses, whose testimony was allowed in this kingdom, were rejected there, and may be so here on a commission of review, as in the case of *Drake and Prime*, 6th of February 1705, *Abington* was allowed a good witness by the Prerogative, and Court of Delegates, and yet his evidence was refused on a review. Here have been three sentences against one indeed in favour of the will, but not on the same evidence, but only sentence against sentence. As to the errors in the proceedings, it is common not to have due entries from *Ireland*, and is answered by the practice of the Court of Delegates here, the Judges meet, adjourn, and at the day perhaps no Judge comes, yet the proceedings do not fall for that reason, but new warrants are granted to attend, and no entries are made of such warrants. Proceedings of Courts are first taken down in minutes, and are drawn up at large from thence, so that it is not strange that several errors should appear in them. As to the prayer of their proctor, that the sentence might be staid, till the other Judges came, who heard the cause, this might have delayed the sentence for ever, for according to my instructions, they two were dead, when sentence was given. Though the sentences in *England* were very solemn, and in conformity, yet there is sufficient cause for a review, because we have new matter to prove, and by new evidence; and as the law has set no time in which such a petition is to be brought, it lies wholly in the breast of the Crown, and no case can happen in which it can be more properly asked than in this, where a daughter is left poor and [34] destitute of any provision from her father, and a suit depending at the same time in *Ireland*, to set aside the will, wherefore it

was advisable to wait till the same was determined in that kingdom, and if the Judges there gave sentence in favour of the will, then to acquiesce, but if they gave sentence for the daughter, this then would be a good reason for us to pray a review of the sentence given in *England*, and is very necessary to prevent the clashing of jurisdictions, in case the sentence of the Commissioners in *Ireland* should be confirmed on the commission of review granted to the petitioners, for them in the same kingdom it would be allowed in one Court to be a good will, and disallowed in another, and there is no other method for one uniform determination, than to have both sentences reviewed by a new commission. So that here the length of time can be no objection, because it was proper for Mrs. *White* to wait the event of the suit in *Ireland*. By the rules of this Court a month is the time limited for a rehearing; suppose then a decree made in favour of the plaintiff, and in another cause, a decree given for the defendant on the same equity, and a petition is preferred to rehear the last cause, the Court will likewise suffer the first cause to be reheard at the same time, tho' the petition is preferred at a greater distance of time, than is limited by the course of the Court, to the end that there may be one uniform decree in both causes, and reviews in Ecclesiastical Courts are of the same nature with rehearings.

Lord Chancellor. Though the cross petitioners suggest that they have new matter to offer, yet as they have produced no affidavits to prove the same, I can take no notice of the allegations of their petition. My opinion however is not final, but I am only humbly to lay my thoughts before his Majesty. I cannot advise the King to grant a commission of review after five years acquiescence under the sentence, for that would render property unsettled and precarious, and no commission without proof of new matter was ever granted at such a distance of time, if the case stood single, but here in one kingdom is a sentence for the will, in the other against it, five Delegates in *Ireland* heard the cause, and four years after, three gave sentence. As to the entries, they are but matter of form, and may be rectified, in this case there have been two sentences in *England* for the will, and one in *Ireland*, so that a commission of review of the sentence of the Delegates in *Ireland* is plainly reasonable, but to prevent contradictory decrees this seems to me at [35] present the best method: To lay before his Majesty that the petitioners are well intitled to a commission, and that it would be proper to suspend the consideration, whether a commission should be granted to the cross petitioners, till those commissioners of review have given sentence, if they reverse the sentence of the Delegates in *Ireland* then there will be no occasion for another commission, because the sentences in *England* will agree, if they affirm it, that it will be proper to grant a review of the sentence in *England* to the same Commissioners, that two different sentences on the same will, may not be on record in the same kingdom. (4 *Instit.* 341; 25 *H.* 8, ch. 19; *Hard.* 216, *Cas.* 7; *Supplement to Wentworth*, 378.) But not to be allowed to give new evidence as to facts and matters before examined to. The acts of the Court of Delegates in *Ireland* were produced in this cause signed by the register, and it was adjudged that there needed no affidavit to prove his hand, he being a publick and known officer, as on an appeal to the Lords the party is never put to prove the register's hand to a decree.

Case 17.—ANONYMUS. [1728.]

At the Chancellor's house, Lord Chancellor.

If one executor pays over assets to the other, he is still answerable for them.
Nels. 8vo Rep. in Canc. 100.

Mr. Attorney General for the Creditors. This comes before your Lordship, on the creditors petition for your Lordship's judgment, on the report of the Commissioners of the account of the assignees. A commission of bankrupt was taken out against *Watson*, the Commissioners find him a bankrupt, assignees are chosen, and a dividend made; afterwards several other effects of the bankrupt coming to their hands, the creditors petition, that the assignees may account, and make a new dividend, and your Lordship was pleased to order that they should account before the Commissioners, and that the Commissioners might state any thing especially for the judgment of the Court. Accordingly the Commissioners have taken the account, and certify that *Green*, *Hall*, and *Aires* were the assignees, that *Green* did not appear, and so no account

was taken as to him, but only from the other two, that *Green* had received several sums of money, and whether the other two assignees should be charged with his receipts, they submit to the judgment of the Court, that the assignees sold a real estate of the bankrupt, that *Aires* received part of the purchase money, and let *Green* have £67 of it, and they likewise submit to your Lordship, whether *Aires* shall be chargeable with this form. And it seems reasonable, that all the assignees should be answerable for the effects come to any of their hands, for all are trusted by the creditors, and the commissioners vest the effects in all jointly, and 'tis upon their joint credit [36] that they are intrusted by the creditors, and it is only for their own ease and convenience, they let one another receive the effects. As to the £67, it is plain that *Aires* must be accountable for it, he admits in his own affidavit that on his receiving £220, residue of the purchase money, upon *Green's* desire he let him have £67, to lend to some of the creditors, he admits then that he received the money, and therefore he is accountable to the creditors for it, he having paid it over to another assignee, not for the proper purpose, but to lend over, and he trusted *Green* with the sum, for he swears he lent it him upon his own credit, and because he thought him a substantial person, and your Lordship adjudged in the case of *Lane and Wroth*, that if one executor pays over to another executor money of the testator he has received, this shall not discharge him of it, and in the case of *Stanley and Darington* the Master of the Rolls was of the same opinion, it coming before him in judgment on the Master's special report in 1727.

Mr. Lutwyche for Mr. Hall, and Mr. Aires, two of the Assignees. Where money is paid to one assignee, the other shall not be answerable, for since an executor or trustee for payment of debts shall answer for no more than he himself received, neither shall an assignee, for executors or trustees for payment of debts are forced upon the creditors; and it is not in their power to change them, but the assignees are trustees chose by the creditors themselves, who give them an equal trust, and can have them changed, and the assignees expressly covenant to answer only severally. Nor is *Aires* to be charged with the £67, all the assignees sell the estate, and *Aires* and *Green* come to the place appointed to receive the purchase money, but *Aires* is there first, and receives the money, and whilst he is counting it over, *Green* comes in, and desires to have £67 of it, if *Green* had received this £67 and *Aires* only the rest, without doubt he should not answer for it, and as *Green* came before the meeting was over, it ought, I think, to be considered, as if it had been originally received by *Green*, and as if *Aires* had never received it.

The Lord Chancellor. It would be of very ill consequence, if a solvent assignee might discharge himself, by paying money over to an insolvent one, he ought to have kept the money when he received it, and therefore *Mr. Aires* must account for the £67, but neither he, or *Mr. Hall*, are to be charged with what [37] *Mr. Green* received. 2 Vern. 504, 515, 570; 1 Salk. 318; 1 Vern. 303; 1 Chan. Cas. 127; Wentw. Off. of Ex. 161; Supplem. to Wentw. 316, 328; Clayt. Rep. 106, Cas. 179; Keilw. 51; Swinb. Part 1, Sect. 7, n. 3; Keilw. 23; 11 H. 6, 38, a; Dyer, 2, Cas. 10, a.

Case 18.—ANONYMUS. [1728.]

At the Chancellor's house, Lord Chancellor.

A commission of bankrupt was superseded, because several of the debts of the petitioning creditors were barred by the statute of limitations.

A Bankrupt preferred a petition to supersede the Commission, on a suggestion, that the debts of the petitioning creditors did not amount to £200, several of their debts being barred by the statute of limitations. And the Lord Chancellor proposed that this issue should be tried at law, whether the petitioning creditors are creditors for £200 within the meaning of the act; in which trial, the bankrupt was to have the benefit of the statute of limitations, in the same manner as upon a plea of *Non assumpsit infra ex annos*, but the council for the creditors being unwilling to have this issue tried, the Lord Chancellor superseded the Commission, because the statute would be eluded, if the creditors who had suffered it to run upon their demands, should be allowed to take out a commission.

Case 19.—ANONYMUS. [1728.]

At the Rolls, Master of the Rolls.

A bond conditioned to convey lands for money received, is considered in equity as articles, and the condition shall be performed in specie, and the obligee having been in possession 20 years, need not prove the money paid.

The condition of a bond was, for so much money in hand paid, to convey, and assure certain lands : The *Master of the Rolls* declared, That bonds of this nature were always considered in equity as articles of agreement, and decreed, the condition to be specifically performed, and the obligee having been in possession twenty years, he would not oblige him to prove the payment of the money, which is recited in the condition to be paid in hand.

Case 20.—WELSH *versus* FISH. [1728.]*At the Chancellor's house, Lord Chancellor.*

Mortgagor brings a bill to redeem on payment of what is due, and a decree is made accordingly. Pending the account the mortgagee dies, and a bill of revivor is filed against his administratrix, and a supplemental bill for a discovery of assets. To the first, she pleads that the suit could not be revived against her, because she was *cestuy que* trust of the mortgaged premises, and had not been made defendant to the original bill, but the plea was over-ruled, because the suit was not revived against her in her own right, but only as representative of the mortgagee. And as to the discovery of assets, she demurred, and her demurrer was allowed ; because the plaintiff (as appeared by the bill and decree) could not have any demands out of them. 2 Vern. 296, 219.

The mortgager filed his bill against *Samuel Fish*, and *Mary* his wife, executrix of the mortgagee, for an account of the rents and profits, and to be let into a redemption, on payment of what was due, and on hearing the cause, it was decreed, That the Master should take an account of what was due to the defendants, for principal, interest, and costs, and deduct out of the same what he should find the defendants had made by the rents and profits of the premises, and the surplus was to be paid by the mortgagor in a limited time, or he was to be for ever foreclosed of his equity of redemption : pending the account, *Samuel Fish* dies, and the [38] plaintiff brings his bill of revivor, and supplemental bill, against the defendant *Mary* the widow, and against *Mary* the daughter, as administratrix of her father *Samuel Fish*, for a discovery of assets. And *Mary* the daughter pleaded in bar to the bill of revivor, that the defendant *Mary* the widow, was devisee of the mortgaged premises, in trust for her, and that the decree could not be revived against her, because she had never been made a defendant to the original bill, and her council insisted that the bill might have been revived against the defendant the widow only, because she was sued in *Auter Droit*, and the husband was only joined for conformity. And as to the discovery, whether her father left assets or not, she demurred.

Lord Chancellor. The original bill is only to redeem, and don't pretend, that by the rents and profits the mortgage is paid off and the decree runs in the same manner, so that it is perfectly unnecessary in this case for *Mary* the daughter to admit assets, or to set them forth, and therefore I allow the demurrer ; but the plea must be over-ruled, for *Samuel Fish* being decreed to account, that account can't be carried on after his death without his representative being before the Master, and therefore the bill is properly revived against *Mary* the daughter, as his administratrix, but if it had been revived against her as *cestuy que* trust of the mortgaged premises, then indeed her plea would have been proper, that she had not been made a party to the original bill. But the council for the plaintiff argued, that the demurrer was not good, because tho' the decree directs the mortgagor to pay the overplus, which supposes the balance would be in favour of the mortgagee, and no provision is made that the mortgagee should refund, if the balance came out against him, yet if upon the foot of the account, the mortgagee should be found to have received more than the principal, interest,

and costs, the surplus must be refunded to the mortgagor, and therefore it is necessary that the defendant should discover, or admit assets, besides, the account was decreed against the defendant *Samuel*; because he had been in perception of the profits, and his assets are obliged to make good what he shall be found to have received. But the *Lord Chancellor* denied the first part of their argument, and said that the decree had provided for the second, for by that, whatever *Samuel* had received out of the rents and profits was to be set off against the principal, interest and costs.

[39] Case 21.—ATKINS & al', *Plaintiffs*; ROWE, *Defendant*. [1728.]

At the Chancellor's house, Lord Chancellor.

The bill sets forth, that the plaintiffs, the defendant, and one *Cob*, all linen-draper, lived in three houses contiguous to one another, held by lease of the Grocers Company; that *Cob* quitted his house, and the leases of the three houses being just expiring, and the plaintiffs, and the defendant, being unwilling to remove from a place where they were well known, and had long inhabited, or to have a bad neighbour in *Cob's* house, and it being the custom of the Grocers Company to appoint a committee, to accept proposals for the renewal of leases, and to report the best purchaser; that thereupon the plaintiffs and defendant came to the following agreement: That one or other of them should take a lease for twenty-one years of the three houses, that one should bid before the Committee, and acquaint the other with his proposal, and that then the others should underbid him, but that the lease should be for the benefit of all; that they should severally pay the rent of the houses they lived in, and that the rent of *Cob's* house should be paid equally by all; that accordingly the defendant *Rowe* proposed to the committee to pay them £400 fine, and £50 a year rent, and the plaintiffs according to their agreement not making so advantageous a proposal, *Rowe* was reported the best bidder, and a lease was made to him upon those terms; and the end of the bill was to have the benefit of this lease, and that the defendant might be considered as a trustee for the plaintiffs. And as to any relief, or discovery, prayed by the bill, the defendant pleaded the statute of frauds and perjuries, and that there was never agreement in writing to the purpose in the bill.

Lord Chancellor. Suppose I employ one to purchase for me, and he liking the bargain, takes a conveyance to himself, shall he plead the statute? this is the same case. Two neighbours being unwilling to have the third house in strange hands, come to the agreement that has been mentioned; which is not for the lease, no, that agreement was with the Grocers Company, and reduced into writing (Q. 2 Vern. 627; 1 Vern. 296). Let the plea stand for an answer, with liberty to except, and the benefit of it be saved to the hearing.

[40] Case 22.—BROOM *versus* HORSLEY. [1728.]

At the Chancellor's house, Lord Chancellor.

To plead to such part of the bill as is not answered, is bad, because it puts the Court to the trouble to see what is answered, and hinders the plaintiff from excepting.

To plead to such part of the bill as is not answered, is a bad form of pleading, because it puts the Court to the trouble of seeing what is, and what is not answered, and deprives the plaintiff of the benefit of taking exceptions to the answer. *Curs. Cancell.* 199, 231.

C. v.—9

Case 23.—MACARTY, alias Lord MUSKERY, & al', *Plaintiffs*; GIBSON, *Defendant*. [1728.]

At the Chancellor's house, Lord Chancellor.

The oath of a legatee who had given a receipt under hand and seal for her whole legacy, was not allowed to be read as evidence, that she had only received part. *Curs. Canc.* 313.

A receiver need not be served with a writ of execution of a decretal order, but only with a copy, and if he disobeys, shall be committed.

The plaintiffs brought their bill, as residuary legatees of Lady *Jane Macarty*, against the defendant, her executor, for an account of assets, and payment of the residue, an account was decreed, and the Master made his report, to which the plaintiffs excepted, because the Master had allowed the defendant £500 for payment of a legacy, though he had compounded with the legatee for £250, and that therefore he being an executor only in trust for them, they ought to have the benefit of the agreement, and he was to be allowed no more than he really paid. And to prove this composition, they offered to read the deposition of the legatee, which was objected to, because she swore for her own advantage, and would make the executor liable to pay her the residue. But Mr. *Mead* said this could be no objection to reading her depositions for the plaintiffs, if they thought proper, for that would be their loss, as it would lessen the residue. But the *Lord Chancellor* would not allow her evidence, because she had given a receipt under hand and seal for the whole legacy, attested by two witnesses, and his Lordship declared, he would never suffer any one's oath to be read contrary to their own deed so solemnly executed. So the exception was over-ruled for want of proof.

A receiver appointed by the Court, is an officer of the Court, and need not be served with a writ of execution of a decretal order, but only with a copy of the order, and if he disobeys it, he shall be committed.

[41] Case 24.—ANONYMUS. [1728.]

At the Rolls.

The plaintiff may either have a decree according to his equity, or the defendants offer in his answer, tho' he replies to it.

The executor and residuary legatee brought a bill against the defendant for a discovery of several of the testator's effects come to his hands, the defendant puts in a full answer, and offers to give the plaintiff £250 for his interest, the plaintiff replies, and after obtains an order to withdraw his replication, and the cause coming on to be heard on bill and answer, the *Master of the Rolls* declared, That the plaintiff might either pray a decree according to his equity, or according to the offer in the answer, by which the defendant gave the plaintiff his election, which was not waved by the replication, but that the defendant would be bound by his answer, though the plaintiff had replied and gone to commission.

Case 25.—ANONYMUS. [1728.]

At the Rolls.

Chancery never allows maintenance for an infant beyond the interest of their fortune. 1 *Vern.* 255; 2 *Vern.* 137.

The testator devised £100 a-piece to his three daughters, payable at twenty-one, or marriage; and if any of them died before their portion became due, her share was to be equally divided among the survivors. One dies under age, and unmarried, another attains her age of twenty-one years, and files her bill against the executor for payment of her legacy of £100, and of £50, the moiety of her sister's share that died, which she was entitled to by survivorship. The executor by his answer craved an allowance out of the principal for maintenance of the plaintiff. But at the hearing the *Master of the Rolls* declared it was an established rule in Chancery, not to allow maintenance for an infant, beyond the interest of her fortune, and therefore in this case no interest

being payable till the principal became due. The executor was intitled to no allowance for maintaining the plaintiff till she came of age.

It was also questioned when the plaintiff was intitled to the payment of the £50, whether at the time it was to have been paid to the sister, in case she had lived to receive it, or at the time the original portion became payable to the plaintiff, but the solicitor for the plaintiff submitted to have the payment of it decreed when the sister would have arrived at twenty-one, and tho' the *Master of the Rolls* said it was a doubt, he seemed to be of the same opinion.

[42] The plaintiff may move for a subpoena returnable immediately, against an officer of the Court, without the usual affidavit, because he is presumed always to attend.

Legacy to two payable at 21 or marriage, and if either die before payment, to survive. One dies under age, and unmarried. *Q.* Whether the legacy over shall be paid at the same time with the original legacy, or at the time the deceased would have come to 21. *Post*, Pag. 473; 2 *Bridg. Convey.* 191, 259, 280, 220, 232; 2 *Vern.* 620, 199, 283; *Nels. Fol. Rep.* in *Canc.* 62; 1 *Anders.* 33; *Swinb. Part 1*, sect. 7, n. 3; 1 *Lev.* 278; 2 *Vern.* 466, 722.

Case 26.—PAGE & al' *versus* PAGE & al'. [1728.]

[S. C. 2 P. Wms. 489.]

At the Chancellor's house, Lord Chancellor.

The testator devises his real and personal estate, to six, in trust, to pay his debts and legacies, and the residue to them, equally to be divided, share and share alike, one dies before the testator, his share of the real estate, shall go to the heir at law, and of the personal, to the next of kin to the testator, as a lapsed legacy, for tho' the legal estate is joint, their interest in the residue is several, and the others can't claim it as executors. See ant. *Cas.* 3, *Cas.* 12; *post*, *Cas.* 32, *Cas.* 157.

The council for the defendants spoke to this effect. 'Mr. *Wilkins* devised all his real and personal estate to six relations, in trust, to pay his debts and legacies, and the residue to his said six relations, equally to be divided among them share and share alike, and made them executors.' *Peter Daly*, one of the devisees, dies in the life-time of the testator, and after the testator dies, and his heirs at law, and next of kin, bring their bill against the executors for an account of the real and personal estate, and to have the sixth part of *Peter Daly* decreed to them, as a lapsed legacy. And at the hearing your Lordship declared that as to the real estate it was jointly devised in fee to the devisees in trust, for payment of debts and legacies, and your Lordship was pleased to order that an account should be taken of the personal estate, and of the debts, and legacies, and if a surplus remained, the consideration of that was reserved till after the report. The Master has made his report, that there remains a surplus of £3000 in money, besides several securities, and the cause now comes before the Court on this report for your Lordship's directions, to whom this surplus shall be paid. And the only question is, as to the sixth part of *Peter Daly*, Whether it shall survive to the defendants as joint devisees? Or whether it shall go in a course of distribution as a lapsed legacy? And this seems to be determined already by the decree, which has declared it to be a joint devise, as to the real estate, and must therefore be a joint devise of the personal estate also, and his part will survive to the rest, tho' one devisee dies in the life-time of the testator, and therefore this sixth ought to be divided into fifths among the surviving devisees, but the defendants are also executors, and therefore it should be construed as a lapsed legacy; they are intitled to it. Where a particular legacy is given to an executor, it looks like excluding him from the residue; because if the testator had given him nothing in particular, he would have had all, but here is no implied trust for the next of kin, nothing to shew that he designed them any thing; but on the contrary, his intention plainly appears that they should have nothing, because he gives the devisees every thing.

[43] *Mr. Solicitor-General for the plaintiffs.* The decree, as far as it goes, has determined in our favour, that the devise is joint by the express words of the will, as to the pay-

ment of debts and legacies, but that the residue is to be divided among the defendants share and share alike, so that tho' they are joint devisees in law, as to payment of debts and legacies, they are devisees in common as to the equitable interest in the residue, which is to be divided share and share alike, and therefore that *Peter Daly* dying in the life-time of the testator, his share of the devise of the residue became lapsed and descended to the heir at law, chargeable with the debts and legacies. As to the personal estate, it did not then appear, whether there would be any surplus, after the debts and legacies were paid, so that point was reserved by the decree till after the account was taken, and it being declared by the Court, that the devise of the real estate is a joint devise for payment of debts and legacies, but a several devise, as to the equitable interest in the residue, it must be construed in the same manner as to the personal estate; but supposing it a lapsed legacy, the defendants say, they are intitled to it as executors, and that it was the testator's intention to leave them every thing. But the testator's intention is not the rule to go by, for where the Court decrees the residue to the next of kin, they never suppose that the testator designed it them, but they construe the will for so much to be an incomplete will, and then in conformity to the statute of distributions, dispose of the residue to the next of kin. But supposing we should take the intention for our guide, in this case it would make against the defendants, for the testator devises to six share and share alike, so that each was to have a sixth part only, why then should he have a share of a sixth not designed to him; and tho' the intention of the will is disappointed as to one of them, there is nothing to shew that the testator designed his share to the survivors, but his intention appears plainly to the contrary. Where there is a residuum, a lapsed legacy falls into it, but here a part of the residuum itself lapses, and this case is stronger than where a particular legacy is given to an executor, for none of the executors here can take any thing as executor, but the whole surplus is disposed of, and each of them is to have a sixth part as legatee, and it would be contrary to the express words of the will to give them any thing as executors, and therefore this lapsed legacy ought to be distributed according to the statute.

Mr. Lutwych. The devise of the legal estate being joint as to the payment of debts and legacies, the whole estate is liable to them, but [44] after this trust discharged, the residue being to be divided among the devisees share and share alike, shews that the devise was several in point of interest, and therefore your Lordship decreed the sixth of the real estate to the heir at law, as a lapsed legacy, but chargeable with the payment of the debts and legacies, besides one of the defendants out of his share is to pay £8 a year, and the testator directs the devisees to leave their shares to their children, which are all proofs of a tenancy in common of the equitable interest in the residue, so that it is the same thing now, as if the testator had computed what the residue of his personal estate would amount to, and had left them £500 a-piece. The next question then is, whether as executors, the defendants are entitled to this sixth part. If a particular legacy is left to an executor, this has been always taken as an evidence that the testator designed them no more; if a sixth then, or any other part, is left to an executor, shall he claim another part as executor? Is not a sixth part a particular legacy? And it was resolved so in the case of *Collet* and *Preston*, where a freeman of *London* devises one moiety of his personal estate to his wife, and made her executrix, the other moiety was decreed to be distributed, by this will every one is to have such a proportion, as to the part that is lapsed; the testator died without a will, and therefore it must be distributed, it is what happened since the making the will, and is not provided for.

Lord Chancellor. This is a joint devise, only as to the trust for payment of debts and legacies, but several, as to their interest in the residue, which is to be divided into six equal parts, share and share alike, the devisees are to take nothing as executors, but each of them are to have a sixth part, and his intention is, that they should have no more; one dies before the testator, so this is within the common rule, that a particular legacy given to an executor shall exclude him from the surplus; here the residue is divided among them as legatees, and each is to have a part, and therefore one of the legatees dying in the life-time of the testator, his share must be distributed among the next of kin.

A bill of revivor don't lie against a devisee. 1 Chan. Cas. 174, 231, 123; 2 Vern. 548, 672; 1 Vern. 426, 283.

After a decree in a cause, you may have it referred to a master to see whether it was set down irregularly for hearing.

[45] Case 27.—ANONYMUS. [1728.]

At the Rolls.

The mortgagee brought his bill to foreclose the defendants, if the money was not paid in a reasonable time, and a decree was made by default, and Mr. *Lutwyche* prayed, that in case the defendants redeemed, the plaintiff might be decreed not only his costs at law of an ejectment which he had brought to recover the possession, and in this cause, but likewise in a cross cause brought by the defendants, and then depending; but the *Master of the Rolls* refused to decree him the costs of the cross cause, because he could take no notice that there was such a cause depending, and the plaintiffs in that cause might proceed, and prevail; and if they did not go on, the cause might be set down *ad requisitionem defendantis*, and he would have costs; but Mr. *Lutwyche* said, that the decree then would be only personal, and they should have no security for their money, and the plaintiffs might be beggars, and insisted, they were intitled to all the costs they were put to by this mortgage, and quoted a case at law, which he said was much stronger than this, where the court would not relieve against the penalty of a bond, till the obligor paid the costs of a former trial, in which the obligee had been nonsuited.

Case 28.—PECK & al' versus PECK & al'. [1728.]

At the Chancellor's house, Lord Chancellor.

If the title of an answer reflects on the plaintiff, it is scandal, because it is not part of the defence, nor can be put in issue. Post, Cas. 42.

Mrs. *Peck*, and her daughter *Anna Maria*, filed their bill against *John Peck*, Esq., eldest son of *John Peck*, Esq., deceased, as widow and daughter of the said Mr. *Peck*, for dower, and their respective share of Mr. *Peck's* personal estate. To this bill, Mr. *Peck* put in an answer, which was referred to the master for scandal and impertinence, and the master reported it to be scandalous and impertinent, and the defendant excepted to the report; and the council for the plaintiffs argued in support of their exception which was taken to the title of the answer. The several answer of *John Peck*, Esq., one of the defendants, to the bill of complaint of *Anna Baines*, alias *Green*, assuming to herself the name of *Anna Peck*, as pretended wife of *John Peck*, Esq., deceased, and of *Anna Maria Green*, assuming to herself the name of *Anna Maria Peck*, as daughter of the said *John Peck*, Esq., deceased. Whatever reflects on the party, if it is impertinent, is certainly scandalous, for its being material, is the only reason why it is allowed, and tho' a charge is ever so scandalous, and criminal, if relevant and necessary to their defence, they have a right to set it forth, and it is proper to be put in issue; but what is in the title of the answer cannot be examined to, or put in issue, and therefore if it reflects on the party, must be certainly impertinent and [46] scandalous. To which it was answered by the council for the defendant, that the title of the answer was agreeable to the stile of the spiritual court, where if a woman as wife sues for the performance of conjugal duties, or to administer, the title of the answer is—such a one, *se nominans* by the name of the deceased, or of the husband, which is done, to avoid any admission of her right, as wife.

Lord Chancellor. There was no reason to fear, that the title of the answer should prejudice the defendant, as an admission of the plaintiffs right, or work any conclusion in this court, and therefore I allow the exception. 1 Vern. 107; Nels. Fol. Rep. in Canc. 72.

Case 29.—TOLLET'S Case. [1728.]

[S. C. 2 Eq. Cas. Abr. 233, 663 ; 2 P. Wms. 489.]

At the Rolls.

Post, Cas. 192.

If a will is signed, sealed, and delivered only, it shall operate as a will, and not as a deed. —One has a power to make a jointure by deed under hand and seal, he executes it by will, this is a good execution in equity in favour of a wife. 2 Vern. 69, 163, 265 ; 1 Vern. 40, 132 ; 1 Chan. Cas. 263, 264, 10, 17, 23, 103, 159 ; Nels. Fol. Rep. in Canc. 273, 38, 272 ; 3 Chan. Cas. 68, 69 ; Cart. 292 ; 2 Vent. 350.

Mr. *Tollet* had a power to settle a jointure on any wife, by deed executed under his hand and seal, he makes a will, and taking notice of his power, bequeaths certain lands to his wife for life, in execution of his power. The Master of the Rolls allowed the husband had not legally executed his power, because he had settled the lands by will, and not by deed, which was an instrument that took effect in the life of the parties, and was as well known and taken notice of by the law as a fine, or recovery, and that where a will was signed, sealed, and delivered only, it has been adjudged that it should pass as a will, and not as a deed, but that this was a defective execution of his power, which ought to be made good in equity in favour of a wife, or children, and that tho' it was a bad will, it would operate as an appointment, and decreed accordingly, tho' this was a voluntary devise to the wife after marriage, and she brought no fortune.

Woodward versus Halsey. (Nels. 8vo. Rep. in Can. 113.) A. had a power to revoke by deed, which he executes by will (but not in favour of a wife, or children). The Master of the Rolls adjudged this to be a revocation, but the decree was reversed per *King*, Lord Chancellor. Hob. 312 ; Sup. to Wentw. 268.

[47] Case 30.—WALE, an infant, by PERRY his prochein amy, *Plaintiff* ;
SALTER & Ux', *Defendants.* [1728.]*At the Rolls.*

The prochein amy, on affidavit of his poverty, must give security to pay costs. Cursus Cancel. 466. See post, Cas. 57.

The defendants moved that it might be referred to a master, to see, whether this bill was exhibited with the consent of the prochein amy, and that he might give security to pay the costs. In the bill he was stiled Mr. *Perry of Colchester*, and an affidavit was read, that he absconded, and had not been at *Colchester* of many years, and was not worth a groat : And the plaintiff's council insisted, that this reference was never had, but at the instance of the prochein amy, on his affidavit, that the bill was exhibited without his knowledge. But the Master of the Rolls made an order, that the prochein amy should give security to pay the costs, and the quantum was to be settled by the master, and all proceedings in the mean time to stay : And the case of *Webster and Guy* was mentioned, where the same order had been made the day before by the *Lord Chancellor*.

Case 31.—ANONYMUS. [1728.]

At the Rolls.

This court will not take cognizance of a sum originally below the dignity of it, tho' by the neglect or mispleading of the plaintiff, it has amounted to a larger. Post, Cas. 187.

An action was brought for £5, which, by letting judgment go by default, was increased to £15, and the defendant filed a bill, and moved for an injunction, which was denied by the *Master of the Rolls*, who declared, he had lately dismissed a bill on

the same account, because the sum was originally below the dignity of the court, tho' by the neglect, or mismanagement of the party, it had amounted to a sum, the court would take cognizance of.

Case 32.—HUNT & al', *Plaintiffs*; BERKLEY & al', *Defendants*. [1728.]

At the Rolls.

One devises several pieces of plate to A. and B., and the residue of her plate to C., and the residue of her personal estate to D. A. and B. die in the life-time of the testator, their legacies shall lapse into the general residue, and not into C.'s, for C.'s is a particular legacy, so expressed, to save the trouble of enumerating particulars.

The testatrix devised her silver tea-kettle, and lamp, with its appurtenances, to the defendant *Berkley*, and to *Anne Stafford*, and *Francis Wolmer*, several pieces of plate, and the residue of her plate to the plaintiff *Brace*, and the residue of her personal estate to *Francis Wolmer*, the defendant, *Berkley*, and to another of the defendants, equally to be divided between them, and also made them her executors. *Anne Stafford* and *Francis Wolmer* died in the life-time of the testatrix, and the plaintiff *Brace*, the daughter [48] of *Francis Wolmer* (who was brother to the testatrix, and her next of kin at the time she made her will) was next of kin to the testatrix at the time of her death. And in this case there were three questions.

First, what passed to the defendant *Berkley* by the devise of the silver tea-kettle, and lamp, with its appurtenances? He claimed the silver canister, tea-pot, and lamp, milk-pot, spoons, strainer, and tongs. But the *Master of the Rolls* adjudged, that by this word appurtenances, nothing passed, but the stand or frame that supported the tea-kettle.

Secondly, to whom the specifick legacies of plate devised to *Anne Stafford*, and *Francis Wolmer*, who died in the life-time of the testatrix should go? Whether to the plaintiff *Brace*, as residuary legatee of the plate, or to the executors as legatees of the general residue? And it was argued that they should fall into the specifick residue of the plate given to the plaintiff *Brace*, for that the residue of the whole personal estate is plainly divided by the will into two parts, the residue of the plate which is devised to the plaintiff *Brace*, and the residue of the other personal estate which is devised to the executors, and by the same rule, that if a pecuniary legacy had lapsed, it would have fallen into the general residue, and not into the particular residue of the plate, the specifick legacies shall lapse into her specifick residue, and not into the general residue. But the *Master of the Rolls* adjudged, that they should fall into the general residue, and that the devise of the residue of the plate to the plaintiff *Brace*, was not to be considered as a residuary devise, but the testator made use of those words only to save herself the trouble of enumerating the several particulars.

Thirdly, to whom shall *Wolmer's* share of the residue go who died before the testatrix? Whether to the two other executors, and residuary legatees, or to the plaintiff *Brace*, as next of kin. And it was argued for the plaintiff, that the three devisees are plainly tenants in common of the residue, and therefore this share cannot survive to the other two, and that they could not take it as executors, because it is plain that the will designed them nothing as executors, but disposed of the whole residue to them as legatees, and therefore since it appears what the testator intended the executors should have, they cannot have more, and they have also particular legacies devised to them, and the case of *Page and Page* (ant. Cas. 26), is an authority in point. And the plaintiff *Brace*, who has also a particular legacy, was not the next of kin at the time the will was made; and if her father *Francis Wolmer* had been dead at that time, it is highly probable she should have been made one of the residuary legatees in his room, but if [49] she had been next of kin when the will was made, the giving her a particular legacy would not have concluded her from claiming this lapsed legacy, as was adjudged by Lord *Sommers* in the case of *Baily and Burgess or Powel*. 2 Vern. 361. (See ant. Cas. 12; post, Cas. 157.)

Master of the Rolls. There is great variety of opinions on this head, I think the testatrix cannot be said to have died intestate as to this part, *nemo potest testatus*, and *intestatus discedere*, is a maxim in the civil law, if a man makes an executor, he cannot die intestate, but he may, if he makes only a testamentary schedule without an executor.

By the civil law the executor is heir, and that law makes no distinction between real, and personal estate, but only between moveable, and immoveable. Executors were first called upon by ordinaries, to distribute for the good of the souls of the deceased, and so were administrators likewise, but executors by the common law were intitled to the surplus of the personal estate. The case of *Foster and Mount*, 1 Vern. 473, is the first case where the surplus was decreed to be distributed, it has been said, that that case was decreed upon a fraud in the executors, but Lord *Macclesfield* and I had the decretal order copied out, and the decree was grounded upon the implied trust for the next of kin, as is rightly taken notice of in 2 Vern. 675, this decree was afterwards reversed by the Lords Commissioners, but their decree of reversal was reversed in the House of Lords, after the courts of equity had come to this resolution, the next of kin sued the executors in the spiritual court for an account, and distribution of the residue, in the case of *Caverly* and *Caverly*, and a prohibition was moved for in *B. R.* by the executors, and granted by Lord *Macclesfield*, who said, if the Court of Chancery would consider the executors as trustees, a bill might be proper in that Court, but that they could not be called to an account on the foot of a trust in the spiritual Court, but nothing further was done in that case. I do not think the executors in this case can be considered as trustees, because the testatrix has made a disposition of her whole estate; but I shall give no opinion, but desire that each side may attend me with precedents. And afterwards in *Trinity* term following, on *Monday June* the 23d, his honour decreed for the executors. (See ant. cas. 3, cas. 26.)

The testatrix had likewise devised to the plaintiff *Brace*, the use of a cabinet of several valuable curiosities for life, and if she had no children, then she devised it to *J. S.*, but if she had children, she gave it her absolutely, and the executors [50] insisted, that she should give security, but did not suggest that she was poor, or insufficient, but the *Master of the Rolls* ordered that she should only give a note or schedule of the particulars subscribed by herself, and declared that this was the usual course of the Court. (See ant. cas. 10; Nels. 8vo. Rep. in Canc. 155.)

The use of the personal estate being devised to Lady *Copley* for life, it was directed that a schedule and appraisement should be made of all the goods and furniture, &c., and that Lady *Copley* should enter into a covenant to restore them without any other damage, than by the reasonable use thereof, wear and tear, and inevitable accidents only excepted, and that the schedule should be annexed to the covenant, and that in case the executor refused to make such an inventory, it should be done by two to be named by my lady, and as many by the person in remainder.

Case 33.—BRACE & al' *versus* the Dutchess of MARLBOROUGH & al', & e contra.
[1728.]

[S. C. 2 P. Wms. 491; 2 Vern. 564; 2 Eq. Cas. Abr. 613. See *Whitworth v. Gaugain*, 1846, 1 Ph. 734; *Thorpe v. Holdsworth*, 1868, L. R. 7 Eq. 146; *Jennings v. Jordan*, 1881, 6 App. Cas. 715; *Atherley v. Barnett*, 1885, 52 L. T. 737; *Bailey v. Barnes*, [1894] 1 Ch. 36.]

At the Rolls.

On a bill by creditors, a sale is decreed by consent, and the creditors are to be paid according to priority, costs shall notwithstanding be paid to all in the first place.

Here were original and cross causes, in which the creditors of Sir *William Gostock*, by a great variety of securities, both as to their nature and number, and Mr. *Brace* (to whom, and his heirs, Sir *William* had conveyed all his lands in trust, to sell for payment of his debts) were the principal parties, and on hearing these causes, an order was made that the Master should state the several securities, the Master makes his report, and the cause coming to be further heard on the report, the estate was decreed to be sold by consent, and the Master was to appoint commissioners to enquire into the contents, and value of the lands contained in each particular security, and the creditors were to be paid according to their priority, and the costs were to be taxed. And the cause now coming back for the directions of the Court on the Master's report; the first question was, as to costs, Whether they should be paid to all the parties out of the estate in the first place? or whether every incumbrancer should be paid his principal, interest, and costs according to his priority? And the *Master of the Rolls* thought it reasonable (and so decreed) that all should be paid their costs in the first

place, for though by the decree all parties are to be paid according to their priority, that is to be understood only as to their principal and interest, for this is not a decree for a redemption, in which case each incumbrancer is to be paid his principal, interest, and costs, in order, but for a sale by consent, which it is the interest of all parties to speed.

In 1713 Sir *William Gostock* confessed a judgment to Sir *William Wake*, afterwards Sir *William Wake* gets an assign-[51]-ment of a mortgage of part of his estate made to Lady *Mills* by the said Sir *William Gostock* in 1687, there being several intervening mortgages, and other securities, and an elder recognizance. And the other question was, whether Sir *William Wake*, by getting this mortgage assigned to him, should be paid off the money due on the mortgage, and also on the judgment, before the intermediate creditors.

Master of the Rolls. If a mortgagee be also a creditor by judgment, or bond, the heir shall not redeem without paying off the money due on the judgment, or bond, to prevent circuity of action because the heir is liable to those incumbrances after redemption, the equity being assets in his hands, but he that would protect himself by taking in a prior incumbrance, must be a fair purchaser without notice, as a mortgagee, but here is no purchaser, no particular lands were in contemplation when the judgment was acknowledged, nor had the creditor by judgment any interest, in the lands, till an elegit executed, nor can he release, because he has no lien on them. (1 Chan. Cas. 267, 268.)

Mr. Lutwyche. I do not remember an instance, where a subsequent incumbrancer has been protected, unless he got in the first security of all, and so obtained the legal estate, but here the recognizance is prior to their mortgage, and shall protect our intermediate mortgage.

Mr. Fazakerly. Mr. *Gibbons* is the first incumbrancer by the recognizance, and has also intermediate mortgages, so that this is a proper objection for him to make, and if our mortgagee had brought an ejectment against him, she must have been nonsuited, and could never have recovered at law, but the case is different as to the other immediate incumbrancees, for suppose Lady *Mills* had brought an ejectment against any of them, they could not have set up this recognizance, therefore we have a good legal demand against every one but Mr. *Gibbons*. It is agreed, that if our last security was a mortgage, instead of a judgment, we might take the advantage of our getting in the old mortgage to be paid both, but I can see no difference between a conveyance and an incumbrance, no body lends money on the record, but in consideration of the interest it carries on the land, which is so far considered, that a purchaser without notice must pay a judgment, the money is lent on the security of a moiety of the lands, the borrower has often nothing else, and though you may take his body and [52] goods in execution, yet you may have his lands also, and a judgment creditor may redeem, tho' a bond creditor cannot, because the equity is liable, so that now we have got the legal estate, and have the same equity with the other creditors; nor is our consent to the sale any objection, which was done only to avoid the multiplicity and intricacy of suits, but not to take away our benefit of priority, the money arising by the sale is in lieu of the estate, and is in the same manner chargeable, and priority in the decree must be understood of legal priority, and therefore these two securities being tacked together by equity, are both prior to the others.

Master of the Rolls. When this cause was first heard, I foresaw numberless difficulties, from the nature, and variety of the securities, and the execution of the deed of trust for the sale, and therefore I thought those I then gave, the only directions could be followed, that the Master should state the several securities, and after I decreed a sale by consent of all the creditors, which otherwise could not have been done, and without a sale it was impossible to have made a decree, for what rule could have been set for redemption, where there were so many securities, and so different in their nature, and all the parties must have had several days given them for redemption one after another, and I think if Sir *William Wake's* claim was good, he could not have the benefit of it for this decree, which was made for a sale by consent of all parties, the parties indeed only consent to the sale, but consenting to the sale is implicitly consenting to the decree, which includes the terms, that the securities should be satisfied according to their priority, which relates to the time only, and therefore I decree the Master's schedule to be a good adjustment of the debts.

At another day the *Master of the Rolls* spoke to this effect. A puisne judgment

creditor gets an assignment of a prior mortgage, shall he by this means be satisfied his judgment preferable to prior mortgage creditors, intermediate between the mortgage assigned, and his judgment? I was the last day of opinion that he could not come at this question for the decree, by which the money was to be applied in payment of the securities, according to their priority, and that that was to be understood of priority, according to time only, but I now think it juster to explain it of priority in point of satisfaction, tho' not in time, and therefore if the puisne judgment creditor can unite his incumbrance to the mortgage, he may notwithstanding this decree, and then the judgment will be a security prior in time also, in respect to the time to come, tho' not in respect of the time past; but I cannot find one single case, where a judgment creditor, or any other incumbrancer, by buying in a precedent [53] mortgage was allowed the preference of intervenient securities, tho' I have looked into all the authorities. A judgment, statute, or recognizance is a general lien (but see 2 Chan. Cas. 35), whereas a preference is given only to those who had a particular interest in some lands, and had no notice of the prior incumbrances, when they lent their money; and 2 Ventr. 337; 3 Chan. Cas. 36, 149, 162, 201; 2 Chan. Cas. 20, 208, 212; 1 Vern. 49, 187; 2 Vern. 29, 30, 160, are all cases, where mortgagees purchase in prior incumbrances; and *Finch* quotes three cases in 2 Ventr. 337, and says, mortgagees and purchasers may protect, and I am determined in my opinion, that incumbrancers may not, from what Lord *Nottingham* says in 1 Vern. 187, that there were very strong arguments against mortgagees or purchasers buying in prior securities to protect themselves, and that there were very strong arguments for it, and that it was a very disputable point till it was settled in the case of *Marsh and Lee*, and therefore since it was a disputed point till that case, even as to mortgagees, I shall not now extend it to a puisne incumbrancer. A mortgagee takes particular lands as his security, a judgment creditor has no particular lands in view, and by chance may have those lands extended for his debt, which the debtor himself had not at the time he entered into the judgment, but which came to him after by purchase or descent, this is a point of consequence, but here a puisne incumbrancer gets in an assignment of a prior mortgage, upon which an intermediate mortgagee gets in a recognizance prior to the first mortgage, and fights him at his own weapons.

Mr. Attorney-General. I apprehend this is a new case to endeavour to tack a puisne judgment to a prior mortgage, and is different from all the common cases, where one that had a puisne incumbrance never claimed the protection of a prior, but where he took some estate, or interest in particular lands. A mortgagee has an estate in particular lands, or relies on them for a security, therefore if he can get in a prior incumbrance, which gives him a legal estate in the lands, he shall have the benefit of both, he that accepts a judgment, has no estate in the lands, or any interest in particular lands, till the elegit is executed; by suit indeed it may turn to a particular interest, but so may likewise a debt by bond, but this judgment was never extended, nor does the cognisor do any act to deceive the cognisee, as the mortgagor does to deceive the mortgagee, for the mortgagee is deceived, because he thinks, that by lending his money, he gains an estate in the particular lands, whereas it does not appear, whether he who lends on a judgment, lends on the real or personal security (for he may use it either way), or that he was any way deceived, or made to believe, he had a better security than he finds; and where a man borrows money on a [54] judgment, he never covenants, that his lands are free from all incumbrances; besides if the defendant would have had this advantage, he should have made a case of it in his answer, and expressly denied notice, or at least should have insisted on it before the Master. but in his objections to the report, he only says, that he ought to have his money on the judgment, as well as the mortgage, but gives no reason; whereas he ought particularly to have set forth, that he lent his money without notice. So that to decree for him, would be to decree for him whether he had notice or not; so that he has not done what is necessary, even in the most favourable cases of purchasers; a small matter would have proved notice of those incumbrances from 1687 to 1713, and priority in the decree could be only meant as to time, there was nothing then appeared to guide the Court in their decree but what arose in point of time, none of these disputes being then started.

Mr. Solicitor General. The common case is a hard one, that an intermediate mortgage should be defeated by the act of the mortgagor and mortgagee; on a bill to redeem or foreclose, he that is prior in satisfaction may be decreed to be paid first,

tho' his security is puisne in time, but then he must make a case for the hearing, and insist upon it, that the second mortgagee should not be allowed to redeem without paying off both the first, and third mortgage; but to unite these securities he must go still further, he must deny notice, and set forth, that he lent his money innocently, and if he can prove these facts, the second mortgagee must pay off both; but then here is a case made for the judgment of the Court, and the decree mentions the particular terms of the redemption, but it would open a way to the greatest fraud, if a puisne incumbrancer might protect himself by buying in a prior mortgage, whether he had notice or not of the intermediate securities when he lent his money, and would be as great a fraud in him as in the mortgagor; so that the point of notice is the chief point, and makes it a fraud or not, and all the cases I have met with, are of mortgagees who had lent their money innocently, and without notice; there if they could get the legal estate, the Court would not take it from them, till they were fully satisfied; a mortgagee is a redeemable purchaser, but did a judgment creditor ever plead himself a purchaser without notice? does he ever inquire into the title of the lands, or lay the deeds before council, or does he contract for any lands? Besides, what they now insist on is not warranted by the pleadings in the cause, or by the decree, and therefore the Court will not aid them to the prejudice of the intermediate securities, who lent their money on the credit of the lands themselves.

[55] *Mr. Lutwyche*. If they have not made such a case, all their mooting is nothing to the purpose: If a creditor would have an equity contrary to the common rule, which is, that he, which is first in time, must be first satisfied, he must make a case of it, to be put in issue, and supported by proofs; he must deny notice of all the mesne incumbrances, when he lent his money on the puisne security; this cause came to a hearing, and a sale is decreed without any notice of this preference, because it was never made a case on the pleadings, or put in issue, and therefore they are not at liberty to insist on it now, or if they were, the law is against them. The judgment creditor has by the *elegit* a right to half the lands, and therefore he would fix his claim on these lands in mortgage, whereas the lands are to be extended by the sheriff, and a moiety to be delivered by him, but the creditor has no particular right to the lands in mortgage by virtue of his judgment, nor certainty that he ever shall, for the sheriff is not bound to deliver him the mortgaged lands, or any part of them as his moiety.

Master of the Rolls. They are too late if the law was with them, they insist indeed by their answer, to be paid off all their securities, but go no further; at the hearing an order is made that the Master should state the several incumbrances, and that he might state any thing specially, they might then have made this case before the Master, the Master makes his report, and then a sale was decreed; then indeed they set out their reasons particularly before the Master, but omit the most material point to deny notice, and there is no reason to send them back, and to break the rules of the Court, especially when the merits seem clearly against them, for though a puisne mortgagee may, I think a puisne incumbrancer cannot avail himself of a prior mortgage, and the *Attorney General's* argument is very strong, that a puisne judgment creditor is not deceived, though there are never so many prior securities, he never asks what incumbrances are on the lands, but has a lien on the person, and goods, the debtor is not a deceiver, nor is the other deceived, the mortgagor that mortgages his lands twice over is a deceiver, and is condemned as such by Parliament, and is deprived thereby of his equity of redemption, his offering to mortgage the lands imports he has not made a prior mortgage, but if he confesses a judgment, that is no implicit assertion that he has not made a mortgage, but his having made prior mortgages on several parts of his estate, may be the reason, why he gives a judgment, as a lien, on the particular parts not in mortgage, or on the equity of redemption: there is a great difference where the money is first lent on a mortgage, and the mortgagee mortgages the lands [56] a second time, and then confesses a judgment to the first mortgagee, for here is a deceit, the prior mortgage has put the estate in his hands, and when he lends on the judgment, he depends on the equity standing as it did when he lent the first money. Therefore I decree the creditors to come in according to the report.

Case 34.—BRADGATE *versus* RIDLINGTON. [1728.]*At the Rolls.*

If lands are devised, in trust, to pay debts and legacies, the debts shall be first paid. Nels. 8vo. Rep. in Canc. 202 ; post, Cas. 115.

The *Master of the Rolls* said, it was now a settled point in equity, that where lands are devised to trustees for payment of debts and legacies, the debts shall be paid in the first place. Hob. 265 ; Nels. Fol. Rep. in Canc. 195 ; 1 Rol. Ab. 920, Cas. 6 ; 2 Vern. 106 ; 1 Vern. 69 ; Went. Off. of Ex. 46, 50, 73, 74 ; St. 21 H. 8, ch. 5 ; Dyer, 234.

Case 35.—ANONYMUS. [1728.]

At the Rolls.

The heir may discharge his estate when the portion becomes payable, tho' it belongs to an infant. 1 Vern. 338 ; Nels. Fol. Rep. in Canc. 61.

A term of two hundred years was limited to trustees, to raise portions for daughters, there was but one daughter, the heir files his bill against the trustees to assign the term as he should appoint, on payment of the portion, tho' the persons interested in the portion were infants (the children of the daughter, who was dead), yet the time when it was payable being past, the heir may discharge his estate.

Case 36.—ATWOOD *and* ATWOOD. [1728.]*At the Rolls.*

By a devise to A. and B., and the heirs males of their bodies, equally to be divided between them, A. and B. are tenants in tail in common.

One made his will, *inter al'*, in these words, 'I give and devise all my lands to my two brothers, *John* and *Thomas*, and the heirs males of their bodies, equally to be divided between them, and I devise twenty shillings a year to A. B., during his life, out of my brother *John's* share.' The *Master of the Rolls* adjudged, that by this devise, *John* and *Thomas* were tenants in tail in common, and not joint tenants for life, with several remainders in tail, and that (them) should relate to the brothers, as well as to their issue, according to the case in 3 Co. 39 b. The testator devises to *John Wilcocks* in tail, remainder to *Elizabeth* and *Martha*, and the heirs of their two bodies engendered by equal portions, equally to be divided. The Court gave judgment, that *Martha* and *Elizabeth* were tenants in common in tail. Besides the testator has devised twenty shillings a year to a stranger for life, out of the share of *John*, which shows he designed this annuity at all events should he paid to the stranger for his life, whereas by supposing [57] them joint tenants for life, if *John* should die before the stranger, the whole would have survived to the other brother discharged of the annuity.

In the arguing this case, the council mentioned the case of *Barker and Barker*, where the testator directed that with the surplus of his real, and personal estate, lands should be purchased, in trust, for *Jerome Barker* and *Robert Barker*, the survivor, and survivors of them, their heirs, and assigns for ever, to be equally divided between them share and share alike.' *Jerome Barker*, died without issue in the life-time of the testator, and the Lord Chancellor *King* adjudged that by this will *Robert Barker* and *Jerome Barker*, if he had lived, would have been joint tenants for life, with several inheritances to their respective heirs, and that by the death of *Jerome* in the life-time of the testator, the devise of the trust of the inheritance, as to one moiety, became a lapsed devise, and is descended to the heir at law of the testator, and that *Robert Barker* was intitled to the whole by survivorship for life. And this decree was affirmed in the House of Lords on *Thursday April* the 20th, 1727. 2 Showr. 452, Cas. 416 ; 1 Ventr. 376 ; 1 Vern. 353, 425, 32 ; 3 Lev. 373 ; Cro. El. 443, Cas. 7 ; 695, Cas. 6 : Goldsb. 182 ; 2 Anders. Cas. 10 ; Dyer, 25.

Case 37.—HORNBY *versus* PEMBERTON. [1728.]*At the Chancellor's house, Lord Chancellor.*

One copartner, who lived at *Constantinople*, brought his action for £800 against the other, who lived in *London*, for goods consigned to him, the defendant, files a bill for a discovery, account, and injunction, and requires, that the defendant might set forth all books, papers, &c., which belonged to him, or concerned any account between them, in his *verbis*, & *figuris*. The defendant in his answer sets forth a particular of all such books and papers, and offers to produce them at *Constantinople*, upon oath, to any person the plaintiff should appoint, and to let him have copies, and the Lord Chancellor was of opinion, that the plaintiff's demand was unreasonable, and the defendant's offer sufficient.

The defendant in this Court, who lived at *Constantinople*, brought his action against the plaintiff for goods consigned by him to the plaintiff in *London*, to the value of £800. The plaintiff put in bail, and filed his bill against the defendant, as his co-partner for an account, and for a discovery, and injunction, and upon the defendants praying a *dedimus*, had an injunction of course till answer. And the defendant filed a cross bill. The plaintiff in the original cause required that the defendant might set forth all books of account, letters, entries, &c., in his *Verbis*, & *Figuris*, which were in his hands, and belonged to the plaintiff, or which concerned any account between the plaintiff and the defendant. The defendant in a schedule annexed to his answer set forth a particular of all books and papers in his hands belonging to the plaintiff, and of all books of account between them, and consented to produce them to any person [58] in *Constantinople*, the plaintiff would appoint, and let the plaintiff have copies of them at his own charge, the plaintiff *inter al'* excepted to this part of the answer. The Master reported the answer insufficient, and the defendant took exceptions to the report, and the Lord Chancellor was of opinion, that the plaintiff's demand was unreasonable, and impossible to be complied with, and done purely to keep the defendant out of his money by the injunction, and inveighed severely against the council who took the exception, which he over-ruled with this direction, That the defendant should produce upon oath all books of account, papers, &c., to such person, or persons at *Constantinople* as the plaintiff should appoint. The affidavit was to be settled by a Master, and to be sworn before the Consul, or Ambassador, at *Constantinople*, according to the usage of *English* merchants residing there, and the plaintiff was to take copies of them, if he pleased, at his own charge.

Another exception was, that the defendant had not discovered what goods he had consigned in *England* to other people. The defendant in his answer sets forth, that he had consigned several parcels of goods to the plaintiff, but that the plaintiff gave him no account of his receipts, and had refused to accept his bills, which being protested for non-payment, greatly injured him in his credit; and that thereupon he would make no more consignments to him, and submits to the Court, Whether this was not a breach and determination of the articles of co-partnership? And the Lord Chancellor so far allowed this exception, as that the defendant should set forth all goods consigned by him to other persons, on his own account in *England*, and to whom, and on what commissions, from 1719, when he ceased to deal with the plaintiff, for this being a matter of judgment, which at the hearing, is to be determined by the Court, therefore the defendant ought to discover; for suppose he die in the mean time, and it should be determined for the plaintiff, how is he then to come at a knowledge of these consignments, though then he would be plainly intitled to a discovery.

The answer being adjudged insufficient, by the course of the Court the injunction was to continue, and the defendant in the cross cause was not obliged to answer till the defendant in the original cause had put in a sufficient answer. But the defendant having sworn in his answer, that £800 was really due to him, and not being able to put in a further answer in less than two years, his Lordship further ordered, that the [59] allowing this exception should not hinder the defendant from getting an answer to his cross bill, and that he might proceed at law so far as to ascertain his debt, notwithstanding the injunction. And Mr. Mead said, that in such particular cases the Court always proceeds contrary to the common rules, and that Lord *Courper* had obliged

a plaintiff to accept an answer from *Tripoli*, which had been ignorantly broke open on shipboard.

Case 38.—FRANCES LUCY, Widow, *Plaintiff* ; The Honourable ROBERT MOOR, Esq. & al', & *e contra*. [1728.]

[S. C. 4 Bro. P. C. 343. See *Druce v. Denison*, 1801, 6 Ves. 395.]

In Court, Lord Chancellor.

George Bohun, Esq., being seized of divers messuages, lands, and tenements of inheritance, and also possessed of a leasehold estate near *Spittlefields* in the county of *Middlesex*, and being likewise possessed of a considerable personal estate, and having four daughters, by his last will and testament in writing, bearing date the 17th of *July* 1705, devised to trustees therein named, and their heirs, all his real estate near *Spittlefields*, or elsewhere in *England* (not therein before devised), to be sold ; and the monies thereby arising, to be subject to the intents of his will declared concerning the residue of his personal estate, as if the same were personal ; and gave his youngest daughter *Jane* £3500, to be paid at the age of twenty-one or marriage, which should first happen ; and (after other legacies) gave the residue of his real and personal estate to his three youngest daughters, *Mary*, *Elizabeth*, and the said *Jane*, to be equally divided between them, and made his said trustees, and his wife, executors of his said will.

The 23d of *December* 1712, articles of agreement were entered into between *George Lucy*, Esq., of the one part, *Mary Bohun*, relict of the said *George Bohun*, and the said *Jane Bohun* (then an infant) of the second part, and the Right Honourable *Allen*, Lord *Bathurst*, and *Gilbert Clerk*, Esq., of the third part, reciting, that a marriage was shortly intended to be had with the consent of the said *Mary*, and that the said *Jane* would be intitled to the sum of £3500 at her age of twenty-one, or day of marriage : And was likewise intitled to a third part of divers lands, tenements, and hereditaments mentioned in her father's will, or to the third part, or share of the monies, or profits arising thereout, and that the said *Jane* was willing to bestow upon the said *George*, in consideration of the said marriage, as [60] well the said sum of £3500, as also all her interest in any the lands, tenements, hereditaments, chattels, and personal estate of the said *George Bohun*, so soon as she should attain her age of twenty-one to hold the said lands, to the use of the said *George Lucy*, his heirs and assigns for ever, and the said *George Lucy* in consideration of the said marriage, and portion, and of such conveyances, and assurances to be made to him of the residue of the said lands and hereditaments, and for securing to the said *Jane* a maintenance, in lieu of dower, did covenant with the said Lord *Bathurst*, and *Gilbert Clerk*, that he would immediately upon such conveyances made to him, and upon the said *Jane's* attaining her age of twenty-one years, settle upon her a jointure of certain lands of £800 *per annum* therein particularly described, discharged from incumbrances for her life, and that the reversion of the said lands after her death, together with other lands of £700 *per annum*, should be settled on the first and other sons of that marriage in tail male, none of the parties, except the said *George Lucy*, executed the said articles.

After the said marriage had, the said *Jane* joined in a fine with her husband, and her sisters, and their husbands, for selling some part of her father's estate, to raise the said £3500, which was paid to the said *George Lucy* her husband. By indentures of lease and release, dated the 4th and 5th of *March* 1719, made between the said *George Lucy*, and the said *Jane* of the one part, and the said Lord *Bathurst*, and *Gilbert Clerk* of the other, in consideration of the said marriage, and in performance of the said articles, and for making a jointure for the said *Jane*, and provision for the issue of the said marriage, the said *George Lucy* settled the same lands in the said articles agreed on, to the use of the said *Jane* for life for her jointure, and in bar of her dower, and also settled, and limited the same premises, together with other lands and hereditaments of above £700 *per annum* to the use of himself for life, with remainder to trustees to preserve contingent remainders, and afterwards subject to the said jointure, to the use of the first and other sons of that marriage in tail male. And this settlement was executed by the said *Jane* at that time of full age.

The 13th of *August* 1721, the said *George Lucy* died without issue, and intestate,

whereby the inheritance in fee of the lands comprised in the said settlement (subject to the said jointure) descended to *William Lucy*, the plaintiff's late husband deceased, as brother and heir of the said *George Lucy*, and administration likewise of the goods and chattels of the said *George Lucy*, was granted to the said *William Lucy*.

Soon after the death of the said *George Lucy*, the said *Jane* his widow, took possession of her said jointure, and enjoyed [61] the same during her widowhood, and in 1722, intermarried with the defendant *Moor*, who in her right enjoyed the same during her life-time; but the said *Jane* never did, pursuant to the said articles, convey her part of the lands of the said *George Bohun*, or assign her share of his personal estate to the said *George Lucy*, in his life-time, or to his heir, or administrator, after his decease.

By indentures of lease and release, dated the 17th and 18th of *June* 1723, between the defendant *Robert Moor*, and the said *Jane* his wife of the one part, and Dr. *Henry Moor*, and Sir *Gustavus Hume*, Bart., of the other part, and by fine levied, the said *Robert Moor*, and *Jane* his wife did bargain and sell to the said Dr. *Henry Moor*, and Sir *Gustavus Hume*, the said *Jane's* third part of her said father's estate, to the use of the said *Robert Moor* for life, remainder to the said *Jane* for life, remainder to the said *Robert* in fee. In *Michaelmas* term 1721, *William Lucy* pretending to be intitled, as heir at law to the said *George Lucy*, to the said *Jane's* third part of her said father's estate, exhibited his bill against the defendant *Robert Moor*, and the said *Jane* to have a conveyance thereof.

The said defendant *Robert Moor*, and the said *Jane* put in their answers, and the said *Jane* swore, that the said *George Lucy* her late husband, as they lived happily together, and had no issue, and there having been so great misunderstandings between the said *George Lucy* and his brother *William Lucy*, that *George Lucy* did not so much as visit him for twelve or thirteen years, made the aforesaid settlement on her; and then, and often after told her, he would leave her her own estate to come to her.

In *December* 1723, the said *Jane* died without issue, and administration was granted of her goods and chattels to the defendant *Robert Moor*.

In *February* 1723, the said *William Lucy* also died, leaving *Frances Lucy* his widow, his executrix, who duly proved his will, and also took out administration to the said *George Lucy*, and in *Michaelmas* term 1724, exhibited her bill against the defendant *Moor*, and others, to the same effect with *William Lucy's* bill; and in *Michaelmas* term 1725, the defendant *Moor* exhibited a cross bill against the plaintiff in the original cause, and others, for an account, and conveyance of the said estate. The 12th of *November* 1728, both causes were heard, when Mr. *Fazakerley* and Mr. *Wills*, of council for *Frances Lucy*, spoke to this effect.

[62] Where a suitable jointure is made (as in this case, there was a much greater than Mrs. *Moor's* whole fortune required), it ought to be intended, to be in consideration of the fortune, tho' it be not expressed, and ought to intitle the husband to such fortune, tho' not actually paid. But here the jointure is expressed, to be made in pursuance of the articles, and by referring to them, is the same as if the articles had been fully recited, and as the lands limited for the jointure are the same in the settlement, as in the articles, the settlement must therefore be upon the foundation of the articles, and Mrs. *Moor's* signing the settlement when she was of age, and her acceptance of her jointure after Mr. *George Lucy's* death, is a full agreement to, and confirmation of the articles, tho' she was under age at the time they were made. That in the case of *Smith and Ball*, where an infant lost money at a horse-race, and after he came of age promised to pay it, Lord Chief Justice *Holt* was of opinion, that the promise should bind him; yet a promise without a consideration is not binding, and nothing was due to the other, because he was an infant. 2 Vern. 501. The Lord Viscount *Hereford* marries the defendant Mrs. *Narbone*, who had an estate in lands, and a portion in money, and being both infants, an act of parliament is obtained, for settling a jointure on the wife, in bar of dower: Provided the jointure shall cease, if the wife when of age, did not settle her lands, but nothing is said as to the personal estate, part of the fortune is a mortgage for £1300 taken in a trustee's name, the wife when of age settled her own lands, and after the husband dies, and the mortgage was decreed to the executors of the husband, and that it should not survive to the wife, as a chose in action. And in the case of *Cornsford and Farmer*, the husband covenanted to leave the wife such a sum, if she survived him, and he made her a provision more than adequate to that sum, and died before he had reduced her fortune into possession, and Lord *Cowper* decreed the fortune to his executors, against the wife. (*Withers* versus *Kelsea*,

1 Chan. Rep. [Cas.] 189 ; 3 Salk. 65.) And tho' Mrs. *Moor* might have waived her jointure, and claimed her fortune which remained unpaid, yet by accepting her jointure, she made her election, and ought to give up her fortune, which was the consideration of her jointure, else she will have a double satisfaction.

Mr. Attorney General for the defendant Robert Moor. The wife's share of her father's lands is still a real estate, and the parties interested may claim it as such, and it is recited in the articles as real estate, which distinguishes this from the cases that have been mentioned, which are of personal things, or choses in action which belonged to the wife, for Mr. *Lucy* could have no title to this share, without a conveyance from the wife, or her trustees, which was never had, [63] the subsequent facts speak a waiver of the articles, and not an inclination to make them obligatory. We all agree Mrs. *Moor* could not be bound by the articles, at the time of their execution, being then not above seventeen years of age, and so not capable to contract, and they are not executed by her, or her trustees, but only by Mr. *Lucy*, who in consideration of her portion of £3500, and upon her conveying her share of the estate to him and his heirs, covenants he will make such a settlement by way of jointure, and provision for the issue of that marriage ; so that the contract is only on his part ; and neither the guardian of the lady's, or any of her trustees, are parties, or if they were, their joining in the articles, could not bind her, for suppose Mr. *Lucy* had brought a bill against her, and her trustees, to have a performance of these articles, equity would not have compelled her to a specific execution : Yet Mr. *Lucy* would not be without a remedy, for he had taken care to secure himself, being not obliged to settle, unless she first conveyed to him and his heirs, and he might always have said, I will not settle, till you first convey. These articles were executed in 1712, and in 1719 Mr. *Lucy* made the settlement, during which time they had no issue, and Mr. *Lucy* had received the £3500, and she would be intitled to dower out of his lands, which were £2700 *per ann.*, so that Mr. *Lucy* might think it proper to settle these lands of £800 a year on her, and that she should retain her share of her father's lands too. In the settlement indeed, notice is taken of the articles, because he designed to settle the same lands, and to the same uses, but there is no notice in the recital, nor is the settlement mentioned to be in consideration of any conveyance made, or to be made by her of her share of her father's estate, so that the settlement reciting the articles in part, it is plain the parties designed to pursue them only in that part, and she swears by her answer, that he made her this settlement out of generosity, and that he often told her so ; and as they have not proved that he insisted upon her first conveying, or that he ever desired her to do so ('tho' she was of age six years before he made the settlement, and he lived two years after making the same), it is a confirmation of her answer, but the thing itself speaks his intention to waive it, because his only remedy was to take advantage of the condition, to insist upon her conveying first, and therefore if he had designed to have had the advantage of it, as it was always in his power to have done so, he would have claimed the benefit of it. Then this is a voluntary settlement made after marriage, in consideration of her portion, and to bar her of dower, and shall a volunteer under the husband claim the benefit of that condition he thought proper to waive ? But it is not purely a voluntary settlement, it was in consideration of her portion, and of her waiving her dower, which was of more value than the lands settled ; so that it would have been prudent in Mr. [64] *Lucy* to have made this settlement, tho' he had called on her to convey, and she had refused : But they say she confirmed the articles after the death of her husband, when her infancy and coverture were over, by consenting to the jointure, and receiving the rents and profits of it ; but if Mr. *Lucy*, designed this settlement without any view to her conveying, nay, by way of discharging her from it, this will be no bar to her enjoying her own lands, and the said *Jane* being an infant when she was married, and the settlement being made long after the marriage, she was entitled to her election, to insist on her dower, or to claim the jointure lands, and *William Lucy*, who was the brother and heir to *George Lucy*, never called upon her to make her election, well knowing that her dower out of the estate descended to him from his brother would have amounted to much more than the lands settled in jointure on her, whereby he was a gainer, so that tho' they both acquiesced under the settlement, no inference can be drawn from thence, that she designed to affirm the articles. And Mr. *Moor* claims title by the conveyance made by his wife, who by the will of her father, and as one of his coheirs, had a right to one third part of his estate, and had done no act to dispose of it to Mr. *George Lucy*, and the plaintiff *Lucy* is only

an executrix, and devisee to her husband *William Lucy*, who was brother and heir of the said *George Lucy*, and is neither in blood, or otherwise related to the said *Jane*, or the family of the *Lucy's*, save by being the wife of *William Lucy*, and there appears no reason to make a strain'd construction to give her any part of this estate, contrary to the intention both of the said *Jane*, and of the said *George Lucy*. All cases in equity depend on circumstances, and those that have been quoted are not of weight, because they are differently circumstanced. In the case of *Lord Hereford*, the wife was not first to convey, but by way of a condition subsequent, and if she did not, she was to lose a proportional part of her jointure, which might induce the Court to make that decree, which stands single, and is contrary to the case of *Lister and Lister*, 2 Vern. 68, where the wife's fortune consisted in money due on bonds, and in lands of inheritance, and the husband before his marriage, made an adequate jointure on his wife, and died before the bonds were altered, or money received, and before any fine levied; and a bill being brought by his creditors after the death of the husband, to make these liable to his debts, the same was dismissed; and Mr. *Vernon* seems to doubt the legality of *Lord Hereford's* case, for he takes notice of three precedents to the contrary.

Mr. Solicitor General. Whether this estate be considered as real or personal, it still remains Mrs. *Moor's*, if she has done nothing to make it her first husband's: And this question will depend on the articles, [65] the settlement, and upon her enjoyment of the estate after the death of Mr. *Lucy*. They say Mr. *Lucy* would be intitled, tho' there were no articles; which I deny. If a man makes a settlement generally on his wife, he will be intitled only to those rights of the wife the law gives him, but not to that part of her fortune he does not reduce into possession, for that would be making two laws in the same kingdom as to one thing; without doubt persons of full age may enter into such articles as shall make the husband a purchaser of the wife's choses in action, and she only his trustee. But here the wife was an infant, and neither she or her trustees have made any contract, that the husband should have her share of her father's estate; but the husband only contracts to make such a settlement, on condition she convey; and this was a prudent and wise agreement, that as the wife was not of an age capable to contract, she should be left to her liberty, whether she would convey or not when she came of age. As to the settlement, tho' it is said to be made in pursuance of the articles, yet it only recites what the husband was to perform, and when it is said to be in consideration of marriage, and of the £3500, and so much of the articles as relates to the conveying the wife's estate is not mentioned, it is a plain waiver by the husband of it, and it was the interest of those that came after him, that he should make this settlement, tho' she did not convey; for her dower in the estate would have amounted to more, and her enjoying the lands is an assent indeed to the settlement (and is a bar to her dower) but not to the articles. In *Lord Hereford's* case, the settlement was made in contemplation of the fortune, and adequate to it; but it is not so here, where it was at the husband's pleasure, whether he would have made it, or not, without a previous conveyance from the wife.

Mr. Wills his reply. The wife I think is bound by the articles, and they are not waived, and the cases we mentioned, make strongly for us, that this part of the estate would belong to the husband, tho' there were no articles, because the settlement is made in view of her portion; and the contrary resolutions that are taken notice of by Mr. *Vernon*, in *Lord Hereford's* case, make that case, I think, of greater authority, as they shew it to have been decreed on great deliberation, and after hearing precedents against it. But they say, Mr. *Lucy* has waived the benefit of these articles, but their arguments are merely conjectural. If one agrees, that on payment of so much money, he will transfer so much stock, tho' the payment of the money is a condition precedent, yet if he transfers first, shall it be said he waives the payment? But they say, the husband never brought a bill to compel the wife to convey: No, because he could not have bound her, being an infant, or feme covert, either by [66] the articles, or settlement; but she might have waived them after his death, and bring a bill against his heir to perform them; the settlement is said to be made in performance of the articles, but the whole are not recited because it was only necessary to shew, that he had done every thing he had covenanted to perform on his part, and as she was not then bound, it was not requisite to recite what was to be done on her part; but when she came to convey, it would have been as proper to recite what she was bound to do: and we say, that her entry after his death, is a confirmation of the articles; they say only,

of the settlement ; but the settlement was made in pursuance of the articles : and Mr. *Lucy* the heir, could not have disturbed her, could not have forced her to make her election, whether she would have the settled lands, or her dower.

And the *Lord Chancellor* ordered and decreed. That, as to this point, the plaintiff's bill in the original cause should be dismissed ; and on the cross bill, it was ordered and decreed, That an account should be taken of the trust estate, under the will of the said *George Bohun*, since the decease of the said *George Lucy*, and one third part of the said rents and profits were to be paid to the plaintiff *Moor* : and that a commission should issue, to divide the estate into thirds, and that after such partition made, the surviving trustees should convey one third to the defendant *Moor*, and his heirs. (This decree was affirmed in Parliament, on *Tuesday, April* the 21st, 1730.)

December 10 [1728]. The second Seal after Michaelmas Term.

MOTIONS.

Case 39.—ANONYMUS.

At the Chancellor's house, Lord Chancellor.

1 Vern. 295 ; 2 Vern. 342, 224, 429, 479. 'Tis a motion of course for the defendant after he comes to age, to be at liberty to put in a new answer, or amend his answer put in whilst he was an infant, if he has a day by the decree to shew cause, after he comes to age.

The mortgagee filed a bill against *Cox* an infant, to redeem lands that were mortgaged to him by the grand-father of the defendant, or to be foreclosed. The defendant put in his answer, setting forth, that the mortgaged lands were purchased by his great-uncle in the name of his great-uncle and his grand-father, but that the money was paid by his great-uncle, who devised premisses to his grand-father for life, remainder to his heirs male in tail, and so claims paramount the mortgage, and is not liable to it. The cause was heard on bill and answer, and an account was decreed (post, Cas. 113), and the defendant was to redeem, or be foreclosed, unless he shewed cause within six months after he came of age, for the grand-father appeared to the mortgagee [67] to have a good title, because by the deed he was joint tenant in fee with his brother, by whose death the whole survived to him. The defendant came of age, and being served with a *subpœna* to shew cause, he now moved to amend his defence, by putting in a new answer, and he swore he believed he could now prove, that the mortgagees had notice of this trust for the great-uncle, at the time he lent the money, which was not insisted on in his former answer. But the council for the plaintiff said, that it never indeed was denied an infant to amend his answer, where it appeared to be material to his defence, but that this of the defendant's own shewing, was not any ways material, for the decree is a decree of foreclosure, unless the defendant redeems, whereas he would amend his defence not to shew he has a right to redeem, but to shew he need not redeem, and consequently he is not affected by this decree ; for as he claims paramount the mortgage, notwithstanding this decree, he may bring a bill against the mortgagee to reconvey. But the *Lord Chancellor* allowed the motion, and said, that the defendant himself was the best judge at present, what would be material for his defence, and that since the case of *Sir John Napier* and *Lady Effingham Howard*, this was a motion of course.

The case of *Sir John Napier* and *Lady Effingham Howard*, & *e contra*, was to this effect.

Sir John Napier an infant, by his *prochein amy* exhibited a bill against the defendants, as tenant in tail, and heir at law to *Sir Theophilus Napier*, to set aside a settlement made by *Sir Theophilus Napier* on the defendant, *Lady Effingham Howard*, during her marriage to the said *Sir Theophilus*. And the defendant, *Lady Effingham Howard*, brought a cross bill against *Sir John Napier* and the trustees, to have a conveyance made to her and her heirs, of the estates comprized in the said settlement ; and both causes coming to be heard, a decree was made, from which both parties appealed, and it was ordered by the Lords, *inter al'*, that as to so much of the decree, as ordered *Sir John Napier's* bill to stand dismissed, so far as the same sought to set aside the settlement, the same should be affirmed, with this addition, unless *Sir John* should

within six months after his attaining his age of twenty-one years, shew cause to the Court of Chancery to the contrary, and that the trustees should convey the estates in the said settlement to Lady *Effingham Howard* and her heirs, unless Sir *John* should within six months after he should attain his age of twenty-one years, shew cause to the said Court to the contrary. Sir *John* came of age, and within the six months preferred his petition (supported by affidavits) to the *Lord Chancellor*, to bring a new bill, or amend his former bill, and to amend his answer to the cross bill, the causes having been greatly mismanaged to his disservice by his solicitor, upon [68] which, *January* the 27th. 1726, after having adjourned over the same, and directed precedents to be searched, his Lordship, assisted by the *Master of the Rolls*, ordered, that Sir *John Napier* should be at liberty to amend, or put in a new answer, and should have time till the first day of the next term, but that no precedent appeared, for amending a bill in any points wherein the same had been dismissed upon the merits, but ordered that Sir *John* should be at liberty to rehear the said causes, and to that end, that the original cause should stand over, till after the time by the said order given for amending the answer, or putting in a new answer was expired (post, Cas. 170). And this order was affirmed by the Lords, 1st of *May* 1727.

A person, by getting himself admitted a pauper, cannot discharge himself of costs he was liable to, precedent to his admission.

Case 40.—ANONYMUS.

At the Chancellor's house, Lord Chancellor. Eodem die.

If a client, at law, applies to have the attorney's bill taxed, he must deposit the money in court. The *Lord Chancellor* introduced this rule into the courts of law, but would not into Chancery, because the bills were so large.

On the client's neglecting to attend the Master on the taxation of the bill, the *Chancellor* would not order him to bring the money into Court, but only that the order of reference should be discharged, if he did not procure a report in a fortnight.

Mr. *Attwood's* bill by an order of Court was referred to the Master to be taxed. And Mr. *Attwood* now moved to discharge the order, unless they deposited the money in Court, on affidavit that so much was due, and that the client absconded, and would not attend the Master. And the *Lord Chancellor* declared, that he first introduced that practice of bringing in the money, into the courts at law, when he was Lord Chief Justice of the Common Pleas, and that the same rule was afterwards observed in the King's Bench. For the party being stopped from suing at law, he thought it reasonable he should have security for his money, but as it had never been done in Chancery, he would not make a precedent, because the bills were so large; but would so far help him, as to order, that unless the other side procured a report in a fortnight, the said order should be discharged.

Case 41.—RICH and WILSON.

At the Chancellor's house, Lord Chancellor. Eodem die.

If a portion is charged on lands, payable at 21, and the child dies before, it shall sink into the estate, but if it is charged on the personal estate, it vests in the child, tho' he dies before the time of payment.

An injunction was granted to the spiritual Court, to stay a suit for a portion charged only on lands. 2 Chan. Cas. 165, 155; 2 Vern. 72, 90, 92, 208, 416, 424, 439, 508; 2 Ventr. 366; 2 Chan. Rep. 286; Nels. Fol. Rep. in Canc. 112, 432.

Sir *Robert Rich* in 1721 settled all his lands in trust, for the payment of debts, and portions to his children, as he should direct by his will. Afterwards he makes his will, and devises £1000 a-piece to his five sons, payable at their respective ages of twenty-one, with interest in the mean time, and devises all his personal estate to the plaintiff his lady, for her sole use and benefit, and makes her executrix. [69] Sir *Robert* dies, and

afterwards *Robert*, one of the sons, dies under twenty-one, and Lady *Rich* takes out administration to him, and Mrs. *Wilson*, his sister, sues her in the spiritual Court (she being in possession both of the real and personal estate of Sir *Robert Rich*) for a distribution of the £1000 devised to her brother by his father's will. Lady *Rich* files a bill, and now moves for an injunction to the spiritual Court, because the portion of the son was charged on the real estate, and therefore ought not to be sued for in that Court: and the whole personal estate is devised to the plaintiff. That it was settled in *Lord Paulet's* case, 1 Vern. 204, 321, that where a portion is charged on lands, payable at a certain day, if the child dies before the time of payment, it shall not be raised, but sink into the land for the benefit of the heir; whereas by the ecclesiastical law, a portion payable at a future day out of a personal estate, is due and vests in the party, tho' he dies before. And the *Lord Chancellor* granted the injunction.

12 December [1728]. *Exceptions to the Master's Report.*

Case 42.—SMITH versus REYNOLDS.

At the Chancellor's house, Lord Chancellor.

A bill is brought to be relieved against a stale bond as satisfied, and as evidence to prove it, the plaintiff sets forth, that the defendant entered into a later bond for money the plaintiff lent him, and that having lost the bond, he filed a bill against the defendant, and had a decree for payment, in which cause he never insisted on anything being due to him from the plaintiff, the defendant in his answer says, he does not believe the plaintiff lost the bond, but concealed or destroyed it, this is scandalous, because it is not material to his defence. Ant. Cas. 28.

The plaintiff filed his bill to be relieved against a bond of £2000 upon which the defendant had brought his action, setting forth that the bond was not entered into for money lent, or any valuable consideration, but purely to serve the defendant, and that it was agreed between them, that it should not be put in suit, to prove which, the plaintiff charged, that no demand had been made from 1703, when the bond was entered into, till the bringing the action; tho' the plaintiff was a gentleman of a large fortune, and the defendant very necessitous; and that the defendant afterwards borrowed of the plaintiff £300 on bond, and that the bond being some how lost, the plaintiff exhibited his bill in this Court against the defendant, and had a decree for the payment. The defendant in his answer, says, That he does not know, or believe, that the plaintiff lost the bond, but believes that he fraudulently concealed or destroyed it. The plaintiff refers the answer for scandal; the Master reports it scandalous, and the defendant took the general exception to the report, that the answer was not scandalous, because pertinent; and the council for the plaintiff argued, That the answer was scandalous, because the words must be designed purely to reflect on the plaintiff, because they are not material, or relevant to the defendant; he should have taken notice of this bond, only as far as it was pertinent, [70] as to have denied that there was any such bond, or any such decree. The bill is brought to have a bond delivered up, and as an evidence that nothing was due on it: We set forth this other bond entered into by the defendant, and our bill, and that the defendant in that cause did not pretend any money was due to him from the plaintiff, and this part of the answer is so wholly immaterial to our charge, that tho' the defendant could prove it, it would be of no service to him in this cause, tho' it might on a bill of review in the other.

The council for the defendant argued, that tho' those words were not material to their defence, yet the plaintiff had made it necessary to set them out, and that if they were out, that their answer might be referred for insufficiency, all the several allegations and charges in the bill are to be answered, as if they were particularly interrogated, and one of the charges of the bill is, that the bond was some how got out of his power, and if we had been asked particularly this question, these words would be pertinent, and the words are not scandalous, what is more common than to charge in a bill, fraud, combination, and confederacy in the defendant, and the words *machinans*, & *fraudulenter intendens*, are not scandal at common law.

Lord Chancellor. Though a matter may be very scandalous in itself, it is not to

be considered so, if it is pertinent, or if the plaintiff asks impertinent questions, though the answer should be reflecting and impertinent, it would not be scandal: and it is very different to charge fraud and combination in a bill generally, and to insist upon it by oath in an answer. This bill is to be relieved against a stale bond, and as an inducement to prove it satisfied, the plaintiff mentions the subsequent bond, proceedings, and decree in this Court; in which cause the defendant never insisted on being paid the money due by this bond he has now put in suit, and therefore it is to be presumed it was satisfied: All this is material to the cause, but the plaintiff in his manner of setting out this transaction, takes notice, that the bond being some way got out of his custody, obliged him to sue in this Court, and the defendant in his answer says, he believes the plaintiff did not lose it, &c., he denies what is not material, and what the plaintiff did not require him to answer, if he had alleged that he had lost it, and had questioned him to it, then his answer would not have been scandalous, tho' immaterial, because the plaintiff led him into it, but now he is impertinent, for going out of the way purely to reflect on the plaintiff. So the report must stand.

[71] You cannot bring on a cause for the further directions of the Court, or move on a Master's report, till it is confirmed.

You cannot move on a decretal order till it is passed with the Register.

Saturday, December 14 [1728]. The third Seal after Michaelmas Term.

MOTIONS.

Case 43.—ANONYMUS.

At the Chancellor's house, Lord Chancellor.

The defendant obtained an order to refer the bill for impertinence after he had twice prayed time to answer, and the *Chancellor* ordered, That he should procure a report within four days, or the order be discharged.

The *Attorney General* moved to discharge an order, to refer a bill for impertinence, because the defendant had obtained two orders, for time to answer, whereby he admitted the bill, tho' he allowed it might have been referred for scandal, because that ought to be expunged, and not remain on the records of the Court. The *Chancellor* ordered, That the defendant should procure a report within four days, or the order be discharged.

Monday, December the 16th [1728].

Case 44.—ANONYMUS.

At the Chancellor's house, Lord Chancellor.

One found an idiot, had leave to traverse the inquisition at her own request, on condition she would appear in person at the trial. 1 Vern. 155.

A woman that was found an idiot by inquisition prayed by herself and council that she might have leave to traverse the inquisition; and the *Lord Chancellor*, after asking her several questions, made an order accordingly, upon condition she should appear in person at the said trial, at the next assizes, or whenever they brought it on.

Case 45.—DAVY & al' versus SEYS.

At the Chancellor's house, Lord Chancellor. Eodem die.

The evidence of a servant who was only nine years of age at the testator's death, but lived three or four years afterwards in the house, was allowed to prove the furniture then standing, 13 years after, tho' she had never taken any memorandum of it. The *Master of the Rolls* may discharge an order made by the *Chancellor ex parte*, or on a motion of course.

Evan Seys the defendant, as administrator of *Evan Seys* deceased (who was executor of *Richard Seys* his father), exhibited an inventory into the spiritual Court, and the

plaintiffs the creditors of the intestate, would charge him before the Master according to this inventory, and the defendant insisted, that when he put it in, he thought all the goods in the house were the goods of the said *Evan Seys*, whereas he had since found out, that great part of them were the goods of the said *Richard Seys*; to prove which, he examined a witness in 1727, then [72] about twenty-two years of age, who deposed, That she was a servant in the house in 1714, at the time that *Richard Seys* died, and that she lived in the said house some years after, and perfectly well remembered the said goods; and her evidence was disallowed by the Master, because she swore to the remembrance of goods when she was not above nine years of age, and at about thirteen years distance, without having taken any note or memorandum of them; but on exceptions to the report, the *Lord Chancellor* thought her a very good witness, because she was not examined to the value of the goods, but only as to their being in the house; and though she was but nine years old at the testator's death, she lived three of four years after in the family, and saw the furniture every day; her evidence agreed too with what another person swore, but his Lordship offered them the liberty to try it, which they declined.

You may move before the *Master of the Rolls*, to discharge the order made by the *Lord Chancellor*, on a motion of course, or an order made *ex parte*, for only one side being heard, it is a continuance of the same motion.

Case 46.—PENVILL and LUSCOMB.

At the Rolls. Eodem die.

See post, Cas. 75.

A fine will bar him who has an equitable title, if he does not bring a bill within five years. 1 Vern. 226; 1 Chan. Cas. 268.

Luscombe the father, made a mortgage in fee, and died after forfeiture, leaving a son and a daughter by one venter, and a son by another; the eldest son dies, and the single question was, Whether the equity of redemption belongs to the sister of the whole blood, as heir to her brother, or to the brother of the half blood, as heir to his father? And it was urged that here was no *Possessio Fratris*; that if the elder brother had left a widow, she would not have had dower out of this estate, tho' a widow is allowed to redeem a mortgage for years, because a lease for years at law is no bar of dower, and the possession of the mortgagee is so far from being the possession of the mortgagor, that if the mortgagee continue twenty years in quiet possession, it will give him a title even against the mortgagor.

Master of the Rolls. I do not remember that this question ever came in judgment before the Court, and the reason is, because there are so few mortgages in fee; most mortgages are made for a term of years, reserving a rent, a pepper-corn at least, and then the possession of the mortgagee is the possession of the mortgagor, for the possession of the lessee is the possession of the lessor; as he acknowledges by paying him rent (for it is necessary that he pay him some rent); but when a mortgage in fee is forfeited, [73] the whole estate is standing out, and there can be no constructive possession of the mortgagor or his heir: but it is said, that this mortgage was satisfied by perception of profits, in the life-time of the eldest son, and therefore the mortgagee was only a trustee for him, but then to make the sister his heir, he must have been in possession of this trust, either by filing a bill against the mortgagee, or by the mortgagee paying him the rents and profits, so the statute of fines bars him who has a legal title, if he does not enter within five years, and him who has an equitable title, if he does not bring his bill within five years, which amounts to an entry, and *Lord Coke* says, there might be *Possessio Fratris* of a use, before the statute for transferring uses into the possession, which is what we call a trust now, and as the possession of lands is gained by entry, so the possession of a trust is by bill, and therefore the elder brother not having exhibited a bill against the mortgagee, I think the equity of redemption belongs to the second brother, but I shall make no decree now. It has been adjudged in this Court, that if tenant in tail male special, remainder in fee, dies without issue inheritable, that there can be no *Possessio Fratris* of the

reversion, for the possession of the estate tail was not the possession of the reversion in fee, but only of the tenancy in tail. (Nels. Fol. Rep. in Canc. 216; 2 Vern. 189; 1 Vern. 132, 60, 144, 84; 2 Chan. Cas. 124, 63, 78; 1 Chan. Cas. 49, 213, 278.)

Wednesday, December the 18th [1728].

PLEAS, AND DEMURRERS.

Case 47.—COKE and WILCOCKS.

At the Chancellor's house, Lord Chancellor.

Notice may be denied either in the plea or answer, where a defendant pleads himself a purchaser for a valuable consideration.

The defendant pleads that his father purchased the lands in question, for a valuable consideration, without notice of the plaintiff's title. And it was argued for the plaintiff, That this plea was not good, because the defendant denies notice in his plea, and not in his answer, which takes away from the plaintiff the liberty of exception. 2 Chan. Cas. 161. So, if fraud is charged in the bill, it must be denied in the answer, and not in the plea. 1 Vern. 185.

Lord Chancellor. Notice may be denied either in the plea or answer; and if the plaintiff replies to the plea, the defendant must verify it; or if notice ought to be denied by the answer, and is not, but in the plea, the consequence will not be, that the plea is bad, but that the answer is insufficient.

[74] If a plea is to stand for an answer, without liberty to except, the plaintiff may except to the rest of the answer.

And this was so resolved by the House of Lords, in the case of *Packer and Stawel*, 1729.

Case 48.—THE SOUTH SEA COMPANY *versus* BUMPSTEAD. [1728.]

At the Chancellor's house, Lord Chancellor. Eodem die.

Mr. Solicitor General for the defendant. The bill is brought by the South Sea Company for a discovery, account, and relief, to which purpose it sets forth, that the South Sea Company in 1723, sent the *Royal George* to the *Spanish West Indies*, and made the defendant Mr. *Bumpstead*, and three other supercargoes, who entered into articles with the said Company, that they would sail directly for *Carthage* or *Porto Bello*, and not call in at any other place; and covenanted, that if within six months after the return of the ship, any complaint should be made of them to the Company, that they had carried on any unlicensed trade contrary to the articles, and the Company should file a bill against them, they would appear and put in a full answer, and not plead or demur; and that they would not suffer any unlicensed goods to be put on board during their voyage to the *Spanish West Indies*, nor in their return: And as the South Sea Company were by the *Assiento* contract to forfeit their trade if they exceeded their tonnage, or brought home any specie, not the produce of the negroes, or any of the King of *Spain's* subjects, without his licence; they likewise covenanted to indemnify the Company from any loss they might suffer by their violation of this contract. And the bill charges, That in breach of these articles, they in their voyage touched at *St. Christopher's*, and staid there twelve days, and took in one hundred tons of goods, not licensed by the Company; by which delay the galleons arrived at *Porto Bello* before them, whereby they missed the opportunity of their market, and that by their selling their own cargo first at a great advance, they lowered the price of the cargo of the Company; and that they in their return staid seven weeks at the *Bastimentos*, and after at *Jamaica*, and then put in at *Antegoa*, and landed their own effects, and got the ship condemned there, as unable to proceed, and put the effects of the Company on board the *Kingsale* man of war, and sent them home. The bill therefore prays a discovery of all these transactions, and an account and satisfaction for the unlicensed goods so put on board, and for 150,000 pieces of eight, the produce of them. To this bill, the defendant *Bumpstead* has pleaded, and answered, and has set forth [75] his conduct during the whole voyage; by which it appears, that the plaintiffs

have no room to complain : and his plea consists of three parts. The first is, to the discovery of any unlicensed goods belonging to him, put on board the said ship, or the produce thereof ; to which he pleads the statute 9 *Annæ*, which enacts, that it shall not be lawful for the South Sea Company, their agents, or factors, to export from any place but *England*, any *East-India* goods to the South Seas, or *Spanish West Indies*, under the penalty of forfeiting the said goods, two-thirds to the *East-India* Company, and the other third to the Crown : And that if he should be obliged to discover what goods he put on board at *St. Christopher's*, it might subject him to the forfeitures of that act, which as they did not belong to the South Sea Company, they could not dispense with, or exempt him from ; he also pleads the *Assiento* contract, by which the annual ship was to carry but 650 tons ; and that the penalty of carrying more was confiscation of the goods, and loss of their trade ; and that by the same contract, they were not to bring home any specie, not the produce of the negroes, or any of the King of *Spain's* subjects, without his licence, under severe penalties ; and that this discovery might subject them to those penalties, and likewise to the penalties of the bonds they had entered into to indemnify the Company. The other two pleas are not to the discovery, but to the account, and relief prayed. The first is, that the representatives of the other supercargoes are not made parties, tho' they all entered into the same covenants, and that it might appear if they had been made defendants, that they had made satisfaction to the Company, or that the Company had given them releases ; or if the plaintiffs should be decreed a satisfaction from the defendant, he might have it over against them *pro rata*. The other plea is, That the King of *Great Britain*, or his *Attorney General*, and the King of *Spain* ought to have been co-plaintiffs, because by the *Assiento* contract, the King of *Spain* is intitled to a fourth part of the cargo of the annual ship, and to five *per cent.* on the other three fourths, and the King of *England* to another fourth part. As to the first plea, no one is certainly bound to discover what shall subject him to a penalty : This Court indeed frequently relieves against forfeitures, but never forces a person to discover what shall subject him to them ; and if on our discovery of what goods we put on board at *St. Christopher's*, it should appear that they were *East-India* goods, they would be forfeited, and as these forfeitures do not belong to the South Sea Company, they cannot waive them, which is always done when the plaintiff would have a discovery of what would subject the defendant to a forfeiture, and the plaintiffs were so sensible of this that they have waived the penalties of the bonds entered into by the supercargoes for the performance of covenants : And the discovery might also subject the defendant to the penalty of the [76] *Assiento* contract, if it should appear that he had carried any thing but negroes, or brought back any specie, not the produce of them, or any of the King of *Spain's* subjects ; so that by the common rules of the Court we are not obliged to make any discovery of these matters that would subject us to such penalties and forfeitures, unless the covenant in the articles obliges us to discover, which I think it does not : A court of equity has nothing to do with covenants but to see them executed, in which it uses a discretionary power, because the party may sue upon them at law ; now the defendant swears in his answer, that these articles were brought to him ready engrossed, by the Secretary of the South Sea Company, a few days before he set sail, and after all his effects were on board ; and that he objected to this covenant, but was obliged to sign it or quit his employment ; and tho' this is not such a duress as by law would defeat the covenant, yet this Court will so far consider it, that if either side took the other at an advantage, they will not carry the covenant into execution, since the party may have his remedy at law ; besides, the effect of this covenant is, that they shall not make use of that defence which the law allows to every subject. Suppose they had covenanted to refer all disputes to arbitration ; yet sure they might have sued in *Westminster-Hall*. In *Stystead's* case, the mortgagor not only covenanted, but made an affidavit that he would not redeem, yet he exhibited a bill and was decreed to redeem : And if parties are relieved against covenants that rob them of the liberty of suing in common with other subjects, much more shall they be relieved against those that deprive them of their legal defence, in case they are sued by others. As to the second plea in bar of the account, it is a general rule, that where an account is to be taken, all concerned in that account are to be made parties to it ; now this bill is to have an account of an unlicensed trade carried on by several supercargoes, whereas if any one of them has satisfied the plaintiffs, it is sufficient, and there is an end of the Company's demand against the rest ; or if

the Company should prevail against the defendant *Bumpstead*, he might be decreed a satisfaction over against the others, to prevent a circuitry of action. And that the load might be laid equally on all, whereas if the defendant *Bumpstead* should bring his bill against the representatives of the other supercargoes, they might shew they had made the Company a satisfaction, and this decree would not bind them. As to the third plea, the plaintiffs by their bill, demand the whole, though they have a right only to part, and though they could not compel the *Attorney General* to join with them, they ought at least to have made him a defendant.

[77] *Mr. Wills*. Our plea to the discovery is undoubtedly good, if the covenant does not stand in our way, and that certainly shall not bind the defendant, if one directs by his will, that if any of the legatees contests the will he shall lose his legacy. he may do it notwithstanding, or if a tenant covenants that if his landlord distrains he will not bring a replevin, yet he may replevy, and considering the nature of this covenant, your Lordship will not carry it further than the letter, which is, that if within six months after the return of the ship, a bill should be brought, they would not plead or demur to it. But this bill is brought long before the ship came home, and therefore is not the bill they covenanted not to plead or demur to, so that this covenant it out of the case. As to the other pleas, the charge is against all the supercargoes, for carrying on an unlicensed trade in confederacy, and therefore no account or relief can be prayed against any one of the confederates without bringing all before the Court, and the Company only bring the bill, whereas we are accountable also to the King of *Great Britain* and to the King of *Spain*.

The *Lord Chancellor* being of opinion for the plaintiffs, and obliged to go to council, would not hear their counsel, but over-ruled the first plea, because it was contrary to what the Company had provided against by an express covenant, and which it was lawful for them to do, and the like plea was over-ruled by *Lord Macclesfield*, after great deliberation, and hearing of counsel, in the case of the *East-India Company* against *Nash* and *Atkins*. But his Lordship saved the benefit of the second plea to the hearing, though it appeared that the covenant was joint, and several, and over-ruled the third plea, because the Kings of *Great Britain* and *Spain* were only intitled to share of the licensed goods of the said ship. but the bill is for an account of goods not licensed. (2 Vern. 244; 1 Vern. 109, 127; Hardr. 137, 201; 2 Chan. Cas. 198; Nels. Fol. Rep. in Canc. 117.)

You may prefer the same petition to the *Lord Chancellor*, that has been dismissed by the *Master of the Rolls*, for it is in nature of an appeal, and the party has no other remedy.

[78] *Friday, December 20 [1728].*

PETITIONS IN COMMISSIONS OF LUNACY.

Case 49.—*Ex parte BUMPTON.*

At the Chancellor's house. Lord Chancellor.

The lunatick being recovered, and examined in Court, the commission was superseded, and the recognizance of the committees ordered to be vacated, the lunatick declaring they had given him a fair account. Post, Cas. 183.

Mr. Bumpston's two sisters were appointed Committees of his person and estate, and they now joined with him in a petition, that the commission might be superseded, the inquisition quashed, and the bond vacated, the lunatick being recovered of his indisposition, and he appeared in Court, and was examined by the *Lord Chancellor*, but his Lordship doubted whether he could vacate the recognizance of the Committees, because it did not appear judicially to the Court that they had performed the condition, and asked the opinion of the *Attorney-General*, who thought it might be done, and that it sufficiently appeared the condition was performed, because *Mr. Bumpston*, who was the only person interested, was in Court, and had declared himself well satisfied that his sisters had done their duty and given him a fair account. And an order was made according to the prayer of the petition.

Saturday, December 21 [1728].

PETITIONS IN COMMISSIONS OF BANKRUPTS.

Case 50.—*Ex parte* RUDDOCK.

At the Chancellor's house, Lord Chancellor.

An affidavit of the bankrupt, sworn before a Master extraordinary in *Cork* was allowed to be read. Courts of law will allow an affidavit sworn before a consul to be read.

The *Lord Chancellor* allowed an affidavit of the bankrupt, sworn before a Master extraordinary in *Cork*, to be read: And declared he had known an affidavit sworn before one of our Consuls abroad, allowed to be read by the Courts of law.

[79] *Monday, December 23 [1728.]*

PETITIONS IN COMMISSIONS OF BANKRUPTS.

Case 51.—*Ex parte* GAZALET.

At the Chancellor's house, Lord Chancellor.

See ant. Cas. 15.

A bond payable at a future day on a contingency is not within 7 *Geo.* 1, ch. 31, and cannot be proved before the commissioners of a bankrupt, before the contingency happens.

This petition coming on again for judgment, the *Lord Chancellor* spoke to this effect. By the 7th *Geo.* 1, ch. 31, persons who have taken securities for money, payable at the end of three months, or other future days of payment of any person who shall become a bankrupt, and which money shall not be due and payable at such time as he becomes a bankrupt, shall be admitted however to prove their bills or other securities, as if they were made payable presently, and not at a future day, and be intitled to a rateable part of the bankrupt's estate, deducting only interest at the rate of five *per cent.* to be computed from the actual payment thereof, to the time such debt would have become payable. This case of a bond payable at a future day upon a contingency, is not within the act, nor can any interest be deducted for it, as the statute requires, but such creditors are in the same condition they were before the act, and when the contingency happens, they may come in for such effects as remain undistributed. This is not *Debitum in presenti, solvendum in futuro*, and perhaps never may be a debt, and must the estate wait for ever, the bankrupt too may be a whole man when the contingency happens, and his certificate will not be a bar to the action, if the plaintiff sets forth the bond and condition in his declaration, for then it will appear the debt did not become due till after the certificate; as was lately adjudged in *B. R.* in the case of *Tully and Sparks*, and therefore I dismiss the petition.

And two other petitions of *Chamel* and *Bateman* were served for judgment at the same time. The petitioners were creditors by bottomry bonds, which were dated before any act of bankruptcy, and became forfeited after before a full distribution of the effects. The obligees had put in their claim before any distribution, but were not allowed by the Commissioners to prove their debts, or come in as creditors, a dividend was made, and then the contingency happened, and the *Lord Chancellor* ordered, that they should come in as creditors for a share of what remained undistributed, but so as not to disturb former dividends.

[80] Case 52.—*Ex parte* COKE and TUCKER, and *Ex parte* PRIESTLAND.

At the Chancellor's house, Lord Chancellor.

Joint creditors shall be first paid out of the joint estate of the bankrupt, and separate creditors out of the separate estate, but each shall come in for any surplus of either.

There were two copartners, and one becomes a bankrupt, and the joint creditors took out a commission against him, and *Coke* and *Tucker* were chosen assignees, and they seized all the joint and separate effects of the bankrupt; and the separate creditors took out a separate commission, and chose *Tucker* and *Priestland* assignees; and *Priestland* brought trover against *Coke* for the separate estate; and *Coke* and *Tucker* petition to stay the action at law, and *Priestland* preferred a cross petition to be at liberty to proceed.

And the *Lord Chancellor* ordered, That it should be referred to one Commissioner of each side, to take an account of the effects belonging to the joint estate, and of the effects belonging to the separate estate; and that what should be found to belong to the joint estate, should be delivered over to the assignees under the joint commission, to be by them applied to the satisfaction of the joint creditors; and what should be found to belong to the separate estate, should be delivered to the assignees under the separate commission, for the benefit of the separate creditors, and if any surplus remained of the joint estate, it was to be applied to the payment of the separate debts, or if any surplus of the separate, to the payment of the joint debts. (2 Vern. 706. But see 2 Chan. Cas. 139, contra.)

AT THE SITTINGS IN CHANCERY BEFORE HILARY TERM, 1728–29.

Wednesday, January the 15th [1729].

PLEAS AND DEMURRERS.

Case 53.—WILDBORE & al', *versus* PARKER & al'.

At the Chancellor's house, Lord Chancellor.

An information is brought for the payment of two notes given for publick uses, and to have the money applied, the defendants to the information file a bill against the relators, to discover the consideration of the notes. Q. If they can demur to the discovery, because it would subject them to a penalty?

Mr. Attorney-General for the defendants. The bill sets forth, that Lord *Fitzwilliams* and Mr. *Wortley Montague* being desirous to serve in Parliament for the city of *Peterborough*, they agreed with the Corporation that my Lord *Fitzwilliams* should give £1000 and Mr. *Montague* £500 to build a bridge and repair a gallery in the church, and the plaintiffs, *Wildbore* and *Delarine*, two of the said city, [81] gave two notes to the defendants, who were members of the corporation, one of which was to this effect. We do acknowledge to have received £1000 for the building a bridge, and repairing a gallery in the church, which we promise to pay to the same uses, and the overplus, if any, to such publick uses of the city as shall be appointed by the principal inhabitants; and the other note was an acknowledgment of the receipt of £500 for the like purposes. And the bill charges that these notes were given upon the defendants engaging to use their interest in the corporation for Lord *Fitzwilliams* and Mr. *Montague*, and that the money was to be paid only in case they were returned to serve in Parliament for the said city; that the said candidates never paid any money to the plaintiffs, and that the consideration was not expressed in the notes, to hide the bribery and corruption: That the defendants afterwards invited Sir *Edward Obrien* to stand for the said city, and pretended they would not return the other two, unless Mr. *Montague* would also give £1000, which not being complied with, the defendants by the opposition they gave Lord *Fitzwilliams* and Mr. *Montague*, obliged them to spend about £4000 (which was much more than the notes were given for), and Mr. *Montague* lost his election, and the defendant the sheriff delivered his precept to a wrong officer, who returned Sir *Edward*

Obrien, who made the city a present of £1000, and that the defendants pretend they cannot give up these notes, because they were given for the benefit of the said city ; but an information has been filed against the now plaintiffs at their relation to have them established : The bill therefore prays, that the defendants may discover the consideration for which these notes were given, and may deliver them up. And as to such part of the bill as desires the defendants to set forth whether there was not such an agreement to return Lord *Fitzwilliams* and Mr. *Montague* ? or what was the consideration of the notes ? the defendants demur, because the cognizance of all parliamentary affairs, or of any agreement to return members, belongs to the House of Commons, and because this discovery might subject them to the punishment and censure of the said House : And as to that part of the bill which prays a discovery whether Sir *Edward Obrien* did not give £1000 to the said city ? they demur, because the King ought to have been made a party by information, or Sir *Edward Obrien* at least, to see how his own charity should be disposed of : And the defendant the High Sheriff demurs to the discovery of any misbehaviour in the return, because the discovery might subject him to the censure and punishment of the House of Commons. And we demur also to the relief. And tho' we have brought an information in the name of the *Attorney-General* against the now plaintiffs, to have the money due on the notes laid out and disposed for the benefit of the city, yet that information cannot be taken notice of in this cause, but it must be judged [82] of as it stands on their bill and our demurrer. The agreement to give these notes is, as they set it out, a corrupt agreement examinable by the House of Commons, and therefore our demurrer to a discovery is proper, for we are not obliged to discover what would subject us to a penalty, whether it is punishable by common law, statute, or the House of Commons : But if we ought to discover, our demurrer to the relief prayed, is good, for where the agreement is corrupt this Court always stands neuter, and so do even the Courts of common law ; for if one brings an action for money had and received by the defendant for the plaintiff's use, and which was indeed paid by the plaintiff on an usurious contract, the law will not let him recover on this action, because both of them were equally guilty : And we demur to the prayer of the specific application of the £1000 given by Sir *Edward Obrien*, because the agreement is a corrupt agreement ; and because the overplus of the money for which the notes are given, is to be applied to such publick uses as the principal inhabitants shall appoint, and they are not made parties ; for this reason also we demur.

Lord Chancellor. I will respite the demurrer till the information comes to a hearing, tho' you give it the specious name of a charity, it is a plain corruption. But since an information is brought, how can I relieve the plaintiffs.

Mr. Solicitor General for the plaintiffs. We should be satisfied if the relators in their information would consent to be examined for us ; but if we should offer to examine them they would demur, as they do now to our bill ; and we aim at a discovery more than a relief, and do not fear the information.

Mr. Attorney General. An information was brought to me signed by counsel, of £1500 given to publick uses, which, to be sure, I would not have signed, if I had known on what consideration the notes were given ; and when the defendants to the information, the now plaintiffs, applied to me to stop proceedings on the information, I ordered an attendance, at which they only produced an affidavit, that these notes were given upon a consideration which had never yet been performed ; which I told them they might insist upon very properly in their answer ; but they disclosed nothing to me of what they now charge by their bill.

[83] *Lord Chancellor.* Let the cause stand over to the next day of demurrers, to see whether the defendants the relator in the information, will submit to be examined as witnesses to the consideration for which the notes in question were given ; or both sides may in the mean time attend Mr. *Attorney General* to know his pleasure, whether it be proper to proceed on the information ; and all proceedings are to stay in the mean time. (Post, Cas. 79, S. C.)

Case 54.—DHEGETOFT & al', *versus* the LONDON ASSURANCE & al'.

At the Chancellor's house, Lord Chancellor. Eodem die, January the 15th, 1728.

Quære, If a bill can be brought on a policy of insurance taken in a trustee's name, on a suggestion that the witnesses live abroad, and that the trustee will not let the plaintiffs bring an action in his name.

The plaintiffs are foreigners and copartners, who fitted out a ship from *Ostend* to *China*, and back again; and the defendant *D'Goniegh* their agent, insured the ship and cargo here in *England*, by the other defendants, and took the policy in his own name. The ship proceeded on her voyage, and called in at *Bencolen*, where the Governor seized her as an interloper, and disposed of her and the cargo. Upon which the plaintiffs brought this bill, setting forth, That the policy was taken in the name of *D'Goniegh* their trustee, and that he refuses to let them sue the other defendants in his name: That the facts happened abroad, and that their witnesses who could prove them were beyond seas; and therefore they pray a discovery and relief. And the defendants demurred to the relief, and their counsel said, That the same demurrer was allowed by his Lordship the 15th of *January 1727*, in the case of *D'Silva versus Wall* and others, where the policy was on a *Portuguese* ship, and it was suggested in the bill, that the witnesses were *Portuguese*, and lived abroad, and that the expences of bringing them over on a trial would be more than the cause would bear, and that their trustee would not let them bring an action in his name; yet his Lordship was of opinion, That they must recover at law as well as they could, and had no title to be relieved here; that it was the common suggestion in every bill that the witnesses were beyond seas, that policies were generally taken in the name of a trustee, and that if he refused to let the action be brought in his name, a bill might be filed against him to compel him to it.

The counsel for the plaintiffs insisted, That if they had filed their bill against the trustee only, he would have demurred, because they had not made the *London Assurance* parties, who might have satisfied them, and that they had brought a proper bill; and that they ought either to have the liberty to use the name of the defendant their trustee, or to have a remedy against the other defendants; that the demurrer ought to be over-ruled, because possibly the Court might think proper to relieve them at the hearing; but if the demurrer should be allowed, they would be out of Court, and so lose even the relief against their trustee, which they were plainly intitled to.

[84] *Lord Chancellor*. At this rate all policies of insurance would be tried in this Court, for they are generally taken in the name of a trustee, and are made on ships going abroad, and the witnesses live abroad. Let the demurrer be respited, till the defendant *D'Goniegh* has put in his answer, and on the 21st of *November 1729*, the demurrer was allowed. (The allowance of the demurrer was affirmed in the House of Lords on *Monday the 1st day of February 1730*. Post, Cas. 106.)

Thursday, January the 16th [1729].

PLEAS AND DEMURRERS.

Case 55.—D'ARANDA *versus* WHITTINGHAM.

At the Chancellor's house, Lord Chancellor.

Two became jointly and severally bound in a bond to the plaintiff; both the obligors die, and the plaintiff brings his bill against the heir of one, and the executor of the other obligor; and the defendant the heir demurred, because no administrator or executor of his ancestor was made a party to the bill: And it was argued, that this was a good demurrer, because by the standing rules of this Court, the personal estate is to be applied first to pay debts, and because if the representative of the personal estate was a defendant, he might shew he had satisfied the debt.

Mr. Lutrych for the Plaintiff. We set forth by our bill, that the intestate absconded

for several years before he died, and that we do not know where he died; that the defendant, who was next of kin, refused to take out letters of administration, and that we, as principal creditors, had applied to the Prerogative Court, and were opposed by the defendant, and denied administration, because we could not prove that the intestate left *bona notabilia*. That we afterwards applied to the Consistory Court of *Bath* and *Wells*, where we likewise failed of administration, because we could not prove he died in that diocese, and that the defendant refused to discover where the intestate died. And this general rule (which is a hardship on the plaintiff, that he must make the representative a party, when at law he might sue the heir [85] alone) is not so sacred, but that the Court dispenses with it in many cases; in the case of *Buckley* and *Eaton*, the *Master of the Rolls* made a decree against the heir for the payment of a bond debt, tho' the widow the administratrix was not made a defendant, because she was in *Ireland*. And they ought not to demur for this reason, because it is not a thing of absolute necessity, but there are several excuses which the Court are to judge of at the hearing, as that he is beyond sea, not to be found, or the like.

Lord Chancellor. A debtor by bond dies, leaving no personal estate, so that nobody will administer to him, must an honest and fair creditor, who ought always to be favoured, be obliged to take out letters of administration to him, and thereby subject himself to the suits and actions of all the other creditors, tho' never so vexatious? But as the defendant who had the right, opposed the plaintiff in taking out administration, and would not discover where the intestate died, or administer to him, I may over-rule this demurrer, without breaking in upon the general rule, and without prejudice at the hearing, for want of parties. 1 Vern. 95; 2 Vern. 195; 2 Lev. *Cock versus Cross*. 3 Lev. *Haight versus Langham*; Supplem. to Wentw. 357.

Saturday, January 18 [1729]. The second Seal before Hilary Term.

MOTIONS.

Case 56.—ANONYMUS.

At the Chancellor's house, Lord Chancellor.

A Writ of execution of a decree was by order served on the defendant's clerk in Court, he being gone to *Ireland*, and an attachment was taken out for non-performance of the decree. And Mr. *Attorney General* moved for the defendant, that he might enter his appearance with the register, that the plaintiff might file interrogatories, and that a commission might be granted to *Ireland* to examine him to the contempt, being the only method could be taken, since he could not, according to the course of the Court, be examined in person. And an order was made accordingly (1 Vern. 187).

[86] Case 57.—ANONYMUS.

At the Chancellor's house, Lord Chancellor. Eodem die.

A *prochein amy* shall not be obliged to give security, because he is a privileged person. See ant. Case 30.

A motion was made that the *prochein amy* being privileged as steward to the Duke of *Bedford*, might give security to pay costs, or a new one be appointed.

Lord Chancellor. I shall not grant such a motion but on affidavit that the *prochein amy* is insolvent, or in mean and doubtful circumstances; for a privileged person is subject to costs, but here the steward can have no privilege, because the Duke of *Bedford* is a minor.

[87] DE TERM. S. HILL. 1728-29, IN CUR. CANCELLARIÆ.

Friday, January the 24th [1729].

Case 58.—Lord Viscount FALMOUTH, and others, in the name of themselves, and the rest of the proprietors of the mines and water-courses set forth in the bill, *Plaintiffs*; Mr. INNYS, the Earl of RADNOR, Mr. TREFUSIS, and others, *Defendants*.

In Court, Lord Chancellor.

If a bill is brought to be quieted in the enjoyment of a water-course, and of wears for working of stamp-mills and mines, diverted and broke down by the defendants, the Court will grant an injunction before answer, and make an order on the defendant, to put the premisses in the same repair they were before the injury.

A bill may be brought to be quieted and established in the enjoyment of a mine or colliery, before the right is established at law, for fear the mine should be ruined in the mean time, and a proper remedy can be had in no other court.

Mr. Attorney General for the Plaintiffs. The end of this bill is for an injunction, to quiet the plaintiffs in the enjoyment of their right, and to have it established by a decree of this Court. To which purpose the bill sets forth, That Lord *Falmouth* is seized in fee of the manor of *Glantuan* in *Cornwall*, and of a waste called *North Downes*, belonging to the said manor, in which are several copper-mines. That the defendants are seized of a farm called *Kerry Wherry Farm*, which is divided from the said manor by a water-course called *Black Wherry Water*, and that the said water has belonged to the Lord *Falmouth*, and those under whom he claims, time out of mind, that the said Lord *Falmouth* was seized of several stamping mills, erected on the said waste, to the number of five and twenty, and [88] that on the other side of the water there was not one stamping mill, though those mills are of great profit and advantage in that country; that the said mills were leased to one *Scholars* for ninety-nine years, and that for turning the water to these mills, a wear was erected called *Stamp Head Wear*, that Mr. *Foster* leased these stamping-mills from my Lord *Falmouth*, and the mines being frequently overflowed, he erected an engine for the draining of them, and two wears called *Engine Head Wear* and *Little Pool Head Wear*, and that one end of the wears was always fixed on *Kerry Wherry* side, and peaceably suffered till some time before the filing the bill, and that the river was by these wears turned to the mills and engine, by cuts or leaps: That in *Kerry Wherry Farm* there are several tin works, from whence a great deal of water issues by an ancient adit, that emptied itself into the said *Black Wherry Water*, just above *Engine Head Wear*, and that other waters arose from tin mines in the lands of *Innys*, which he purchased from Mr. *Tomkyns*, in which was an adit, which emptied itself also into the river just above the *Engine Head Wear*, and that the mills and engine were greatly assisted by these waters, that above £1000 a month was made by these works, till on the 29th of *May* 1723, when the mines were in full work, Mr. *Innys* in a violent manner broke down the *Engine Head Wear* and *Little Pool Head Wear* and thereby diverted the water which served the said engine and mills, whereby the work was stopped all the year following, and made a new adit in the mines called the *Gump*, and *Wheel Jolly Mines*, and by so doing diverted the water from going into the old adits: and that these mines being worn out he could have no other aim and intention than to distress the plaintiffs; that *Little Pool Head Wear* was erected by the adventurers, about fourteen or fifteen years ago, by the consent of those under whom the defendants claim, that the defendant *Innys* cut several trenches on his side to divert the water, which were of no use or service to him, but only made the water run to waste. This, my lord, is the plaintiff's right to the river, wears, and adits; these are the several diversions and obstructions of the defendants, our right to the waters, appears from our long and quiet enjoyment, which we have fully proved: And can it be supposed, that on a river of so much use, in a country abounding with mines, there should be twenty-five mills on one side of the river, and none on the other, if those on the other side had any right to the water? The fact speaks for itself, that they had no right, since they never attempted to erect any: And the defendant *Innys* doth not pretend any such enjoyment of the river, nor denies ours, but says we enjoyed it only for the use of our mills, and that we cannot now claim it for the use of our engines, which is but a late erection, but surely if we have had time out of mind a sole use of the river, we may employ it in the playing of engines, or any other use we please, and [89] then the several diversions

of the defendant must be an injury to our right. As to breaking down the wears, he says the bank on that side is his, but it doth not appear by the proofs, whose soil it is, and it may be the plaintiffs; but suppose it the defendant's, this is no excuse for his breaking them down, for *Engine Head Wear* has been erected many years, and been quietly enjoyed, which is the strongest evidence that the plaintiff has a right to fix his wear there, tho' the soil should be the defendants, and *Little Pool Head Wear* was erected about fourteen or fifteen years ago, with the consent of the owners of *Kerry Wherry Farm*, and no complaint of it ever made till now, nor any pretence of having a right to break it down. And as to the adits, they have from time to time run into the river, and the stream would be of little use without them. Upon the filing our bill on proper affidavits we obtained an injunction till the coming in of the defendants answers, and afterwards Lord *Macclesfield* made an order that the premisses should be repaired, and put in the same condition they were in before the breaking down the wears, at the defendant *Innys* his expence. And the Lords Commissioners continued the injunction till the hearing the cause. In the case of mines and collieries, and diversions of water, there is always a necessity to come into a Court of Chancery, and the plaintiffs can have no adequate remedy elsewhere, tho' they were to bring ever so many actions, but the only proper remedy is to put a stop to the wrong, and restore things to the old condition.

Mr. Serjeant *Shepherd* insisted that the plaintiffs ought first to have ascertained their right by a trial at law, and that in the case of *Taylor and Hales*, when the plaintiffs counsel moved for an injunction, they produced an exemplification of the verdict, and that after they had prevailed at law, they might bring their bill to have their right established.

But Mr. *Solicitor General* mentioned the case of *Foster and Saul*, and the Lord Chancellor agreed that it was settled otherwise in the case of mines and collieries, lest the mine should be ruined in the mean time, and his Lordship declared that if the plaintiffs should be obliged to proceed at law only, there would be infinite and endless actions of trespass, but that this Court only could give them a proper and adequate remedy, by quieting them in the enjoyment of their right, restoring things to their old condition, and establishing their right by a decree. But then whether the plaintiffs had the right or not, that they insisted on must be tried by issues, and that he would determine it by the depositions. (1 Vern. 22, 266, 308, 312, 354, 441.)

[90] Mr. *Solicitor General*. Where there is a contrariety of evidence, issues are necessary to be tried before any decree can be made: But I hope here, without directing any, that your lordship will decree for us; for our evidence is positive and uncontroverted, that there are twenty-five mills on our side of the river, and none on theirs, nor no instance given of their having any use of the river. The next fact is, that these wears have been erected many years, and quietly enjoyed by Lord *Falmouth*, till the breaking them down in 1723, and that they were always repaired by the Lord *Falmouth* only, and we submit to your lordship, if these are not sufficient evidence of a sole right to the use of the river, and *Innys* his interruption in 1723 was thus occasioned; Mr. *Innys* had formerly some share in these mines as an adventurer, whose interest is determinable at the will of the lord, and the mines being repaired and put in order by Lord *Falmouth* and his lessees, his lordship was pleased to determine the interest of *Innys*, and in revenge he sets up this scheme to divert the water.

Mr. *Peere Williams*. In the case of *Finch versus Resbridger*, 2 Vern. 390, a bill was brought to quiet the plaintiff in the enjoyment of a water-course, on the evidence, as here, of a long and quiet enjoyment, and the Court was pressed to direct a trial before they granted a perpetual injunction, but it was denied, because the plaintiff had long and peaceably been in possession of it, and since it was thought reasonable in case of a private water-course, it is much more so in ours, and therefore we hope your lordship will make the injunction perpetual. And the Duke of *Bedford* claimed a right to bring water from *Kensington* to his house at *Chelsea*, and the Lord *Cowper* said, that after forty or fifty years quiet possession he would suppose a right, tho' it did not amount to a prescription at law, and decreed a perpetual injunction.

Mr. Serjeant *Shepherd* for the defendant *Innys*. The plaintiffs insist on three points, First, that they have a sole right to the water; secondly, that they have a right to erect any wears they please over the river on our grounds; and thirdly, that they have a right to the waters flowing from two adits belonging to our mines into this river, and that we have no right to alter these casual waters. As to the first, if this

river is the boundary of the two estates, then the whole does not belong to them, but we have an equal right to the use, but they endeavour to prove their right from a long and quiet usage, which would indeed be a good evidence [91] of a right, did not we account for it otherwise. Lord *Falmouth's* mines have occasion for the whole use of this water, Mr. *Innys*, and his grandfather *Gregoire*, had a quarter part in these mines; so that there being a unity of possession, it is no wonder while that continued, they were never interrupted in their exercise of this right, but now we have lost our interest in these mines, we have a power to assert our right by pulling down the wears, and if the plaintiff thinks himself injured, we thereby give him an opportunity to try his title, but it appears that we had an equal right with the Lord *Falmouth* to the use of this water, not only from its being a common boundary, but from our actual exercise of this right, for we have it in proof that whenever any ore was found in the stream, it was always equally divided between the Lord *Falmouth* and Mr. *Innys*, and we say that whenever they pretended to this right, they were always interrupted in the enjoyment of it, and that for this reason our grandfather and we were let into a share in the adventure, and Mr. *Scholars*, who in 1670 built the stamp mills, was then in possession also of *Kerry Wherry Farm*, but when the said mills came afterwards to the possession of Mr. *Craig*, he paid an acknowledgment for this right, so that this unity of possession, and our being a sharer in the works accounts for their long and quiet usage. But secondly, if they had such a right, it would not give them a title to erect the wears if *Scholars's* mills are new mills, and *Stamp Head Wear* was built for the use of them, they can plead no prescriptive right to it, and much less to *Engine Head Wear*, which was built about twenty years ago, and to *Little Pool Head Wear*, which was built about seven years since, and these were the wears we broke down, not *Stamp Head Wear*. And this single point might easily have been tried at law, we have not meddled with the old wear, but only with the two new ones, and the proper way was to pull them up, that it might be determined at law whether we had a right to do so or not. As to the third, it is impossible they should have any such right from the nature of adits, whose only use is to unwater mines, and it is necessary to the due working the mines to alter and change, and to make new adits; for if the vein changes or runs deeper, there must be a new adit, or it must be sunk deeper; and they being only for the use of the mine, they must change as that does, and when they claim a prescriptive right to these waters, and that we should not change them, this is in effect to claim a right to destroy and render our mines useless, whereas by the laws of the stannaries, we may alter these adits as we please, may make them thro' other men's lands, or sink the vein deeper, and as our vein grew more deep, it was necessary to make this new adit, which costs us above £160. And there can be no prescriptive right to the adits of mines, which are supposed to be within time of mind.

[92] Lord *Chancellor*. The plaintiffs have obtained an injunction to stop one new adit the defendant *Innys* has made, and to restrain him from opening two others, they were apprehensive he designed to make, can you give me an instance of an injunction being granted *quia timet*.

Mr. *Attorney General*. This Court will grant an injunction to stay waste on affidavit of a contract for the sale of the timber, and it is the great use of coming into this Court for an injunction to prevent.

Saturday, January 25 [1729]. Mr. *Robins*. It appears by *Lutterel's* case, 4 Co. 84 b, that tho' the plaintiffs had a prescriptive right to the water, they could only divert it, as the prescription directs; now the old course of the water was to the stamping mills, and therefore they cannot erect other wears to turn their engine; nor is it any objection that these wears were erected before Mr. *Innys* came into possession of *Kerry Wherry Farm*, for these wears are in nature of a nuisance or an incroachment, and whether the premises continue in the same hands or are aliened, the alienees may have redress or abate it in the same manner as the persons in whose time it was done. (5 Co. 101 b.)

Lord *Chancellor*. I will not determine the right of the parties, but shall direct issues to be tried at law; one question in this cause is, Whether by custom, or the stannary laws, adits are such fixed courses of water that they cannot be diverted? Another question is, Whether the whole water belongs to Lord *Falmouth*? if so, it is nothing to the defendants what use he makes of it; but still he cannot injure another man by laying the ends of his wears on their lands. As to *Stamp Head Wear*, I should suppose an agreement to do so, because it has been built and enjoyed above threescore

years; but I cannot do so as to the two other wears, of twenty and seven years standing.

The first issue must be, Whether the Lord *Falmouth* and those claiming under him have a right to the whole water, or to the use of the whole water, of so much of the stream called *Black River Water*, as runs between *Stamp Head Wear* and *Chesswater Bridge*.

[93] The parties could not agree the second issue, which it should be, Whether Lord *Falmouth* had a right to erect the wears? or, Whether the defendant had a right to break them down? and therefore the Lord Chancellor directed an action of trespass to be brought, to which the defendant *Innys* should plead the general issue, and give nothing in evidence but the meer right.

The other issue was, whether Mr. *Innys* and those under whom he claims, have a right to divert or draw off the water running through the three adits of *Gump*, *Wheel*, *Jolly* and *Colnoth Mines*, or any or either of them (by making new adits from these mines or otherwise), from falling into *Black Water River*, in such places as the said waters fall respectively into the said river on or before the 29th of *May*, 1723?

The first and the third issue was to be put into one record, and his lordship thinking it not reasonable that a matter of this value should be tried at the assizes, ordered the said issues and action to be tried at the bar of *B. R.* in which the lord *Falmouth* was to be plaintiff, and *Innys* the defendant, both issues were to be tried by the same jury, and a special jury was to be returned and a view had.

The council for the defendant *Innys* insisted that it was hard for him alone to stand this trial against all the plaintiffs, and therefore prayed, if the issues were found against him, he might pay only *nisi prius* costs, which Mr. *Mead* said had been often directed, but the Lord Chancellor said that it could not be done.

Case 59.—MUNES *versus* GOMECEIRA. [1729.]

In Court, Lord Chancellor. Eodem die.

Quære, if the Exchequer Chamber can try a matter of fact.

Mr. *Attorney-General* for the defendant, moved to supersede two writs of error brought by the plaintiff, contrary to his agreement, and after giving two releases of errors. The defendant *Gomecera* was bound with the plaintiff in a bond of £500 to *Hubbart* as his surety, *Hubbart* put the bond in suit against the defendant, who paid the money, and had the bond assigned to him, and brought his action against *Munes*, and had judgment, and *Munes* gave him a release of errors, and yet notwithstanding brought a writ of error. And *Munes* being further indebted to the defendant, they came to a general account, and *Munes* gave the defendant two bonds for the balance, with warrants of attorney to confess judgment, and releases of error on each judgment, and *Gomecera* objecting that, notwithstanding these releases, he might bring writs of error as he had done on the former [94] judgment, he promised him that he would not, and yet has brought two writs of error in the Exchequer Chamber, returnable this day, and as that Court cannot try a release without the aid of this Court, we shall lose the benefit of our releases.

Lord Chancellor. I have known it indeed a question, Whether the Exchequer Chamber could try a matter of fact? but the Court were of opinion they could. Error indeed in fact does not lie before them by the statute, but this is not an error in fact, but a plea in bar. No bill is depending in this Court, no unfair practice has been committed here, but only a writ of error is sued out, which is a writ of right, and would you have me supersede it on these suggestions?

Mr. *Solicitor-General*. As the writ issues out of this Court, it is proper to apply to your lordship till it is returned into another Court, and then indeed the application will be proper there, and if there has been any irregularity in the issuing out the writ, or if it issues contrary to the express agreement of the parties, these are sufficient causes to apply to your lordship. An error in fact cannot be tried in the Exchequer Chamber, because they cannot issue a venire; and tho' this is not an error in fact, but a plea in bar, yet if the release should be denied, they cannot proceed, because the Court cannot try it, and so we should lose the benefit of these releases. And tho' a writ of error is a writ of right (and so indeed is every process) yet nothing is more

common than where the parties agree not to bring error for the Courts of law to set them aside on motion. And such an agreement may be taken advantage of in this Court as well as at law ; for sure a man may agree to depart from his right.

Lord Chancellor. Let the other side shew cause on *Tuesday* why these writs of error should not be superseded, and proceedings stay in the mean time. (See post, Cas. 67 ; Cas. 70.)

[95] *Monday, January 27* [1729].

Case 60.—ANDREWS *versus* TUCKWELL.

At the Rolls.

A devise of a copyhold is not within the statute of wills, because it passes by the surrender, but a devise of the equity of redemption of a copyhold is. 2 Vern. 679 ; 1 Vern. 69 ; 2 Chan. Cas. 8.

A copyholder in fee makes a mortgage thereof, and surrenders to the use of the mortgagee, afterwards he surrenders to the use of his will, and devises the equity of redemption in fee, the *Master of the Rolls* directed an issue to try the validity of the will, and the jury gave a verdict against the will, because it was not attested by three witnesses. And on the return of the *postea*, the *Master of the Rolls* said, that a devise of a copyhold was not within the statute of wills, and therefore in the case of *Bodington* and *Bodington*, where a copyhold was surrendered to the use of the will, tho' the will was not attested by three witnesses, it was adjudged a good appointment of the uses, and that the copyhold passed by the surrender, but where the equity of redemption of a copyhold is devised, of which there can be no surrender, it must be considered as a devise of lands, and if the will is not attested by three witnesses, the devise is void, and in this case the second surrender made by the mortgagor can be of no avail, because it was a void surrender, and all the estate being before out of him.

Case 61.—BAILY and PLOUGHMAN. [1729.]

At the Rolls. Eodem die.

Where a creditor is part satisfied out of the personal estate, he shall receive nothing out of the real estate, devised in trust to executors, till the other creditors have been first paid out of the real estate, the same proportion he received out of the personal. Post, Cas. 180, 181 ; Cas. 78, Cas. 115 ; Nels. Fol. Rep. in Canc. 479 ; 2 Vern. 763, 61, 435 ; 1 Chan. Cas. 32, 248 ; 2 Chan. Cas. 54 ; 2 Vern. 106 ; 1 Vern. 69 ; Wentw. Off. of Ex. 46, 50, 73, 740 ; St. 21 H. 8, ch. 5 ; Dyer, 234.

It was adjudged in this cause, on the authority of the case of *Degg* and *Degg*, decreed by the present *Master of the Rolls*, and affirmed on appeal by the Lord Chancellor *Macclesfield* that where a real estate is devised to executors in trust for the payment of debts, tho' the creditors shall be paid according to priority out of the personal estate, which must be distributed in a course of administration, and the executor may retain to satisfy himself, yet neither he or any other creditor shall come in with the other creditors, who have received no part of their debt, to be paid the residue of the debt in an average out of the real estate, but the other creditors shall be first satisfied out of the real estate, in proportion to what was received out of the personal estate, before the others shall be let into any share of the real estate.

[96] Case 62.—ANONYMUS. [1729.]

At the Rolls. Eodem die.

If lands are devised for payment of debts, the purchaser need not see the debts paid, otherwise if they are particularly mentioned ; but lands charged with debts and legacies, remain so in any hands. 2 Chan. Cas. 115, 221 ; 1 Vern. 301 ; 2 Vern. 5.

If an estate is devised to trustees to be sold for the payment of debts, the purchaser need not concern himself to see the money applied, but it is otherwise if the debts are

particularly specified ; but if lands are charged with the payment of debts and legacies, the estate remains charged in whosoever hands it comes.

Tuesday, January 28 [1729].

Case 63.—WHITWORTH *versus* HALLET.

In Court, Lord Chancellor.

Bill brought against the wife for a general account, and for a special account of £800 received in her husband's life-time, and of jewels, plate, and household goods.

Mr. Solicitor General for the defendant. The plaintiff as administrator, and principal creditor by judgment, to Mr. *Hallet*, late husband of the defendant *Mary Hallet*, brings this bill for an account of the personal estate of her husband come to her hands, in his life-time and since his decease, and for a special account of his jewels, plate, and household goods, and of £800 she received in her husband's life-time. The plaintiff first endeavours to bring her into a general account, which was a new attempt, to bring a wife to a general account for money received in her husband's life-time, for as the husband cannot bring such a bill, no more can his administrator who stands in his place, then he descends to particulars, and as to the household goods, the defendant sets forth, that Mr. *Crawley* her brother purchased them from her husband for £200, which was their full value, that he assigned them to Lady *Crawley* their mother, who pitying her daughter's circumstances, whom the husband had left with eight children, she permitted her to enjoy the said furniture, and at her death devised to her the use of them for life, separate and apart from her husband, and as to the plate and jewels, she sets out, that by the marriage articles her husband covenanted that in case she survived him she should have, and take to her own use, all such jewels and chamber-plate as were in her use and wear at any time during his life ; this covenant, the plaintiff says, is no more than that she should have her paraphernalia, which by law she cannot retain against creditors, which construction makes the covenant of no signification, but the husband intended by this covenant to secure that which would be otherwise precarious. The covenant goes farther than the rule of law, and makes no exception to her retaining them, tho' there should be creditors.

[97] The plaintiff says, this covenant would be an inlet to the greatest fraud, that a husband when he found himself involved in his circumstances, might turn his effects into jewels, and let his wife use them, and so defeat his creditors of their just demands, but it is not saying an ill use may be made of this covenant, that will destroy it, but he must shew it has been done in this particular case, and then no doubt the Court would interpose, but the small value of the jewels not exceeding £320 shews the contrary ; as to the £800, she says this was the produce of a separate estate she had of £250 a year, or that if it was not to be understood as such, that she received it in her husband's life-time, and applied it for the maintenance of herself and her family ; her husband left her in 1719, with eight children, whom she maintained till 1723 ; is this £800 more than sufficient to maintain them four years ? and she swears, that she sold her own chamber plate to support her family during his absence.

Lord Chancellor. Does the covenant in the marriage articles give the wife a property ? can she retain the jewels and plate specifically ? otherwise she can only stand in the place of a covenantee, and be paid in a course of administration. Suppose the husband had disposed of any of them during coverture, could the wife have brought trover against the vendee ? she is to have such jewels and plate as she had in her use or wearing at any time during his life, not such as she had at the time of his death, and therefore she must have either a property in all of them, or in none of them, and if it gives her no legal interest, it must stand as a covenant. As to the £800, it is no matter whether it was her's, or her husband's, being received by her four years before her husband's death, and spent in supporting the family ; therefore the bill must be dismissed, except as to the jewels and plate, as to which, the wife is only to be considered as a creditor by covenant, and they are to be sold before a master to the best purchaser, and the money arising by the sale is to be paid to the plaintiff the administrator, to be applied by him in a course of administration.

[98] Case 64.—JANE TAYLOR, an infant, by her *prochein amy*, Plaintiff; Mr. GERST executor, and Mr. JOHNSON & ux. residuary legatees of RICHARD FURNIVAL, Defendants. [1729.]

At the Rolls. Eodem die.

A grandchild is not to be considered as a child. See post, Cas. 68; 2 Chan. Cas. 26; 2 Vern. 625. A legacy payable to a son or daughter at 21, or marriage, cannot bear interest, but the child is intitled to a maintenance. 1 Chan. Cas. 26; 2 Vern. 625.

Richard Furnival the grand-father in 1701, devised to *Jane* the plaintiff, and to *Mrs. Johnson* the defendant, his grand-daughters £500 a-piece, proviso, that if either of them died before twenty-one, or marriage, her legacy should survive to the other. And this bill is brought to be paid the interest of this £500 from the death of the testator. The defendant by his answer insists, that the legacy is not payable but on a contingency, and that no interest is due till the contingency happens; but the counsel for the plaintiff argued, that it was a general rule that where a legacy was devised generally, with such a subsequent proviso, that the principal vests in the legatee immediately, subject only to the contingency, and shall carry interest, and vests absolutely if the contingency does not happen to defeat it; and if lands had been devised in this manner, with a proviso, that if the devisee died before twenty-one, or marriage, the lands should go over, the profits in the mean time would belong to the devisee. But a bequest to a grand-daughter is a bequest to a child, and if a legacy to a daughter is made payable at twenty-one, or marriage, it will bear interest in the mean time.

But the counsel for the defendants denied, that a grandchild was considered, or had the same favour shewed it as a child, as appeared by the resolution of the Lords, in the case of *Kettle and Townsend*, 1 Salk. 187, Cas. 6, and they denied also, that if a legacy was made payable to a son or a daughter, at twenty-one or marriage, that they should have interest for it, and said that they were only intitled to a maintenance.

Master of the Rolls. A general legacy is to be paid immediately, therefore the £500 must be put out at interest for the benefit of the grand-daughter, subject to the contingency; and the Master is to see what is convenient to allow the father for the maintenance of his daughter, but the remainder of the interest is not subject to the contingency.

[99] It was resolved by his Honour in this cause, that if money placed out at interest is called in by the executor without any cause, he shall pay interest for it. (1 Chan. Cas. 60. If an executor calls in money out at interest without cause, he shall pay interest for it. Nels. Fol. Rep. in Canc. 457; 2 Chan. Cas. 21, 35, 152, 235; 1 Vern. 196; 2 Vern. 744, 548.)

And that if a legacy is out on a security when the testator dies, immediate interest from his death is due for it, and not only from a year after his decease.

Case 65.—WILLY and POULTON. [1729.]

At the Rolls. Eodem die.

Administration during the minority of two, ceases when one comes of age, and administration is to be granted to him.

If administration is granted during the minority of two persons, it ceases when one of them comes of age, and administration ought to be granted to him.

Wednesday, January 29, 1728-9.

Case 66.—Mr. LAD, in behalf of himself and others, the orphans and creditors of the city of London, Plaintiff; The Mayor, Commonalty, and Citizens of London, Defendants.

*In Court, Lord Chancellor; Sir Robert Raymond, Chief Just. of B. R.;
The Master of the Rolls.*

Mr. Lutwyche for the Plaintiff. By the 5 & 6 of W. and M. ch. 10, a perpetual fund is provided for the benefit of the orphans, and the other creditors of the city of London;

the preamble of which act shews, that the city was considerably more indebted to the orphans and other persons than they were able to pay ; wherefore the Parliament, to give them their assistance to pay the said debts, enabled them to raise a perpetual fund for the payment of interest for the said debts at four *per cent. per annum*, the legal interest being at that time six *per cent.*, and that all the principal and interest due to *Christmas* 1693, should be computed, and cast into one sum ; and this fund was to be made up of several yearly sums, which were to be raised by virtue of this act ; the clear annual sum of £8000 a year was charged on the lands and revenues of the city ; £2000 *per annum* were to be raised out of the personal estates of the citizens ; £600 a year was reserved on the lease for twenty-one years of the convex lamps, and after the determination of that lease, all the profits of the public lights were to be appropriated to [100] these uses ; two shillings and sixpence was to be paid on the binding of an apprentice, and five shillings on his admission to his freedom ; and fourpence *per tun* was to be paid on all wines imported into *London*, after the 24th of *June*, 1694 ; fourpence for meage of coal and culm sold by the chaldron, and after the 29th of *September* sixpence more *per chaldron* for fifty years ; and for coals sold by the tun, sixpence *per tun*, from the said 29th of *September*, for fifty years ; and after the said impositions of sixpence *per chaldron* and tun were determined, all the revenues of the city are to stand charged with the further sum of £6000 a year.

From the 24th of *June* 1694 to 1712, the annual fund was every year deficient, but since that time it has been more than enough to pay the annual interest of £4 *per cent.* (by the coal duty bringing in more than was imagined), so that there remains now in the chamber of *London* about £47,000. And the only question is, whether this overplus shall go to the city of *London*, or whether it shall be applied to make good the deficiencies of former years ? and I am surprised the city should make this a question, considering they had spent the money of the orphans and their other creditors, and could only pay them by way of composition ; or how they can pretend that the fund is only answerable for so much of the £4 *per cent.* as it will yield yearly, and that if it yields less, the orphans must bear the loss ; but if more, that they are to have the benefit. The act recites this to be a composition, and establishes a fund for the annual payment of £4 *per cent.* interest, and so proportionably for a greater or lesser sum, and all the money to be raised by virtue of this act is to be appropriated to this use and no other ; books of the receipts and disbursements are to be kept, and great penalties are laid on the officers who shall divert or misapply any of the said sums. As the whole is to be appropriated, what room is there for this question, which is further cleared up by the nature of the fund, great part whereof is casual, some part indeed is certain, as the £8000 a year. Suppose the city revenues should one year fall short of paying this sum, should not the arrears be made up in subsequent years, if the revenues in the following years exceeded that sum ; they might as well say, our lands last year yielded but £4000, this year, £2000, and yet the deficiency of the last year shall not be made up : our case appears plain on the bare stating of it, the act gives the orphans a power to assign their shares, which is done in this manner. They assign all that is due and payable to them, or that shall be due and payable to them, by virtue of this act ; therefore since the whole and every clause of the act shews that the whole money was to be appropriated to this use, there can be no doubt but that the surplusses must be applied to make good the former deficiencies.

[101] *Mr. Willis.* The only question in this cause is, Whether there being for several years great deficiencies in this fund, they shall be made good out of the surplusses, of succeeding years ? and if the words were doubtful, the act ought to have such a construction put upon it as would be just and reasonable, but there can be no doubt even as to the words. It must be admitted, that the city was greatly indebted when the act was made, that interest at that time was more than £4 *per cent.*, that this act was greatly beneficial to the city, and the only justice in lowering the interest was, that this being certain, would be as good as the common interest of £6 *per cent.*, which was uncertain, whereas if the interest was to arise only as the fund produced more or less, it would be a very unfair composition, but the words are plainly with us, and all the clauses of the act clearly shew, that if there was any deficiency, it was to be made up by the first overplus. The design of the act was to give annuities of £4 *per cent.* for ever, and to create a perpetual fund for the payment of them, now if the deficiencies are not to be made up, how can the annuities be said to be perpetual, in each clause which mentions the particular sums of which this fund is to consist, they are said

to be appropriated for ever to this purpose. Appropriated signifies to be put to that use, and no other, so that if there was a general surplus, though there was enough to pay the whole interest every year, the city could apply it to no other uses without an act of parliament: for subsequent deficiencies might happen, and if every sum is appropriated, how can the surplus not be appropriated, there is but one instance where the city are at liberty to use any of this money, which plainly shews they cannot in any other, yet even there it was the intention of the act, that any deficiency should be made good. They have by S. 23, a power to apply £2000 a year out of this fund for seven years, towards the expences of the government of the city, but the clause goes on, and says, that if any deficiency should happen, the city is to repay the money, or so much thereof, as shall be necessary to make good the said deficiency, and all the revenues are made chargeable. Here the design of the act was, that there should be no deficiency the first seven years, how then does it appear they intended there should be any afterwards? and by the seventeenth clause of the act the city is impowered to receive such orphans money as executors should lodge with them, and with the money to pay off orphans, who are above the age of twenty-one years, what is due to them for principal and interest: why should they that were to be paid off be in a better condition than they that continued in? This act must be construed as other parliamentary funds are, that where a perpetual annuity is granted, and a perpetual fund for the payment of it, the fund is to be considered as a [102] debtor, and the annuities as creditors, and the arrears are likewise to be looked upon as creditors on the fund; and then there cannot properly be a surplus, till those arrears are paid.

Mr. Mead. By S. 11 of this act it appears that the debt of the city is extinguished, and the corporation discharged, and the compensation given to the creditors, is a perpetual annual interest of £4 *per cent.*, the nature of this fund makes the case stronger, the payments by s. 10 are to be made twice a year, at St. Thomas and St. John the Baptist's day, which was in favour of the orphans, that they should not stay till the four *per cent.* was raised, but they are to have half yearly divided among them what is raised. And by this act the city are made receivers of several branches of this fund: now it would be very odd, if by their wilful neglect of not receiving sufficient one year, and by their receiving more than enough another year, they should be capable of making an advantage of the surplus. And tho' it is provided, that the yearly rents and payments shall be applied for the payment of the said annual sum of £4, or to so much thereof only as the said monies appointed to be raised shall yearly amount unto, to satisfy and pay. The meaning of this clause is only to prevent the postponing of the payment of the annuity, or so much of it as the fund would annually raise, and not to prevent the deficiencies of any one year being made good by the surplusses of another.

Mr. Attorney-General for the defendants. The Mayor and Commonalty by this act are trustees for the orphans, and are also trustees for the city, and therefore if any doubt arose on this act, it was proper for them to submit it to your lordship's judgment. The single question is, as to the overplusses since 1712, Whether they ought to be applied for the benefit of the city, or to make good the deficiencies of former years? and this will depend on the penning of this particular act, notwithstanding what has been said of parliamentary funds, and the word appropriate, and arises on the 10th clause (all the rents, &c., shall for ever be applied for the payment of the annual sum of £4 *per cent.* &c., or to so much thereof only as the money shall yearly amount to, to satisfy and pay towards the interest, to the said orphans and creditors equally in proportion to their respective interests); the natural construction of this clause is, that if the fund produced £4 *per cent.* annually, it was to be paid; if it did not, no more was to be paid than it did produce, and if this is not the construction, to what purpose is the word only? The Legislature might think this fund would generally produce the £4 *per cent.* annually, and that such a construction as they contend for, might occasion long and intricate accounts, to divide a surplus at such a distance [103] of time among so many persons interested, and therefore penned this clause to avoid that inconvenience. As to the clause which empowers the city to take out £2000 a year for the first seven years, if our construction is right, their inference is not good; for the city by this clause is only to make good such a deficiency as should be occasioned by the taking out this money, and if what they contend for had been the design of the act, it would have been said as expressly, that the city should make good the deficiencies out of the surplusses, as it had said in the other case, that they should make good those, that arose by their taking out the £2000 a year.

Mr. Solicitor General. This question depends on that clause mentioned by *Mr. Attorney General*, which appoints how the money shall be applied, and supposes there might be a deficiency; by this clause the money is to be applied for the payment of the £4 *per cent.*, but the act, foreseeing a deficiency from the uncertainty of the fund, has provided, in case of that deficiency, by the subsequent words *Or to so much, &c.*, and they are not put in barely that the city might not postpone the payments till sufficient was raised for the payment of £4 *per cent.*, for then such words would have been made use of; and if the act has made no provision after, by this clause they are only to have £4 *per cent.*, if the fund will raise it; if not, what it will raise; and the direct contrary follows from that clause, whereby the city are impowered to make use of £2000 a year. From what the counsel for the plaintiff would infer, it was reasonable what they made use of in that manner should be replaced to the fund, if in several clauses the act supposes deficiencies, and provides for them in one case, and does not in another, does it follow that the act designed to provide for them in both cases? or rather that it designed to provide for them only in one? By this act the stock is transferable, but the act might suppose it would be transferred as other stocks are by a transfer of the capital and growing dividends, and not of the arrears also, as has been practised in the transfer of orphan stock, and then in case the surpluses were to make good the deficiencies, what difficulties would there be to find the proprietors in those several years; some of the funds are temporary, as there might be a deficiency for some years, then a surplus, and then a deficiency (as what makes a surplus now, will make a deficiency hereafter), since the act has not directed what shall be done with the surplus, it might design it to make good the deficiencies of subsequent years, for in this sense there would not be any difficulty to find out the creditors, but the difficulties in looking back would be insuperable; so that they have made but one question of what might be made two questions, and if the [104] surpluses must make good any deficiencies, they must remain to answer those of the growing annuities.

Mr. Common Serjeant Lingard. The right of the proprietors arises only from the act, and other clauses plainly point out what we contend for; the £2000 a year might be taken out whether there was a deficiency or not, and was not to be repaid unless a deficiency happened. Suppose during those seven years the fund was sufficient, and the next year a deficiency happened, no part of the £14000 was to be repaid. The seven years were to commence from *Michaelmas* 1693, and the six-pence duty on coals was to commence from *Michaelmas* 1700, and this power of borrowing expiring when a fresh duty arose, looks as if the act had the city in view, and would ease them as to their particular revenues; and they have a right to the benefit of the surplus occasioned by this new duty, because when it ceases they are to be charged £6000 a year further; and as the accounts are to be yearly audited, it looks as if the act provided no further than for every year, and that every thing at the end of that time was to be settled.

Mr. Fazakerley. If the surpluses are to answer the deficiencies, in what manner are they to be applied? are the arrears, or the yearly payments, to be first cleared off? if the arrears grew great, and were first to be paid, they would be only paid, and nothing would be left to satisfy the annual payments. Suppose there is a surplus, and no deficiency, must it lie dead for fear of future deficiencies? there is a clause to make good the deficiency only that shall arise by the city taking from the fund the £2000 a year, and therefore the act having a deficiency also in the clause in dispute directly under consideration, and not making any provision for it, is a strong inducement to think it designed to supply no other deficiency.

Master of the Rolls. This is a very plain case, and the defendants rely on one word to subvert the scope of the whole act; the design of the act was to make the creditors some satisfaction but the act had a regard to the city too, as well as to the creditors, £8000 a year is provided out of the city lands, the rent of the convex lights, and the subject in general is charged, by a duty on coals imported, to be paid by freemen, or not; this debt affected the whole real and personal estate of the city, and for the honour and carrying on the government of it, the act gives the city the relief therein mentioned. The act says, that *For and towards raising a perpetual fund, &c.*, and [105] then comes the eighth clause; the end of which I think very material, though it has not been taken notice of, after laying a duty on coals, it goes on (*All sums of money as part of the said fund shall be paid into the receipt of the chamber, and are hereby appropriated for the raising the said fund, and applied towards the discharge of the said debt*) and

then comes the clause the defendants rely on, which is a very necessary clause, and says, that though there is a deficiency, there shall be a payment *pro rata*; the act had before said that all should be appropriated, and the word (*only*) tho' we could give no account of it, is not sufficient to overturn the tenor of the act, but it might be inserted for this reason, here are particular branches of the city charged with a rent-charge, and the word might be added to indemnify the city, and to prevent their being accountable for, or their revenues burthened with more than annuities of four *per cent.*, otherwise I cannot account for it; as to the twenty-third clause that relates to the £2000 a year, I take it to be very plain that a surplus in any of those years was to make good a deficiency of the others, from the words (*during the whole seven years*), and this will determine the question, for as the act plainly expresses itself as to this case, it is a plain indication of the intention of the Legislature that it should be so in every other, it is the common case of a rent-charge on lands, if any bad years happen the grantee may distrain for all the arrears in better years.

Lord Chief Justice. I am of the same opinion with the *Master of the Rolls*, and the whole tenor of the act leaves no room for doubt. Here is a perpetual provision made for a debt, a perpetual fund appropriated, to be considered, as the *Master of the Rolls* says, as a rent-charge, where all the arrears are to be satisfied. The whole difficulty arises from the word *only*, which is not to control the rest of the act, but I think may be inserted to a good intent. Here was an annual fund established, and an annual payment, and therefore this word might be added to prevent any doubt whether the arrears, if any, or the annual payments, should be first satisfied; and reason and justice is very clear for the plaintiff, and there is no danger of confusion, because the accounts are annually stated, and the arrears are always assigned with the capital.

Lord Chancellor. The plaintiff hath no reason to blame the defendants for laying this case before the Court, since, as trustees, they ought to have the direction of it. The surplus that has, and may arise from this fund, would be a great ease to the city, towards the payment of the £6000 a year they are charged [106] with, when the duties on coals expire; and the plaintiff ought to thank the city for their frugal management of these revenues, whereby this overplus is occasioned. The right arises from the act, the meaning of which, taken together is, that the city being greatly indebted and insolvent, the old debt is extinguished, and a new debt created, of interest of four *per cent.* annually for the old debt for ever; for the payment of which £8000 *per annum* is charged on the city lands, and the others are new duties. All which annual payments, &c., are appropriated to this, and no other use; if any deficiency, it must be submitted to, and is to be made up by a surplus, if any should happen hereafter. And the word *only* was necessarily inserted, otherwise the first due would be first paid, and so the fund of this year would have been applied to the arrear of the year before; to prevent which, the interest is directed to be paid annually; and this is a direct, plain, and easy construction of the act. Be it therefore decreed, that the annual surpluses arising out of the fund for the payment of four *per cent.* interest are to be applied to make good the deficiencies that have been in any precedent years, and the plaintiff and, &c., are to be paid in proportion.

Case 67.—MUNES *versus* GOMECEIRA. [1729.]

In Court, Lord Chancellor. Eodem die.

See ant. Cas. 59; post, Cas. 70.

Mr. Lutwyche for the plaintiff. We are to shew cause to your Lordship why these writs of error should not be superseded. This is the first motion ever was made of this kind, and I do not know that it has been ever determined that a writ of error should be superseded, lest the defendant in the Exchequer Chamber lose the benefit of a release of errors, or that if a release should be pleaded there, that Court could not try it. They say further, that the plaintiff agreed not to bring writs of error, but there was no cause in this Court, nor was this agreement made an order of this Court; then indeed, if the plaintiff had brought these writs, an attachment would have issued against him for his contempt: but we swear we made no such agreement, and this Court will not take notice of extrajudicial agreements, they might as well move to stop actions, on supposed agreements not to bring them; no, the party must defend

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himself as well as he can, or bring his action on the promise ; besides, the defendant proceeded so far on these writs, that he insisted on bail, and made them justify in open Court, which is a submission to the writ of error.

Mr. Wills. The counsel for the defendant have assigned two reasons why these writs of error should be superseded ; first, because [107] the plaintiff gave releases of error ; but this is of no weight : they allow it would not be of any, if the writs were returnable into any other Court than the Exchequer Chamber ; but since the statute gives them a power to examine the judgment, if a release is pleaded, it is a necessary consequence that they can try it, or at least, your Lordship, on this motion, will not determine whether they can or no. Secondly, because the plaintiff agreed not to bring writs of error, which indeed would have been a reasonable cause, if the defendant had immediately applied to your Lordship, and the agreement had been uncontroverted ; but he insisted on bail in *B. R.* which is an admittance of our having a right to bring these writs, and he is now safe and sure of his money at all events.

Mr. Strange. Two for the defendant swear, there was an agreement not to bring writs of error ; and three on our side swear there was no such agreement ; and a writ of error may be brought, notwithstanding an agreement to the contrary, unless it is made a rule of Court, and a release of errors is widely different from an agreement not to bring error, and is only to secure the party from any niceties ; and they allow this would not be a sufficient foundation to move to supersede these writs, if they were returnable into *B. R.* but that it is because they are returnable into the Exchequer Chamber, which cannot try a matter of fact ; but that is not true : indeed error in fact does not lie there by the statute, because the party may bring a writ of error in fact *coram vobis* in *B. R.* In *Temple* and *Ullock's* case, 1 Sid. 257, Cas. 1, a release of errors was pleaded, and they went to trial on it ; and there would otherwise be a failure of justice, but if we should allow all they say, the defendant's proceedings on the bail have authenticated these writs.

Lord Chancellor. There was no necessity to erect a new judicature for error in fact, for the reason given by *Mr. Strange* : but if a matter of fact in the Exchequer Chamber is pleaded in bar to a writ of error, and is put in issue, they can try it as a necessary incident ; and I remember one of the Barons told me that a fact being pleaded in bar to a writ of error, the Exchequer Chamber resolved to have tried it, if the parties had not come to an agreement. Let it be spoke to again on *Friday* next.

[108] Case 68.—Sir BROOK BRIDGES *versus* HALES & al'. [1729.]

At the Lord Chancellor's house, Lord Chancellor. Eodem die.

Mr. Solicitor General for the plaintiff. *Mr. Brook Bridges*, the grand-father of the plaintiff, on the marriage of his son *Brook*, settled lands in trust to the use of himself for life, remainder to his son *Brook* for life, with a power to trustees to raise £3000 a-piece for younger children ; and by another settlement, a term of five hundred years is limited to trustees for the same purposes, with several remainders over, according to the usual form of marriage settlements ; with a remainder to the grand-father in fee. *Brook Bridges* the grand-father dies, and *Brook Bridges* the son, afterwards *Sir Brook Bridges*, having two children, *Sir Brook Bridges* the plaintiff, now about twenty years of age, and the defendant *Margaret*, now about sixteen years old, made his will, *inter al'*, in these words :

'I give and bequeath to my daughter *Margaret* £20,000, to be paid her by my executor, at eighteen years of age, or marriage ; and I desire that my son and daughter may be under the care and direction of *Sir Thomas Hales*, and *Mr. Hales*.' (Swinb. part 3, sect. 12, n. 6.) And then the will goes on, 'and all my debts, demands, and funeral expences being first paid and satisfied, I give and bequeath the remainder of my personal estate, *viz.* all my stock in the Bank, South Sea, East India, and Million Bank stock, and South Sea annuities, to my son *Brook Bridges*, whom I nominate and appoint sole executor of this my last will and testament.'

And the first question in this cause is, Whether *Margaret*, the daughter, is entitled to the £20,000 only, or to the £3000 also, provided for her by the settlement ? and by the fixed rules of this Court, if the father devises to his daughter a portion equal, or greater than a sum she is intitled to by settlement out of his lands, this shall be taken as a satisfaction for the portion, and she shall only have her election, and it

was so adjudged by Lord *Harcourt*, in the case of *Copley and Copley*; there the daughter under the settlement of the grand father was intitled to £5000, and under the settlement of her father to £8000, and her father also by will devised to her £8000 without saying it was to go in satisfaction of the portion she was intitled to by the settlement; but the Court decreed, that the daughter might make her election, but that she was entitled to only one £8000. And our case does not rest singly on the general rule of the Court, but the settlement also shews it to be the design of the parties, in which there is a proviso, that the said portion shall not be raised, if the daughter is preferred on her marriage by [109] the father, in his life-time, with an equal fortune; or if he gave her a less, only as much was to be raised as would serve to make it up. And tho' she was not married in his life-time, yet he leaves her £20,000 by will, payable at marriage, or eighteen, so that the parties to the settlement designed she should not have this provision, if the father made her otherwise as good, and he had this settlement in view.

The next question is as to the remainder, which the defendant *Margaret* says, is restrained by the *viz.* and that the plaintiff can take no more than is there mentioned, and that she is intitled to a moiety of the residue by the statute of distribution. But the *viz.* is only to enumerate the chief parts of his personal estate, and not to exclude him from the rest, or if the *viz.* should occasion any, to remove all doubts, the testator has made him sole executor, whereby all the remainder will belong to him as such, or if it be taken as a specific legacy, why then the remainder must go to pay the £20,000, and nothing will be left to be distributed.

And we think Sir *Thomas Hales* and Mr. *Hales*, by the words of the will, are appointed guardians to the children, for otherwise they cannot be under their care and direction, but they are unwilling to act without the direction of the Court.

Mr. Rider. The case of *Thomas and Kemish*, 2 Vern. 348, is an authority in point, that the devise to the daughter shall be taken as a satisfaction of £3000 portion charged on the lands. (2 Vern. 255, 258.)

As to the second point a *viz.* may explain, but cannot restrain the words which went before, as an habendum in a deed must not destroy the premisses, because it is only to explain or illustrate; indeed where the premisses are in general words, the habendum may restrain, because all are included in the general words. In the case of *Stukely and Butler*, Hob. 168, a grant was made of all his woods growing on the manor of &c., *viz.* of such particular woods, the *viz.* was held void, because it restrained the general words; besides the words, as the defendant would construe them, would not be sense, for then they would be as much as if he had said, All the remainder of my South Sea, Bank stock, &c., whereas he had not before devised any of those stocks, &c. And if they are to stand in the room of the general word remainder, then it is a specific legacy, and the debts and legacies are to be paid out first of the other personal estate.

[110] *Mr. Attorney General for the defendant Margaret.* The first question is, Whether this devise shall be construed as a satisfaction? though the general doctrine of the Court is against double portions, yet ours differs greatly from the common cases, the portions here are to arise from different funds, and are given by different persons, one is to issue out of lands, the other out of personal estate, the one is charged by the grand-father, the other is given by the father; it is unreasonable to suppose the same person designed to give a double portion, but not that the father designed to add to the fortune of his daughter settled on her by her grand-father. And the proviso is tied up to a daughter married in the life-time of the father.

The next question relates to the remainder, which must be confined to the particulars mentioned, and the general words are explained by the subsequent, and it is the proper office of a *viz.* to explain and restrain general words, it must not indeed be repugnant to and destroy them, he does not say all the remainder, and so the daughter *Margaret* will be intitled to a moiety under the statute, notwithstanding the son is made executor: and the testator's intention was, that the debts and funerals should be paid out of his legacy.

The £20,000 is to be paid to the daughter at eighteen, or marriage, and though interest generally is not to commence till the time of payment, yet where a portion is devised to a child not otherwise provided for, she is intitled to interest from the time of her father's death.

Mr. Lutwyche. I shall make but one observation on the first point, that the portion is not charged on the estate of the father, but of the grand-father, for the father had

only an estate for life, and the remainder in fee was limited to the grand-father, but in *Copley's* case the inheritance was charged, but here one devises £20,000 to his daughter, none of whose estate was charged with her portion, or liable to pay the same, and therefore the devise cannot be supposed to be intended as a satisfaction.

Where a child has no provision, though her portion is made payable at eighteen, or marriage, she shall have maintenance in the mean time, because it cannot be supposed the father designed otherwise. And I have known interest decreed to be paid from the death of the testator for a legacy to a younger son, payable at a future day, though he was otherwise provided for.

[111] *Mr. Solicitor General's Reply.* The general rule is, that no interest is due on a legacy payable at a future day; and even in case of an unprovided child the interest is not given, but only a provision or maintenance, as was adjudged by the House of Lords, the 13th of May 1728, in the case of *Glegg and Glegg*. By marriage articles, a term of two hundred years was agreed to be limited to trustees in trust, to raise £3000 for daughters portions, with such maintenance as should be thought fit (see ant. Cas. 64); and after, by a settlement made in pursuance of these articles, a term of two hundred years was limited to trustees, by sale or mortgage, or by the rents till sale, to raise portions for daughters; if but one, £3000 to be paid at twenty-one or marriage, if more than one, &c., and in trust out of the rents and profits in the mean time, to raise such yearly sums for maintenance as the trustees should judge convenient, not exceeding the interest of the portions at five *per cent.*, there was only one daughter, and the trustees thought proper to allow her £150 a year, which was the whole interest, for her maintenance. And the *Master of the Rolls* decreed her to be paid such maintenance, but the House of Lords thought proper to reduce it to £100 a year, but here is no power lodged in trustees.

As to the first point, the case of *Copley and Copley* was decreed after great debate: there the grand-father charged the estate, which he settled on the marriage of his son, with the payment of £5000 for daughters portions; and the father, on the marriage of a second wife, charged other lands with the payment of £8000 to daughters; he had but one daughter, to whom he afterwards devised £8000. By the second settlement he provided £8000 for daughters generally, without taking notice of the £5000, and then he devised away his estate to a stranger, chargeable with £8000. In that case the portions moved from different ancestors, and were payable at different times; by the settlement, at twenty-one, or marriage; by the will, at eighteen, or marriage: there the daughter was disinherited, yet Lord *Harcourt* decreed, that the first £8000 should be taken as a satisfaction for the £5000, and the last £8000 for the first £8000, but gave the daughter her election. (1 Chan. Cas. 310; Nels. Fol. Rep. in Canc. 290, 294; 2 Vern. 115, 110, 177, 258, 298, 478, 498, 505, 555, 255, 439, 484; 2 Ventr. 348; Pyne's Case; Nels. 8vo Rep. in Canc. 38.)

Lord Chancellor. The daughter, from the death of her father, till the legacy is payable, is intitled to maintenance. (2 Vern. 517; Nels. 8vo Rep. in Canc. 101.) As to all the remainder, the Court declares it belongs to the plaintiff Sir *Brook Bridges*, and that the will sufficiently declares Sir *Thomas Hales* and his son guardians, and they being unwilling to meddle with the estate, a receiver must be appointed by the Master. (1 Chan. Cas. 60, 249.) But I shall make no decree as to the first point, but leave it undetermined [112] till the daughter comes of age, because here are several settlements, and it does not appear whether she is intitled to any, or what fortune, by them; or whether the portions were only to be raised, in case there was a younger son and daughter.

N. B. The Court afterwards allowed a maintenance to Lady *Coverley's* daughters, till their portions became payable at twenty-one, or marriage, which were charged on the real estate.

Case 69.—ALLEN versus ALLEN.

At the Chancellor's house, Lord Chancellor. Eodem die.

Mr. Solicitor-General for the plaintiff. Mr. Allen made his will, and thereby devised, *inter al'*, to the defendant his wife, all his furniture, jewels, linen, chariot, and coach and horses, and all his plate. And this bill is brought against her by the heir of the testator. By this will she claims all the horses on his estate at *Barbadoes*; whereas the testator only meant the horses used with the coach and chariot; and under

furniture, she would comprehend the marble slabs and chimney-pieces, which in *London* are considered as the furniture of the tenant, and are removeable by them, but things fixed to the freehold are not to be given to the devisee in disfavour of the heir. She also claims the wine, coals, and stacks of hay, and brewing vessels, and pictures, glasses, prints, and books in her own closet; and under jewels and plate, she lays claim to his watch, pistols, and gold-headed cane; whereas these words are not to be extended beyond their common meaning.

The council for the defendant argued, That the pictures and prints being used as furniture, would pass by that word, and that marble chimney-pieces and glasses were ornaments every day taken down by tenants, and also upon executions; and that if she could not take down the marble chimney-pieces in the house in the country, which belonged to the heir, yet that she might take down the marble chimney-pieces and slabs in his house in town, which would otherwise belong to his executors, and which they, as tenants, might take down; that brewing-vessels were as proper furniture for the brew-house, as kitchen furniture for a kitchen; that watches would pass either as plate or jewels, and that a gold-headed cane was plate.

[113] *Lord Chancellor*. By the word furniture, the defendant is not intitled to the marble slabs, or chimney-pieces, or any thing fixed to the freehold, in the house in the country, on the testator's own estate; and glasses in pannels are to be considered as part of the freehold, but not if they are screwed in; and there is a great difference between the heir and devisee, or the executor and devisee, and a landlord and tenant. Books are not furniture; and the watch and gold-headed cane will not pass either as jewels or plate. (Post, Cas. 117; 2 Vern. 512, 638, 508; Swinb. part 7, sect. 10, n. 8.)

Friday, January the 31st [1729].

Case 70.—MUNES and GOMECEIRA.

In Court, Lord Chancellor.

See ant. Cas. 59, Cas. 67.

Mr. Attorney General for the defendant. The case in 1 Sid. 257, Cas. 1, is wrong reported, and I have examined the record, and it is a writ of error brought in *B. R.* of a judgment in *C. B.* 17 Ca. 2, and it is so reported in 1 Keb. 904.

Lord Chancellor. It is a jest to say, since the statute gives the Exchequer Chamber a power to examine the judgment on a writ of error, that they cannot try any plea in bar; they may direct a *venire fac.* for the jury to appear before them, and try it themselves; however, on this motion, I shall not determine whether they can or no. So let the order be discharged.

Monday, February the 3d [1729].

Case 71.—COLMER versus COLMER, & al'.

In Court, Lord Chancellor.

See post, Cas. 74.

Mr. Attorney General for the plaintiff. Mrs. Colmer, the plaintiff, the widow of Mr. Minter, being intitled to a third part of his personal estate, on a treaty of marriage with the defendant Thomas Colmer, articles of agreement were entered into, whereby it was covenanted and agreed, that £4000, part of her said share, should be lodged in the hands of her trustees in trust, to pay the interest thereof to the plaintiff for life, for her sole and separate use, and [114] if she died before her intended husband, then to pay the principal to such uses, and to such persons, as she, by deed or will, should direct and appoint; and for want of such appointment, to the husband; but if the husband died first, to pay the principal to her. And as to the £8000 residue of the said third part, the husband, during his life, was to have the sole management thereof in trade; but if he died before the plaintiff, leaving no issue, or if the issue died in her life-time, his heirs, or executors, within twelve months after his death, were to pay the same to her; or if he died first, leaving issue, the £8000 was to be paid to trustees in trust, to pay the interest to the plaintiff for life, and after her death, in

trust, to pay the principal to and among the children, as she should appoint; and for want of such appointment, to pay it among them equally; but if she died first, leaving issue, then to pay the principal, after the husband's death, to and among such children as he should appoint, and for want of such appointment, to the children equally; but if the plaintiff died first, leaving no issue, or if they died in the husband's life-time, the £8000 was to be the husband's. The marriage was had, and the plaintiff being dissatisfied with these articles, which were prepared, and brought to her ready ingrossed to be signed by the defendant the husband, she prevailed upon him, after the marriage, to execute other articles, by which the £4000, which by the first articles was to go over to the husband, in case the wife died first without any appointment, was limited to her children by her former husband, and the £8000 was also to go over to them, and not to the husband, in case the wife died without issue, or the issue died in the husband's life-time. And the husband also covenanted to settle £4000 out of his own estate in trust, in case the wife survived him, to pay the interest to her for life, and after her decease to pay the principal, as she should appoint, and for want of such appointment, to their children; but if he survived, in trust to pay the principal to him, or to his appointment: and he also covenanted, to leave her all the diamonds and jewels which were in her use or wear during the coverture, and that if he survived her, she might dispose by will of all the plate she had before marriage: and it was further covenanted, that nothing in those articles should extend to bar her of dower, or of any part of his personal estate she was intitled to by the custom of the city of *London*, or by the statute of distributions. For some time they agreed very well, but several quarrels arising about her children by her first husband, whose portions the defendant was desirous to get into his hands, he treated her with great incivility and cruelty, denied her children and acquaintance admittance to her, gave the management of his family to a footman, encouraged the servants to insult her, and at length withdrew himself privately, and of the sudden from his house and family, unknown to his wife, and she hearing he was gone to *Portsmouth*, [115] followed him, where finding he was gone on board a vessel, she hired a hoy to carry her to the ship, and when the husband saw her coming, he persuaded the captain to cut his cables, and set sail, so that she could not come up to him, upon which she returned to *London*, but in the mean time, the other defendants had entered her dwelling house, and denied her admittance, and had contrived to have the servants she left in the house arrested in sham actions, upon which she was forced to lie with a friend, they took possession of every thing, even of her wearing apparel and jewels, and of the plate that was her former husband's, under colour of a deed of trust, and letter of attorney executed to them by the husband, who in order to deprive her of a subsistence, made an assignment to them of all his debts, goods, and personal estate whatsoever: and also, of all his real estate, which is about £400 a year in possession, and £700 a year in expectancy after his mother's death. Upon this the plaintiff brought her bill against her husband, and his said trustees, for a discovery, and a maintenance out of the estate of her husband, and that he might be compelled to give security to settle the £8000 and £4000 according to the articles, and that the trustees might restore the plate they had taken away. It is proper in this case, my lord, to sue here for a maintenance, and not in the spiritual Court, because there was no separation of the wife from the husband, and it is as reasonable that the wife should have a provision, where the husband deserts and forsakes her, as where through his cruelty, he forces her to forsake him and run away. And there are several precedents, where this Court has allowed the wife a maintenance, on the circumstances of her case, as *Oxenden versus Oxenden*, 2 Vern. 493, and *Williams and Callow*, 2 Vern. 752, and the present is as strong, or stronger than those cases, the portion here is much greater, and it is unreasonable he should go away with such a fortune, and not give the wife a maintenance, but the defendants say, she has £4000 separate estate, but this is reduced to £2400 by a loss from the fall of South Sea stock in the year 1720, which does not bring in above a hundred and thirteen pounds a year, nor is this an adequate provision for so great a fortune, and was designed only in nature of pin-money, whilst they lived and cohabited together, and not as a maintenance for her, if they lived asunder. We hope your Lordship will likewise give some directions for securing the £8000 and £4000 which belong to her by the articles, on the contingencies therein mentioned.

Mr. Solicitor General. The chief end of this bill is for an allowance, during the absence of the husband, who has no ground of complaint against the wife; and yet, though he received so large a portion with her, he leaves her without any cause, without

any [116] notice, without any provision, and goes to *Maryland*. Where there is a separation for cruelty, or a legal divorce, the spiritual Court will compel the husband to allow the wife alimony; but here is no occasion for a separation or divorce, and the husband is not within the jurisdiction of the Court christian, nor amenable by any process thereof, so that the only relief the wife can have is in this Court; besides he has assigned over all his real and personal estate to trustees, so that they have the whole legal interest in them, and he is intitled to the benefit of the trust only, after the payment of his debts, and no proceedings in any other Court can affect his estate in their hands. A husband is certainly obliged to maintain his wife, and we only apply to your Lordship to compel the trustees to do that which the husband himself ought to do, to afford her a proper and convenient maintenance: and our case is much stronger than either of the cases that have been mentioned in Mr. *Vernon's* reports, in *Ozenden's* case, the wife left the husband for his cruelty and ill usage, of which she was not a proper and impartial judge, but here the husband leaves the wife, she follows him, and he makes the ship cut her cables to hinder her from seeing him, so that in our case the separation is certainly the act of the husband, and he deserts her. In *Ozenden's* case £6000 part of the wife's fortune was lodged in trustees hands, so here the £8000 part of the plaintiff's fortune is in trustees hands too, and the husband by this contrivance, without designing it, has undoubtedly given this Court a jurisdiction. But they say, they are not trustees for us, so it was said in *Ozenden's* case, as to the £6000, the £8000 is blended with the rest of the estate, the trustees are seized to his use of this part, with the rest of the estate, during his life, but after his decease in trust for us, the Court in those cases thought it reasonable the wife should have a maintenance out of what had been once her own estate; they say, the husband has remitted us £50, which is a strong evidence he thought us intitled to something, and as the wife brought him a plentiful fortune, and he is in very good circumstances, she ought to have a handsome provision; is £113 a year sufficient? they say £4000 is a sufficient maintenance; it appears from the articles, she was not, during the cohabitation, to maintain herself with bread out of this money; all the family expences were to be borne by the husband, and they had no thoughts at that time of their living asunder, or allowing it, at that time, to have been a reasonable maintenance, it is far otherwise, now part of it is lost, and the interest reduced one *per cent*. As to the £8000 and £4000, we submit to your Lordship's judgment what directions to give, and tho' neither of those sums are payable indeed during his life, yet since he has left us without any thoughts, as appears, of returning, and the whole estate is vested in trustees, we hope your Lordship [117] will think it reasonable to have so much secured in their hands for those uses, and if they sold the plate that was the plaintiff's before marriage (ant. Cas. 68; postea, Case 74), they ought to restore it, for by turning it into money, they make it impossible for the husband to perform his covenant; the trustees own they sold all they found in the house, and therefore this may be a proper inquiry for the Master.

Mr. Paunceford. Though this covenant is not to be performed immediately, yet as the husband has secreted himself, and conveyed away his estate, it is proper to pray of your lordship to have the sums secured to her on the contingency of the articles. As to the maintenance, feme coverts and infants are the objects of the care of this Court; and your lordship has lately thought proper, in the case of *Sir Brook Bridges* and *Hales*, to allow an infant maintenance out of her fortune, though it was not payable till eighteen, or marriage.

Case 72.—BADGER and BADGER. [1729.]

At the Rolls. Eodem die.

One living in *Oxfordshire* covenants to purchase lands of £80 a year, the parties intitled chusing the money, were decreed to have 24 years purchase, which was the price lands sold at in that country, but not the interest of the purchase money, but only the £80 a year.

The husband, by articles previous to his marriage, covenants to purchase lands of £80 a year in trust for the issue of that marriage, as tenants in tail in common, remainder in fee to his own right heirs; and on a bill filed for that purpose, a decree was made, that the husband should perform the articles; he dies, and the other

children with the eldest son, join in a petition to have the money paid to them, and not invested in a purchase (2 Vern. 551, 428), and an order was made accordingly ; and the only question was, at what price the purchase should be settled ? and the *Master of the Rolls* thought at first, that by the covenant the husband was bound only to purchase lands of £80 a year any where in *England* or *Wales*, but afterwards he was of opinion, that since this Court had decreed an execution of the trust, they would likewise take care that it was executed in a reasonable manner, and as the parties lived in *Oxfordshire*, it was most likely the purchase was designed to have been thereabouts, and therefore he ordered the petitioners to be paid after the rate of twenty-four years purchase, which was the usual price lands sold at in that country, and that they should be allowed £80 a year from the death of the father, though they insisted to be allowed the interest at five *per cent.* for the money which was decreed to be paid for the purchase.

[118] Case 73.—ANONYMUS. [1729.]

At the Rolls. Eodem die.

Depositions of a witness in another cause, or Court, may be read against him, without order in this court, to shew the inconsistency of his evidence.

If a witness is examined in this Court, you may read, without an order, any other depositions of the same person, in the spiritual Court, or elsewhere, in any other cause, so that you make use of them only to confront the evidence he then gives.

Tuesday, February the 4th [1729].

Case 74.—COLMER *versus* COLMER, & al'.

In Court, Lord Chancellor.

Mr. Lutwyche for the defendant *Thomas Colmer, the husband*. This is a new case, and of great consequence, and the plaintiff prays more than the Court has ever yet granted (see ant. Cas. 71), to have a separate maintenance allowed her, because of the ill usage and behaviour of the husband, and of his voluntary and causeless desertion of her ; whereas the fact is, that he went to *Maryland* on his own affairs, being a merchant that traded to and from thence ; and before his going, he made a settlement, in trust, for the payment of his debts, which amounted to above £20,000, he having lived beyond his circumstances, at the rate of £1500 a year, and allowed his wife £400 a year, besides the interest of the £4000, and yet she run him greatly in debt ; so that this is the case of a merchant going beyond seas to settle his affairs, who makes a provision for the payment of his debts in the mean time, and there is no foundation for this bill ; besides, he offered to settle her in a house at *Hornsey*, and to provide her with lodgings in town before he went off. The cases in 2 Vern. are very different from this, and the want of those circumstances makes this a very new case : in the case of *Lady Oxenden*, the husband brought a bill to have the benefit of the wife's portion, and as, where the husband files a bill to have the benefit of a trust, which he would not have at law, the Court has always obliged him to make the wife a settlement, so they thought it much more reasonable in the like case to compel him to allow her a maintenance ; there the wife had no provision, was parted from the husband for his cruelty, and he had a bill in Court to have the trust decreed for him, but here the husband has not exhibited a bill, and this matter is of the jurisdiction of the spiritual Court, the plaintiff ought to sue her husband there for a restitution of conjugal rights ; and as to what they object, that they could not serve him with the process of that Court, sure they might, as well as they have served him with [119] the process of this Court ; they had an order, that service of the other defendants his trustees and attornies, should be good service of him, and *Maryland* is within some diocese, and those who are there may be cited ; but suppose they could not, must this Court therefore make decrees for them ? they might as well say, we cannot arrest a man on an action at law, because he is gone abroad, or absconds, therefore pray let us be relieved here ; but the spiritual Courts have a method of citing the party by putting up the process on the doors of his parish church, and if he does not appear, they seize his effects here, and this Court will enforce the sentence of the spiritual Courts by a sequestration. *Lady Oxenden's* is the first case of this nature ; and in the

case of *Williams and Callow*, the husband too had brought a bill, which gave the Court a jurisdiction ; but there is no precedent, where a woman after having made a bargain for a particular part, for her separate estate, sued in this Court for a further maintenance ; can she be said to be in a starving condition ? I argue thus ; on a supposition that they had made out their case of cruelty and ill usage, but we have proved that she has no reason to complain, but has been treated with great indulgence and good nature, and the gratifying her in her expences was one of the chief reasons which obliged him to go abroad, which appears by the second articles, which the husband entered into, purely out of his kindness to the wife, whereby he settles on her £4000 out of his own estate, and further agrees, that they should not bar her of dower, or of the share of his personal estate she was intitled to by the custom of the city of *London*, or by the statute of distributions, as the first articles did ; and is she to be relieved against the creditors on these articles, which are partly voluntary, especially when the creditors are not made parties ? nay, supposing her left causelessly, shall she set aside these deeds, made for the payment of his just debts, when she is already provided for ? what they further pray as to security, is contrary to the intent of both articles ; for in the first, he binds himself to the performance in the penalty of £24,000, and in the second by a covenant, and therefore she must be content with these securities, as was lately adjudged by your lordship in the case of *Whitworth and Hallet*, and the covenant as to the diamonds and jewels, are the same in both cases. (Ante, Case 63.)

Mr. Mead. No rule is more established than that this Court will not better the securities the parties themselves have agreed to accept of, and bills for that purpose have been always dismissed. She is intitled to the diamonds and jewels on a contingency, by a covenant of the husband, which is no specifick lien, as your lordship adjudged in the case of *Whitworth and Hallet*, even after the husband's death, though there the jewels [120] and diamonds were in the wife's possession too, as also in the case of *Gazalet* (see ante, Case 15, Case 51), that creditors by covenant, or on a contingency, could not come in under a commission of bankruptcy as creditors, till the covenant was broken, or the contingency happened : so the wife must rely on the security in the articles, and this Court will be the less willing to interpose, as the second articles are voluntary, so that the only question in this case is, Whether the Court can decree a provision to the wife out of the husband's estate assigned to trustees for the payment of his debts. It was proper for the husband to go to *Maryland* to settle his affairs, and it is likely he will return when he has done so, and he cannot be said to have voluntarily deserted her, in order to distress her ; and as to cruelty they have not made out a single instance, but have only made proof of some angry and indecent expressions. The evidence in *Lady Oxenden's* case would have been sufficient in the spiritual Court for a separation, and the husband brought a bill to have the portion raised, and the *Lord Keeper* said, if a husband brings a bill for the wife's portion, the Court always obliges him to make her a settlement, or some provision out of it, and shall not the Court then, when it sees sufficient evidence for a divorce *a mensa & thoro*, take care that the wife have a separate maintenance ? there the portion was in trustees hands, which the husband could not come at without the assistance of this Court, but here the wife's fortune has been already received, and there are no articles, no trust to be executed. And a bill never was brought, even in behalf of an infant improvidently married, for a settlement or provision, if the husband had got the portion into his possession or power ; and in the case of *Williams and Callow*, the original bill was brought by the husband, but they say here is a trust, but it is such a trust as the husband himself cannot vary, nor could he bring such a bill. And how can the Court say what is a reasonable maintenance, where a man is in trade, and gone abroad to get in his effects, and she cannot be said in this case to be in a starving condition ; besides the husband had agreed to let his house before he went to *Maryland*, and the trustees offered her the keys, to take out what was her own, and they swear that they have paid in satisfaction of the debts more than they have yet received, which shews the deeds are not fraudulent.

Lord Chancellor. This is a case proper not only for the spiritual Court, but also for a court of common law, it is a breach of the peace in the husband not to maintain his wife, and if articles of the peace were exhibited by the wife against the husband, and he entered into a recognizance, to not maintain her, would be a forfeiture of his recognizance, by which he binds himself [121] *bene & honeste tractare* her. If the plaintiff sued in the spiritual Court, it must be for a restitution of conjugal duties,

and then for alimony. I will not enter into the question, who was in fault in this case? the witnesses say, the husband allowed her £400 a year, besides her separate maintenance, and some marks indeed appear of his being a kind husband, but they afterwards fell out, and it is plain he voluntarily left her, and went away without her knowledge, and that when she heard where he was gone, she followed him, and that he made the master cut the cables, that she might not come into the ship, and on her return, she was denied entrance into her own house, and the servants she left there were arrested in sham actions to get them out of the house; so that she was turned out to the wide world: and it plainly appears by the deeds, that he designed to serve her so, and to prevent her from any maintenance out of his estate: what must the wife do in this case? in *Sir Oliver Butler's* case, 3 Keb. 187, Cas. 44, the wife sued for alimony, and the husband pleaded, that she had a separate maintenance of £300 a year, and the plea was over-ruled; and on a motion in *B. R.* for a prohibition, it was denied by the Court; first, because a Court of law could take no cognizance of it, because it was a trust; and secondly, because though the wife had a separate allowance, she was intitled to maintenance according to the circumstances of the husband: so that according to the opinion of the Court of Arches, and of the King's Bench, the estate of the husband is to be the measure of alimony. Not to maintain a wife, would in other countries be a sufficient cause of divorce *a vinculo matrimonii*, the wife is to be maintained according to the port of her husband, and as the husband here has vested the property of all his estate in trustees, the plaintiff has no remedy but in this Court. Wherefore it appearing to the Court, that here was a voluntary desertion of the husband, and that the deeds were fraudulent, and executed with a design to bar her of all maintenance, and the defendants have not proved any debts, therefore it is to be referred to a Master, to see what is proper to be allowed for the past and future maintenance of the plaintiff (regard being had to the portion she brought, and to the present circumstances of the husband), till he shall return and cohabit; but as to the other parts, the bill must be dismissed. (2 Vern. 671, 386; 1 Chan. Cas. 250; 2 Chan. Cas. 102; Nels. Fol. Rep. in Canc. 73, 153.)

[122] Case 75.—PENVIL *versus* LUSCOMB. [1729.]

At the Rolls. Eodem die.

See ant. Cas. 46.

Mr. Rider for the defendants. An equitable interest, or at least such a one as the eldest brother had in this case, will not intitle the sister to the equity of redemption; the rule of *Possessio Fratris* is part of two other rules, one of which is, that he that claims as heir, must make himself heir to him that was last seized; and the other is, that he must be heir of the whole blood. It is not an actual possession of the land that is sufficient to make a *Possessio Fratris*, but an actual seizin of the fee simple, for if the brother is tenant in tail male special, remainder in fee, and dies without issue inheritable, there shall be no *Possessio Fratris* of the remainder, and supposing there may be *Possessio Fratris* of a trust, it must be of a trust in fee, but a mortgagor is only tenant at will to the mortgagee. Suppose an estate is conveyed to one and his heirs, on condition that on payment of the money at the end of the year the feoffee shall reconvey; the mortgagor dies within the year, and his heir enters, he is only tenant at will, and if he dies before the performance of the condition, the sister of the whole blood shall not have the benefit of the condition, but the brother of the half blood; now the same person is intitled to redeem the estate after forfeiture, who was intitled to perform the condition; for this is a performance of the condition in equity. The best rule, if any, to judge of the equity of redemption of a mortgage in fee, is to consider it as a reversion; and the word reversion is accordingly in several acts of Parliament used for the equity of redemption, but there is no *Possessio Fratris* of a reversion; if there be a *Possessio Fratris* of a mortgage in fee, it must be where the money is paid; then indeed the mortgagee is as much a trustee for the mortgagor and his heirs, as if the estate had been conveyed to him on those trusts; but by a perception of the profits, the mortgagor is only tenant at will.

Afterwards the *Master of the Rolls* decreed the equity of redemption to the younger brother. because the elder brother had never brought a bill to redeem.

[123] *Friday, February the 7th* [1729].

Case 76.—MILNER *versus* MILLS, & *e contra*.

In Court, Lord Chancellor.

Lands contracted for go to the heir or devisee of the purchaser, and the money must be paid by his representative. Post, Case 152; Nels. Fol. Rep. in Canc. 201, 343; 2 Vern. 213, 322; 1 Chan. Cas. 39; Swinb. part 7, sect. 10, n. 8; Nels. 8vo Rep. in Canc. 76, 106.

The original bill was exhibited by the administrator of Mr. *Brown*, against his heir at law, for an account of the personal estate of the intestate, which he had taken possession of, and the heir filed a cross bill against the administrator, to pay the purchase money for certain lands, which Mr. *Brown* had articted for the purchase of in his life-time, out of his personal estate, it being a settled rule in Chancery, that if a person contracts for the purchase of lands, they shall be considered as real estate, and descend to his heir, or he may devise them by will, and his representative shall pay the purchase money out of assets. And the Lord Chancellor decreed accordingly in this case.

Case 77.—ANONYMUS. [1729.]

In Court, Lord Chancellor. Eodem die.

The defendant, tho' he is not served with a subpoena, may rejoin gratis. But by 2 Chan. Cas. 21, the answer shall be taken for true. Curs. Canc. 153, 154, 161.

If the plaintiff replies to the defendant's answer, but never serves him with a subpoena to rejoin, he may rejoin gratis, in order to prove his answer, though the plaintiff cannot force him to rejoin without a subpoena.

Saturday, February the 15th [1729.]

Case 78.—CHAMBERS & al' *versus* HARVEST, WOODFORD, & al'.

At the Rolls.

Creditors shall be paid *pro rata*, and not in a course of administration, where an estate is devised to trustees to sell for payment of debts, tho' they are made executors too, especially if they refuse to act. Ant. Cas. 61; post, Cas. 181, Cas. 115; 3 H. 6, 3; Nels. Fol. Rep. in Canc. 478, 195; 1 Vern. 101, 63; 2 Vern. 763, 61, 435, 106, 133, 405, 248; 1 Chan. Cas. 32, 248; 2 Chan. Cas. 54.

The Reverend Mr. *Hayes Woodford* devised his estate to trustees and their heirs (whom he also made executors), to be sold for payment of his debts, the trustees refuse to act, and the creditors bring in a bill for a sale, and there were three questions at the hearing.

The first was, Whether the money arising by the sale of the estate should not be disposed of in a course of administration (the trustees being also executors)? but his Honour [124] the *Master of the Rolls* decreed, the creditors should be paid ratably, as he had formerly done in the case of *Degg and Degg*, which was confirmed on appeal by the Lord Chancellor *Macclesfield*, especially in this case, because the trustees had renounced, so that there could be no sale without the assistance of the Court.

The second was, whether the heir at law, who was bound in several bonds with his father, by way of security, might not retain? but it was adjudged that he could not, but only come in for a ratable share with the other creditors. (Post, Cas. 180; 2 Vern. 61; 2 Chan. Cas. 54.)

The third question was, From what time the heir, who was in the receipt of the rents and profits of the estate should account? Whether from the time of the filing the bill, or only from the time of pronouncing the decree, as at law, from the time of the judgment? but the *Master of the Rolls* said, that at law they were sure of judgment in two or three terms, but here there might not be a decree in a considerable time, and

therefore decreed he should account from the time of filing the bill according to the case of *Montague* and *Ford*, lately adjudged by the *Lord Chancellor*. (2 Chan. Cas. 225 ; 1 Vern. 282.)

Friday, February 21 [1729].

PLEAS AND DEMURRERS.

Case 79.—WILDBORE & al' *versus* PARKER & al'.

At the Chancellor's house, Lord Chancellor.

Ant. Cas. 53, S. C.

If a bill is brought for a reconveyance of lands granted to qualify a person to be elected, as being without a consideration, tho' the defendant admits it by his answer, the Court will not relieve.

The defendants, the relators in the information, not consenting to be examined in that cause, for the present plaintiffs, the demurrers, came on again to be argued ; and the *Attorney General*, for the defendants, spoke to the same effect as at the first hearing. What the plaintiffs principally object is, that the defendants have brought an information for the payment of these notes, but how can the plaintiffs avail themselves of that in this suit ? they may make a proper defence to it by their answer, and prove it by others, for they themselves charge that these notes were given at a great meeting, and we submit to your lordship, if we should discover the consideration, and it should appear to be what they alledge, whether that would profit them ; if they will give such notes, the least punishment they can suffer is to pay them : where lands have been conveyed, to qualify the grantees to be elected Members of Parliament, and bills have been brought for a reconveyance of the estate, as being granted without any consideration, though the defendant has admitted it by his [125] answer, yet the Court has said, as the estate was vested by law, they would give the plaintiffs no assistance, but dismiss their bill ; and if an action had been brought on these notes, the defendants could not have brought a bill for a discovery of the consideration and relief, no more than in the case of an usurious contract.

Mr. Solicitor General for the plaintiff. This bill is in nature of a defence to the original bill or information, and it is proper for your lordship at the hearing of that information to be acquainted with all the circumstances relating to these notes : and our case is very different from what has been said of notes given, or conveyances made on corrupt agreements, they would have this Court decree the payment of notes, which cannot be sued at law (because they are not made payable to any certain person), and shall not your lordship then consider on what consideration they were given ? since they have brought an information, it is proper to consider whether their demand is just, and the now defendants are to be looked upon as plaintiffs in the information, though it is filed in the name of the *Attorney General* ; suppose then they had brought a bill for payment of these notes and we a cross bill for a discovery of the consideration, could they have demurred ? could they have said, No, we will not tell ; the Court shall decree blindfold for us ; it never was allowed a party to protect himself in this manner. The Court indeed will stand neuter, where a bill prays to be relieved against a corrupt agreement ; but where the end of the bill is for a specifick execution of it, it will certainly first examine into it, and they cannot mention the case of a bill for an execution of a contract, and of a cross bill for a discovery, that a demurrer to the discovery has been allowed ; for that is to say, the Court must decree what, if they were acquainted with the whole truth, they would not ; no, your lordship must be let into the whole affair. If a Member of Parliament brings his action against another, and the defendant files his bill for relief, the other shall not be allowed his privilege. But they say several were present ; what then ; if we should examine them, they would demur too, as the relators do now, shall we swear against ourselves, shall we subject ourselves to penalties. (1 Vern. 329.)

Lord Chancellor. The demurrers must be allowed, as to the first point, but overruled as to the rest, and the sheriff is not obliged to discover. Bribery and corruption are certainly punishable by the common and statute law, and the House of Commons have undoubtedly a power of judging of elections, and the incidents thereof, but that

is not the present question. [126] Notes are given for which there is no remedy at law, and the defendants file an information in the name of the *Attorney General* for the payment of them, must this Court suppose the consideration expressed to be good, without looking into it? Suppose a fraudulent note is obtained, which yet appears fair on the face of it, though fraud is punishable by law, yet if the party comes here to have it executed, or puts it in suit at law on a bill for a discovery, he must answer, though it may subject him to a penalty: so if the defendants will not discover, they shall have no benefit by the information, if that was out of the case, I should be of another opinion. And tho' others were present, if they were parties, they too may refuse to swear, because a discovery would subject them to punishment.

Monday, February the 24th [1729].

Case 80.—ATTORNEY GENERAL *versus* WYNNE & Ux', & HUMPHRYS;
WYNNE *et* Ux' *versus* HUMPHRYS.

At the Chancellor's house, Lord Chancellor.

Hardr. 131, 313; 2 Ro. Ab. 299; 1 Lev. 235, 6; Vaugh. 207; 1 Show. 293. The validity of a codicil of the personal estate that has been proved, can be only litigated in the spiritual Court. 6 Co. 23; Suppl. to Went. 270, 281; 2 Vern. 8, 76; 1 Chan. Cas. 80; Cro. Ca. 396; 1 Bulst. 199, pl. 459.

Mr. Solicitor General for the defendant Humphrys. The information is brought at the relation of Mr. Justice Price and others, the trustees of a charity, given by the will of Mrs. *Strangewaies*, against *Watkins William Wynne*, and *Mary* his wife, sister and executrix of the will of the testatrix, and against *Humphrys* her late steward. And as to so much of the information, as seeks to bring the defendant *Humphrys* to account for, or pay over any of the personal estate of the said Mrs. *Strangewaies* in his hands, he demurs, because by the standing rules of the Court he is liable only to account to the executrix. The executrix likewise has brought her bill against *Humphrys* for an account, to which he pleads a codicil of the said Mrs. *Strangewaies*, whereby she expressly orders, that he should not be accountable to her executrix for any of her affairs, and discharges him from all accounts of her concerns. And we conceive our demurrer ought to be allowed, otherwise every legatee might bring a bill against the debtor of his testator, whereas a payment to him would not be good, nor could he give the debtor a discharge. And this information is brought against the executrix too, charging collusion, with a design to elude the codicil, whereby it is expressly ordered that he should not be accountable to the executrix. And our plea also is good, for this codicil has been proved by the executrix, though now [127] she charges it to be obtained unduly, and by unfair suggestions, when the testatrix was *in extremis*; but it appears from the case of *Kerrick versus Bransby*, decreed in the House of Lords, *Monday, March 11, 1727*, that this codicil having been proved, must be taken for good, and cannot be litigated but in the spiritual Court. I will not enter into that question, whether if a just creditor had brought this bill, or information, a release, or what would have been a bar to an executor, would have been a bar to him, but surely it will in this case of a legatee.

Mr. Attorney General for the plaintiffs. I shall first consider the demurrer. I allow a legatee or creditor cannot bring a bill for an account against a debtor or accountant of the testator, because, as has been said, then every legatee or creditor might bring such a bill, but we have made the representative likewise a party to our information, and charged her to be in collusion with the other defendant, so that an account taken in this cause would be final and conclusive against Mr. *Humphrys*; the testatrix has ordered the residue of her money, and her rents in arrear, to be laid out in a purchase of lands, for the charitable uses in her will; Mr. *Humphrys* says the executrix has proved the codicil, we charge that it was obtained *in extremis*, and that the executrix's proving of it is an evidence of collusion, for by this codicil the will would be intirely frustrated, for not only the arrears are thereby discharged, but also several sums of money which were in his hands; taking this then for a collusion in an executrix, to prove a codicil which amounts to a general release, the next question is, Whether a creditor or a legatee might not bring such a bill? certainly a creditor might, and why

not a legatee, who has as certain a right ; and tho' an executor must assent to a legacy, yet this Court will enforce him to consent, the relators are residuary legatees, in trust for charitable uses, and therefore are certainly intitled to an answer.

As to the plea, it is certainly improper for us to bring a bill for an account contrary to a codicil we have proved, but then the question is, how far this plea shall operate as a release ? it is pleaded to so much of the bill as seeks to impeach, or set aside the codicil, or to bring him to an account, he was employed many years as her steward, and she intended by this codicil, only to release him from any account as such, he insists it will intitle him to notes of hand for money paid for her use, so that the plea would in effect cover her whole personal estate, and the executrix may call him to an account, notwithstanding the codicil, because it does not appear 'till the account is taken, whether there will be enough to answer [128] debts, therefore he ought to answer, and submit to the judgment of the Court on the whole, how far the codicil shall extend.

Lord Chancellor. One legatee brings a bill against another (for *Humphrys* by this codicil is a legatee), and the executrix, charging a collusion, which ought not to be said in this case, because the executrix also has brought a bill, and the defendants plea to it, coming on to be argued at the same time, I can now take notice of it, besides the demurrer doth not go to the whole bill, but by his answer he expressly denies all collusion, and if this codicil is not fairly proved, they may contest it in the proper ecclesiastical court, but I must suppose it good ; therefore the demurrer must be allowed. But as to the plea, there may be a question how far the codicil shall extend, and therefore let the plea stand for an answer, with liberty to except, as to any matter subsequent to the making the codicil ; and the benefit be saved to the hearing. (1 Chan. Cas. 277 ; Nels. Fol. Rep. in Canc. 303.)

Wednesday, February the 26th.

Case 81.—SCATTERGOOD *versus* HARRISON.

At the Chancellor's house, Lord Chancellor.

The Attorney General for the plaintiff. Mr. Scattergood, who lived at *Maderas*, at divers times consigned several goods and effects to his brother-in-law Mr. *Trenchfield* in *London*, afterwards on his coming over into *England*, he sickened and died at *Portsmouth*, having first made his will, and Mr. *Trenchfield* and Mr. *Fenwick* executors ; *Trenchfield* only proved the will and possessed the effects, he died, and left Mr. *Raworth* his executor, who made his will, and appointed the defendant *Harrison* his executor, against whom, as the representative of Mr. *Trenchfield*, the plaintiff brought this bill for an account of the assets of Mr. Scattergood, and an account being decreed, the Master has reported specially, that the defendant claims an allowance of commission money, but we insist that he is not intitled to any allowance, Mr. *Trenchfield* was nearly related to the testator, there was no particular contract with him as factor, and in his accounts he has charged nothing for factorage, but may be supposed to have done it out of kindness to the testator, and for sake of those large sums of money he had in his hands, for which he paid no interest, at least he is not intitled to any allowance since the testator's death, being executor, and having £100 legacy given him, and he might have refused to act, and your lordship adjudged so the sixth day of last *December*, [129] in the case of *Sutton versus Nightingale*, for then he did not transact as factor, but as executor, who is intitled to nothing for his care and trouble, but must be allowed all his necessary expences, and in that case Mr. *Nightingale* had no legacy given him.

Lord Chancellor. Mr. *Trenchfield*, *prima facie* is certainly intitled to factorage, but if you can shew any thing whereby it necessarily appears he was not to have any, that will destroy the other presumption ; you say he has not charged it in his accounts, but as they were not closed, he might have charged it at the foot of them, unless you had shewn that in his accounts with others, he charged factorage immediately, and not at the end of the account.

Mr. Lutwyche for the defendant. They say we ought not to have any commission, because Mr. *Trenchfield* was a near relation to Mr. Scattergood, was made executor, and has a legacy left him, but the legacy is not said to be given him for his trouble as executor, which is very observable, for that would have excluded him from a residue of the personal estate, but he would be intitled to this legacy, though he had refused to act as executor ; and tho' an executor is not to be allowed for his ordinary care and

pains, yet he is not obliged to go into the trade, and to act, and negotiate for the testator in this extraordinary manner ; but they say we are to be allowed our expences, we conceive it proper to settle them by this general allowance of commission-money, because it is hard for us to produce a voucher, for every particular sum we expended, and we allowed interest for the several sums of money in our hands.

Mr. Wills. What he did as factor he ought to be allowed for, since he was executor as well as before, for by taking upon him that office, he is not obliged to act as factor ; and if he had employed another, he would have been allowed factorage in his accounts : suppose an attorney is made executor, if he has occasion to carry on law-suits on the account of his testator, must he give up his fees.

Lord Chancellor. I cannot now go out of the report, which says he acted only as executor, and his receipts and payments in the report are set out as executor. Suppose the case to be (as nothing [130] appears to me to the contrary), that Mr. *Scattergood* brought these effects home with him, and the executor disposed of them, sure he shall be allowed only his charges and expences, but if any thing appeared to be consigned to Mr. *Trenchfield* by the testator in his life-time, though it came to his hands after his death (since he acted before as factor), he should be allowed commission for it. Therefore I decree factorage and commission to the defendant, for all the money and goods which came to Mr. *Trenchfield's* hands in the life-time of the testator, but he is to have no commission for what he did as executor. (1 Vern. 316 ; Nels. Fol. Rep. in Canc. 361.)

Case 82.—DUNSCOMB *versus* DUNSCOMB. [1729.]

At the Rolls. Eodem die.

One devises lands to his daughter, and her heirs, after her mother's death, but directed, that if his son paid her £500 after her mother's death, to be invested in lands, that the lands devised to her should go to him ; this shall be considered on the same foot with every other mortgage.

Mr. *Dunscomb* by his will and codicil, devised certain lands to his wife for life, remainder to the plaintiff his daughter and her heirs, but directed, that if his son paid to his daughter £500 after his wife's death, to be laid out in lands, then the lands he had devised to her after her mother's death, should go to him and his heirs. And the bill is brought to compel the defendant the son to pay this £500 within a reasonable time, or be foreclosed.

And the counsel for the defendant insisted, that on every bill of foreclosure, the Court decrees an account to be taken of what is due of one side for principal, interest, and costs, and of the rents and profits of the other, which are first to be applied to pay off the interest, and then to sink the principal, and the defendant to be foreclosed, if he does not pay what is reported due within such a time after the Master's report : and that the same decree ought to be made here, for till the account was taken, they could not tell whether it was worth their while to redeem or not.

On the other side it was argued for the plaintiff, that the payment of the £500 was a condition precedent, and that the defendant had no title to an account of the rents and profits from the mother's death, nor was he to pay interest for the £500, and that money by the will was to be invested in a purchase of lands, whereby it appears the testator did not design the rents and profits should go to sink the principal.

Master of the Rolls. The defendant must pay interest for the £500, and is intitled to an account of the rents and profits ; it is the case of every mortgagee, and here may be a foreclosure, for the defendant has not his life-time to pay the money in, but only a reasonable time after the mother's death. (1 Vern. 7, 214, 232, 33, 190 ; 2 Vern. 366 ; 2 Chan. Cas. 33, 58, 147, 159.)

[131] *Monday, March the 3d [1729].*

Case 83.—CHARLES SELBY AMHERST, Esq., Administrator of Dame MARGARET STRODE, his late wife, who was the widow of Sir GEORGE STRODE, deceased, *Plaintiff*; WILLIAM ROBINSON LITTON, Esq., devisee of the will of LITTON LITTON, Esq., deceased, who was the only son and heir of the said Sir GEORGE STRODE deceased, GEORGE DARNELLY, a remainder man, under the will of the said Sir GEORGE STRODE deceased, FRANCIS MASCAL, and JAMES BEDINGFIELD, mortgagees of the estate in question, *Defendants*.

[S. C. 2 Eq. Cas. Abr. 602 ; 5 Bro. P. C. 254.]

At the Chancellor's house, Lord Chancellor.

Mr. Solicitor General for the plaintiff. Sir *George Strode* being seized in fee of the manor of *Itchingham*, and divers lands and hereditaments in the county of *Sussex*, of the yearly value of £500 and upwards, part whereof was subject to two several mortgages made by him to *Francis Brook*, each for a term of one thousand years, for securing the principal sum of £1100 and interest, and other part whereof was subject to another mortgage made by him to *Mary Selyard*, for another term of one thousand years, for securing the principal sum of £500 and interest ; and the said Sir *George* being also seized of other estates in the counties of *Worcester* and *Gloucester*, and *Hereford*, subject to other mortgages, did by his last will and testament, dated the 21st day of *May* 1707, 'devise all his manors, messuages, lands, tenements, and hereditaments, 'to his only son *Litton Litton*, and the heirs male of his body, remainder to his godson *Strode Bedingfield* for life, remainder to his first and other sons in tail male, upon 'condition that the said *Strode Bedingfield* and his issue male should change his name 'of *Bedingfield* to *Strode*, and take the arms of the *Strodes* : and in case the said *Strode Bedingfield* should refuse or neglect to change his surname from *Bedingfield* to *Strode*, 'then the testator's will was, [132] that the said devise should be void, and in such 'case, he gave the same to his godson *George Darnelly* for life, remainder to his first 'and other sons in tail male, he and they changing their surnames in the same manner 'as *Strode Bedingfield* was to do ; and in case he and his issue should refuse, then the 'devise to him and them was to be void ; and in such case, the testator devised the 'same to his own right heirs.'

The testator, Sir *George Strode*, soon after died, and his son *Litton* became seized of the mortgaged premises in *Sussex*, as tenant in tail, subject to the said mortgages, and seized of the reversion in fee as the only son and heir of Sir *George Strode* his father, subject to the several intermediate remainders before mentioned. *Litton Litton* was also seized of a great estate in fee simple in possession, in the counties of *Hertford*, *Bedford*, and *London*, devised to him by the will of Sir *William Litton*, of the value of about £3000 *per annum*, and by his will dated the 16th of *April* 1710, 'gave to 'his mother Dame *Margaret Strode* a legacy of £2000,' and after giving several pecuniary legacies to other persons, the will goes on, 'And my further will and meaning is, and 'I do hereby direct, order, and appoint, that my executrix hereafter named, shall 'within six months after my decease, pay off and discharge all mortgages, and incumbrances laid, and charged upon my estate in *Sussex*, and heretofore charged by my 'honoured father Sir *George Strode* knight, deceased, to wit, one mortgage of £1100 'lent by Mr. *Francis Brook*, and one other mortgage of £500 lent by Mrs. *Selyard* 'to my said father ; and my will and meaning is, and I do hereby direct and appoint, 'that the said several mortgage leases shall be kept on foot, and upon payment of 'the said several sums of money due upon the said mortgages, shall be assigned by 'the said mortgagees, to my dear and ever honoured mother Dame *Margaret Strode*, 'for her sole use and benefit, during the remainder of the several terms in the said 'several mortgages contained. And he further gave to his mother a yearly rent-charge of £100 for her life, to be issuing out of all his manors and lands in the counties 'of *Hertford* and *Bedford*. And gave to his wife *Bridget* a yearly rent-charge of £500, 'to be issuing out of all his manors and lands in the counties of *Hertford* and *Bedford*, 'for her life.

'And as for, and concerning all and every his manors, messuages, lands, tenements, 'and hereditaments, which he the said *Litton Litton* was then seized of, in law or equity,

or which he had a power to give, or charge, he did give and dispose of the same in the manner following, viz. If his wife should be with child at the time of his decease, then he gave all his said manors, &c., to his cousin *William Robinson Litton* (who was his mother's brother's son) until such time [133] as such child should be born, and after the birth of such child, if such child proved a son, then he devised all his said manors, &c., to his said after-born son, and to the heirs male of his body, the remainder to his said cousin *William Robinson Litton*, and his heirs; and in case of the birth of such son, then he devised a rent-charge of £200 issuing and to be paid by his said son out of the said manors and lands unto the said *William Robinson Litton* and his heirs, with a power of distress in case of non-payment; and if the said after-born child proved a daughter, then he gave to such daughter £5000, to be raised and paid out of the rents and profits of the said estate, at the age of eighteen years, or marriage; and if his said wife should not be with child at his death, then he gave all his said manors, &c., to his said cousin *William Robinson Litton*, and his heirs. And he ordered his executrix to pay all his father's just debts, and gave the residue of his personal estate, after his debts, legacies, and funeral expences were paid, to his said wife, *Bridget Litton*, whom he appointed sole executrix of his will; and he appointed that all his furniture, goods, and household-stuff, then being in his manor-seat at *Knebworth*, should remain and continue in his said house after his death, for the use and benefit of the said *William Robinson Litton*, to whom he thereby gave the same. *Litton Litton*, soon after the making of this will died, and his wife *Bridget* proved the same, and *William Robinson Litton* (who was her guardian during her minority) purchased of the said *Bridget* the benefit of the residue of *Litton Litton's* personal estate, and agreed to pay off all the debts, and the wife not being with child, *William Robinson Litton* entered on all the premises, in the counties of *Hertford*, *Bedford*, and *London*; and added the surname *Litton* to his own, and *Strode Bedingfield* who was intitled to the remainder of the estate in *Sussex*, and of the other lands and premises under the will of *Sir George Strode*, entered on the same, and took the name and arms of *Strode*; and in *Michaelmas* term 1710, exhibited a bill in Chancery against *William Robinson Litton*, *Lady Strode*, *Bridget Litton*, and the mortgagees, to be let into a redemption of the mortgaged premises in *Sussex*; and the cause coming to be heard on the 22d of *February* 1711, a decree was made by Lord *Harcourt*, That the mortgagees should be paid off out of the assets of *Litton Litton*, and upon payment, should assign over their mortgages to *Lady Strode*, or her order; but if the said *Strode* should pay to *Lady Strode* the money due on the said mortgages, with interest, before an assignment of the said terms to her, then the said mortgagees were to assign to *Strode Strode*, or to such persons whom he should appoint; but such assignment was to be subject to such further directions as the Court should think fit to make, when proper parties should be before them.

[134] Pursuant to this decree, the defendant *Robinson Litton* paid off the mortgages out of the assets of *Litton Litton*, and the mortgagees assigned to the plaintiff *Selby Amherst*, by the direction of *Dame Strode* then his wife, but such assignments were subject to redemption by *Strode Strode*, or such other persons as should be intitled to the inheritance of the premises under the will of *Sir George Strode*, and to the further directions of the Court. And afterwards the plaintiff, by the appointment of *Strode Strode*, and upon paying to him the said mortgage money, assigned the same to the defendants *Mascal* and *Bedingfield*, subject to such directions as in the decree. *Lady Strode* died, having first made her will, and the plaintiff her husband residuary legatee of her real and personal estate, who took out administration with the will annexed. And *Strode Strode* being dead without issue, the reversion of the mortgaged premises by the will of *Litton Litton* came to *William Robinson Litton*.

In *Michaelmas* term 1725, the plaintiff brought a bill for a redemption of the said terms, and in *Easter* term 1726, the defendant *William Robinson Litton* brought a cross bill to redeem the said mortgaged terms; and both causes being heard the 13th of *November* 1727, as to the title of the defendant *Darnelly*, the Lord Chancellor directed a case to be stated for the opinion of the Judges of *B. R.*, who were unanimous in their judgment, that his remainder could not take place, being on a condition precedent, which never happened. *Strode Bedingfield* having taken the name and arms of *Strode*: and therefore the defendant *William Robinson Litton* must take under the will of *Litton Litton*: and now both causes come to be heard before your lordship on the equity reserved; and the question is, Whether *Litton Litton* intended by his

will, that his mother should have only the money secured by the said mortgage terms, or the terms themselves ? and we think his intention is very plain (as far as it could take place), to give her the said terms, discharged of the money. By the same will he gives her £2000, and surely, if he had designed her by the clause in question, only the money secured by the said mortgages, he would have ordered his executors to pay her so much money, and not have taken this round-about way : he directs his executrix to pay off the mortgages in six months after his decease, and the leases are to be kept on foot ; for what purpose ? to raise the like sum for his mother ? no ; but to be assigned by the mortgagees to his dear mother, for her sole use and benefit, for the residue of the terms ; the absolute interest in the leases, when the money was paid off, were to be assigned, and by suffering a recovery he might have barred the remainder-men of their equity of redemption, and he could not have made use of more proper and plain words to shew his [135] intention, to devise to his mother these terms exonerated of the mortgage money.

But the defendant insists on the decree, whereby *Strode Strode* may redeem, and Lady *Strode* is to assign to him, on his paying off the mortgage money. This decree was right, as the case then stood, for *Litton Litton* could not make those terms absolute against those in remainder, who claimed under the will of Sir *George Strode*, and if *Robinson Litton's* remainder had depended on the same will, he too would have had a right to redeem in his turn, and Lady *Strode* could only have the benefit of the money : but the Court foreseeing that the remainder to *Strode Strode* would be spent in the compass of a life, that at that time he had no issue, and that if he never had any sons, and *Darnelly* no title, another case might happen, such as hath now really come to pass, has made no provision for the defendant *William Robinson Litton*, though he insisted in his answer to that bill, that he was intitled to redeem those terms as remainder-man in fee, but has left that point open for the judgment of the Court, as the facts likewise have done, which passed subsequent to this decree : *William Robinson Litton* paid off the mortgage money out of the assets of *Litton Litton*, and the terms were assigned to *Selby Amherst*, who assigned them to *Mascal* and *Bedingfield* by the direction of *Strode Strode*, with the same reservations as in the decree. The case between *Strode Strode* and Lady *Strode* was very different from the case between the plaintiff and *William Robinson Litton*, *Strode Strode* took under the will of Sir *George Strode*, but *William Robinson Litton* under the will of *Litton Litton*, who being only tenant in tail with a remote remainder in fee, and not having suffered a recovery, could do nothing to put the intermediate remainder to *Strode Strode* in a worse condition than it was by the will of Sir *George Strode*, and could not make the terms absolute, as to him who claimed by a title paramount ; but *William Robinson Litton* claimed under the will of *Litton Litton* himself, who could give him the inheritance, and his mother the terms, which are not to be considered as attendant on the inheritance ; and though they were created for a particular purpose, yet the owner might order them to be kept on foot for the benefit of a devisee, as well as have created original terms out of the inheritance by his will, and though this intention could not have its full effect against *Strode Strode*, it may against *William Robinson Litton* ; and therefore we hope the plaintiff shall have these terms assigned to him on payment of the mortgage money.

Mr. Fazakerly. As the question is between two voluntary devisees, neither of them are intitled to a preference. The intention must be [136] gathered from the words of the will, which must operate, if the testator had a power to devise, and he having the remainder in fee, if the intermediate estates determined, the equity of redemption of these terms was in him and his heirs, which sure he might dispose of ; so the only question is, Whether he has disposed of it. The mortgage leases are to be assigned, which extends to the whole interest, the testator knew they were mortgage leases, and of more value than the money they were security for, and as he has declared, they shall be assigned to his mother, he has likewise declared to what purpose, to her sole use and benefit, and for how long a time ; during the residue of the said terms, so that to desire these terms to be taken from her, is to desire contrary to the express words of the will, as he had a power over the whole terms ; has he reserved any part of them out of this devise ? It is said such a devise is not prudent or reasonable, but your lordship will consider what he has done ; not whether he has acted prudently or otherwise ; and what he has done is for his mother. It is possible he might design for her the

money only ; it is possible he might design her the terms ; and if so, the words of the will are to turn the balance, and they are in our favour.

As to the decree, that is so far from doing us a prejudice, that it makes strongly for us ; for if these terms had been to attend the inheritance, the same directions would have been given as were on the payment of a mortgage to one *Bridges* on another estate, which was expressly ordered by the decree to be assigned over, in trust to attend the inheritance, and the care the Court took in these different directions, shews their opinion, that it was not necessary directly to consider our case, because *Strode Strode* might have children ; but it was necessary to decree the mortgage terms should be assigned, as *Strode Strode* should appoint, because he was not only intitled to the equity of redemption, as tenant for life, but he had a right also to be reimbursed *pro rata* from the owner of the inheritance, but then those assignments are to be subject to such directions as the Court should think fit to make when proper parties should be before them, the decree provided for the only person who was then plaintiff, but it was necessary to reserve the consideration, in case *Strode Strode* should die without issue, whether the terms were absolute in Lady *Strode*, or whether the equity was devised to *William Robinson Litton*, who then claimed it by his answer, and it is therefore very odd for the defendant to insist on this decree, which notwithstanding gives him no equity of redemption, and so is rather against him, or to say that our right shall be determined on implication by this decree.

[139] The rent-charge devised to the mother is not on this estate, but on the other lands, which is a further confirmation that he had disposed of these terms to her, and the objection that the devise of the inheritance without the terms is of no value, and that therefore *Litton Litton* cannot be supposed to have devised them to his cousin separate from these leases, is of no weight, because he has left him by the same will several other estates of great value.

Mr. Wills for the defendant William Robinson Litton. The single question is, Whether by this will the mortgage money only is given to Lady *Strode*, or the terms themselves ? The council for the plaintiffs say, the words and intention of the testator are plainly for them, and the decree to ; or at least, that it leaves the point at large : I beg leave to differ from them, and say first, that the words of the will are plainly for us. There were two interests in these terms, the legal interest, which was in the mortgages, and the equitable interest, which was in the owners of the estate ; and nothing was intended to be assigned by this will, but the legal interest only, and the testator might, and would have used other words, if he had designed to pass the whole interest, as, that the whole interest, or terms should be for her sole use and benefit, or, that the owners of the estate should have released to her their equity of redemption, or would have devised to her the terms themselves. It is the mortgagees who are to assign to her, and they can assign only the redeemable interest they had, and he says, that the mortgages shall be kept on foot, which are words made use of, when the terms are designed to protect the inheritance, and the words, *For her sole use and benefit*, make no alteration in the sense ; for what was she to hold for her sole use and benefit ? why what was assigned to her ? which was only the interest of the mortgagees : and the words, so the intention of the testator is with us ; we were his cousin germain to whom he intended a beneficial devise, and with a design to establish his name, and would he have given away then such a considerable part of the estate, as these terms of a thousand years, and leave us only an idle reversion ? he might as well have devised the estate to his mother, and directed his executrix to pay off the incumbrances. They say, if he had designed her the money only, he would never have used such a circuitry ; yes, the money was liable to be lost, but these lands he knew were a good security for so much money.

But they say, the decree has not determined this point, and that the reservation is in their favour, but by proper parties the Court could not mean such as would dispute the right to redeem, in case *Strode Strode* died without issue, for Lady [140] *Strode* and *William Robinson Litton* were parties to that suit ; so that proper parties to this point were not then wanting, and *William Robinson Litton* does not insist in his answer, that he, and not Lady *Strode*, but that he, and not the plaintiff is intitled to the equity of redemption, and the point reserved does not regard Lady *Strode*, but the plaintiff.

(Tuesday morning, March the 4th [1729]) *Mr. Attorney General for the Defendant William Robinson Litton.* These terms are allowed by both sides to be redeemable : but the question is, By which of the parties ? whether by the plaintiff, or the defendant *William Robinson Litton* ? and this must be determined by the will, and the decree. As to the first, we shall consider the words, and the intention of the testator. There were two interests in these terms ; the legal interest in the mortgagees, which stood as a security for their money ; and the equitable interest of redemption in those who had the inheritance : and no words of the will are applicable to this equitable interest ; but his intention was, that his executors should purchase the legal interest for his mother, there are no devising words of these terms to her, but only a direction to his executors to pay off the said mortgages, and that the mortgage leases should be kept on foot, for otherwise on redemption, the terms would have merged in the inheritance, then that they should be assigned by the mortgagees to his mother, and there is no direction but as to their interest, and the words, *During the residue of the said terms*, were necessary, because the mortgagees had such an interest, and they would have been inserted in any common assignment, they are still called mortgage terms, and there are directions for his heirs to join in the assignment, or to release the equity of redemption, but barely that the mortgagees should assign, therefore in point of law, this assignment would be for the residue of the terms, and in point of equity, it would be subject to redemption. As to his intention, it is impossible to believe, as the estate then stood, he intended to devise to her these terms of one thousand years ; but it is strange they say, he should use such a circuitry ; if he designed her only the money, why could not he directly have devised it to her. The question never is on the reasonableness of a devise, but what the testator has devised, though better reasons may be given for that, than why he should devise her the terms ; he might rather chuse that the incumbrances should be in her hands than in a stranger's, and might think it for her advantage to have her money laid out on such a good security ; by their construction, though he designed the bulk of the estate should go in his name, yet he devises away absolute terms of one thousand [141] years : why did not he devise the fee to her ? he has given his mother a worse estate, without any advantage to him in reversion : and the intention of the testator will further appear, from considering how the estate stood limited at the time of his making the will, *Litton Litton* was tenant in tail, remainder to *Strode Beddingfield* for life, remainder to his first and every other son in tail male, with a contingent remainder to *Darnelly* and his issue male ; and *Litton Litton* had also in expectation that his wife might be *enseint* of a son. They must suppose then that it was *Litton Litton's* intention, that during the continuance of those estates, his mother should have the mortgage money only, for he could not bar those of their right of redemption, who claimed under the will of *Sir George Strode*, and that he has expressed his intention in the same words, by which after the determination of those estates he gives her the equity too, whereas it was probable those intermediate remainders would continue as long as the terms themselves, so they would make the same words carry two meanings, during those estates to be only a devise of the money, and when they were determined of the terms themselves. We shall next consider the decree in 1710, which has determined this question in favour of us, and that was not the point reserved, because all parties were then before the Court that were proper to contest it. It is agreed, that the will of *Litton Litton* could not prejudice those who claimed under the will of *Sir George Strode* ; then who were proper to controvert this point but *Lady Strode* and *William Robinson Litton*, who were both before the Court, and not the sons of *Strode Strode* and *Mr. Darnelly* ; for they were not concerned in this question, because they claimed under the will of *Sir George Strode* ? By the first clause of the decree, the Master is to take an account of what is due on the mortgages, and *William Robinson Litton* is to pay off what is reported due, out of the assets of *Litton Litton*, and the mortgagees are to assign to *Lady Strode*, for security of so much money, if the Court were of opinion the terms belonged to her, would they have given this direction, that they should be assigned as securities ? Yes, they say, because they were subject to redemption by *Strode Strode*, and these terms on his paying of the money are to be assigned as he shall appoint : this direction was in regard to the apportionment of the money, for tenant for life is not obliged to pay off the whole mortgage money, but those in the reversion must contribute, and this assignment is to be subject to the further directions of the Court. It is not the

assignment to Lady *Strode*, but this to *Strode Strode*, that the Court has reserved a power over, when proper parties were before them, which were those who claimed the inheritance, under the will of Sir *George Strode*, against whom *Strode Strode* had an equity of apportionment. If the Court had designed what they insist upon, the decree would not have made the same reservation on both assignments. *Litton* [142] *Litton* directs that all the mortgages on the estate should be paid off out of his assets, which on payment of the money would consequently attend the inheritance, but when tenant for life came to redeem these particular mortgages in question, it would have been injurious to him for the Court to have directed they should attend the inheritance, because he was intitled to a contribution, and this accounts for the different directions of the decree, as to these, and the mortgage to Mr. *Bridges*, and they cannot vary the decree by this original bill, but they must either rehear that cause or bring a bill of review.

Mr. Rider. By the plain construction of the words of this will, it appears that the testator designed these mortgage terms to his mother only as securities: the first direction is, that his executrix should pay off the mortgages; if he had said no more, this would have been for the advantage of the several remainder-men, but then the mortgagees are to assign to Lady *Strode*; could he use plainer or clearer words to show that he designed her the money only? For the natural meaning of them is, that the mortgagees being paid off, should assign to her, and she stand in their place, and the words, *For her sole use and benefit*, relate only to the enjoyment of them as mortgages. The counsel for the plaintiff own, that during the continuance of the remainders, these terms must be considered only as securities, and can it be imagined, that after so many estates spent, the same words should have another signification? But the decree has plainly determined this question, whereby the mortgage terms are directed to be assigned to Lady *Strode* as securities; if these words stood singly, they would be an incontestable evidence for us, and the following words make no alteration, and this assignment is to be subject to such directions as the Court shall think fit to make when proper parties are before them; for this is only spoke of the assignment then last mentioned to *Strode Strode*, and it was necessary to insert those words, for otherwise the several remainder-men would have the benefit of his redemption. But supposing it his intention to give these terms to his mother, the devise cannot take effect. Suppose Sir *George Strode* had created these terms, in trust, to attend the several remainders in tail, and after the expiration of those estates, the remainder over, such a remainder would not be good, because a term cannot be limited over after an estate tail; by this devise they are made terms in gross, and separated from the inheritance, so that a recovery by any of the tenants in tail would not be a bar to it, and therefore such a devise is void, by the doctrine of perpetuities.

[143] *Lord Chancellor*. It seems to me that this question was never before the Court. The decree says, the mortgages shall be paid off, out of the assets of *Litton Litton*, and that the mortgagees shall assign to Lady *Strode*, or her appointment, in order to secure to her the principal and interest, subject to redemption by *Strode Strode*, and then the mortgages were to be assigned to him, and the assignment was to be subject to such directions as the Court should think fit to make, when all proper parties were before them, which must be meant of this last assignment to *Strode Strode*; the bill was brought by *Strode Strode* to have the mortgages discharged: Lady *Strode* by her answer says, she is intitled to the money, and *Robinson Litton* says, he is intitled to the equity of redemption as devisee of the reversion; Lady *Strode* insists, that the mortgage money is to be paid off out of the assets of *Litton Litton*, and the terms assigned to her, but takes no notice of what interest she has in them: and this was the only point for the directions of the Court. The case then before us is no more than this; an estate is limited to one in tail male, remainder to another for life, remainder to his first and every other son in tail male on a contingency, remainder over to another in the same manner, reversion in fee to the tenant in tail; the tenant in tail makes his will, and thereby taking notice of two mortgages on the estate, directs his executrix to pay them off, and that the mortgaged leases be kept on foot, and assigned to his mother for her sole use and benefit, during the remainder of the said terms, which are terms in gross in the mortgagees; if the mortgagor indeed pays off such mortgages, the terms will attend the inheritance, but as he has a property in them, he may certainly disannex them; what then does the testator intend to give by these words? not the money, for the mortgages were to be discharged out of his personal

estate; not that the terms might attend the inheritance, or be surrendered, but to the end that the mortgagees might assign them to his mother, not as a trustee, but for her sole use and benefit: so that the words are very plain and clear, and tho' the testator had no power to make these terms absolute against the intermediate remaindermen, yet the will must take place as far as it may, and the decree could go no further against them, than to put the mother in the place of the mortgagees, but now those remainders are all spent; the case is only this: tenant in fee of lands subject to two mortgages, orders his executors to pay off the mortgage money out of his personal estate, and devises the mortgage terms to one, and the inheritance to another, as both parts of such a will are consistent, both the devisees must take; these terms never attended on the inheritance, but are substantive terms, and given to his mother immediately; or suppose they were attendant, [144] they are not devised over after the determination of estates tail, for the devise does not take effect till after the death of the testator, when there was only an estate for life in being.

Be it therefore decreed, that it be referred to a Master, to see what is due for principal, interest, and cost on the said mortgages, and that on payment thereof by the plaintiff, the mortgagees shall assign to him, and he is to enjoy the said terms absolute against the defendant *William Robinson Litton*, and his heirs; and the defendant's cross bill is to be dismissed; and as to the defendant *Darnelly*, be it decreed, that he took no estate by the will of *Sir George Strode*. (Post, Cas. 120.)

Monday, March the 3d [1729].

Case 84.—MARTIN *versus* STILES and SHERMAN.

At the Rolls.

One seized in fee of upper and lower mills, leases the lower with the stream, and covenants for quiet enjoyment, and after leases the upper, and the lessee covenants not to divert or pen up the said streams to the prejudice of the lower mills, the lessee of the lower mills may bring a bill on breach of this covenant, in the room of his lessor, for an injunction, without first bringing an action of trespass.

Sir James Clark being seized in fee of the upper and lower mills, made a lease of the lower, which were corn-mills, with the water-courses thereto appertaining, to the plaintiff for twenty-one years, and covenanted for himself, and those claiming under him, that the plaintiff should quietly enjoy; *Sir James* afterwards lets the upper mills, which were four powder-mills and a corn-mill, to the defendant *Styles*, who covenanted that he would not divert, convert, or turn, by himself, his workmen, or under tenants, any of the streams or water-courses coming down to the said mills; or pen up the said streams, whereby the lower mills might be prejudiced for want of water: and *Styles* makes an under lease of the corn-mill to the defendant *Sherman*. The plaintiff brings this bill against the defendants, to have the benefit of this covenant, in the place of *Sir James Clerk*, who had covenanted for his quiet enjoyment, and assigns as a breach, that the defendant *Sherman* had penned the water up so high, that the stream run back to *Ember Mills*, instead of running down to the plaintiff's mills: and the plaintiff read evidence to prove, that the defendant penned the water up so high, purely to distress him, and turn it on the *Ember Mills*; on the other hand, the defendants endeavoured to prove, that it was necessary to the working their own mill, that the stream should be penned up so high; that the plaintiff's mills being enlarged drew more water than usual, and that damming up the stream did not make it run back, as they had tried by laying straws on it.

[145] *Master of the Rolls.* The landlord having covenanted with the plaintiff, that he should quietly enjoy the streams and water-courses, the plaintiff is intitled to stand in the place of the lessor, to have the benefit of the defendant *Styles's* covenant, not to prejudice or hurt the plaintiff's mills, and to a perpetual injunction without first bringing an action of trespass; and I would grant the injunction according to the words of the covenant; but then, if the plaintiff should apply to the Court for a breach of this injunction, the question would come in dispute, how high the defendant might pen the water? which is not settled by the evidence on either side; and one witness for the defendant swears, that the higher the water is penned up, the better his mill works; and then, though the penning may be a prejudice to the plaintiff,

it is not a breach of the covenant, for the defendant himself is in the first place to have the full benefit of the water.

The plaintiff cannot have a *quod permittat*, for that lies only for the owner of the inheritance, regist. 155. So that I am only in doubt how to give the plaintiff a proper relief, and this case is not like to the establishment of a right to a water-course, but rather like to the settling of boundaries, and may be determined, either by persons chosen by the parties, to be approved of by the Master, who may settle how high the defendant may pen the water, consistent with his covenant, or by commissioners.

But at last the *Master of the Rolls* directed three issues to be tried, First, Whether the defendant had penned up the water, consistent with his covenant, or not? Secondly, If not, how much the plaintiff was damnified thereby? And Thirdly, how high the defendant might pen up the water, consistent with his covenant.

[146] *Friday, March the 7th [1729].*

Case 85.—The Earl of TANKERVILLE, *Plaintiff*; Sir GEORGE COKE, Mr. RUTH, and Mr. MILLS, executors of CHARLES late Earl of TANKERVILLE deceased, JAMES Earl of BERKLEY, surviving trustee, Lord LIMINGTON and Lady BRIDGET his wife, WILLIAM PAULET Esq. and Lady ANNABELLA his wife, WILLIAM WILMER Esq. and Lady MARY his wife, daughters of the late Earl of TANKERVILLE deceased, Mr. GORDON, executor of GREY BENNET one of the younger sons of the late Earl of TANKERVILLE, ELIZABETH MISSON, executrix of Sir JAMES MISSON a trustee, CHARLES BENNET Esq., commonly called Lord OSSULSTON eldest son of the plaintiff, HENRY NEVIL alias GREY, devisee under the will of RALPH Lord GREY, and CHARLES WILMER son of WILLIAM WILMER, *Defendants*.

At the Chancellor's house, Lord Chancellor.

A. having a power to charge only £5000 a-piece, the other £3000 a-piece, shall not be made good out of his personal estate, because he designed only to charge the lands, and has devised away the residue of his personal estate.

If one grants an annuity out of the manor of *Dale*, and has no such manor, yet his person is liable.

A. having a power to charge lands with portions for younger children, suffers a recovery, and after by will reciting his power, he charges the estate with £1000 for the portion of his daughter, and devises her £1000, the recovery having extinguished his power, the £1000 charged on the lands was decreed to be paid out of his personal estate.

Mr. Solicitor-General for the plaintiff. This bill is brought for a specific performance of articles, entered into by the plaintiff's father, previous to his marriage with *Mary*, the daughter of the late *Ford Lord Grey* deceased; and to be relieved against two deeds of appointment, whereby the late Earl of *Tankerville* charged the *Ossulston* estate with the payment of £8000 a-piece, for the portions of the defendants, his younger children. And in order to set the plaintiff's case in a clear light before your lordship, I shall consider how the several estates of *Ford Lord Grey*, and of *Charles* late Earl of *Tankerville*, stood limited at the time of the execution of these articles: part of the estate of *Ford Lord Grey* was in settlement, and part out of settlement. The lands in settlement were by indentures of lease and release, dated respectively the 31st of *May*, and the first of *June 1672*, [147] conveyed by *William Lord Grey* his grand-father in trust to the use of himself for life, remainder to his son *Ralph* for life, remainder to *Ford* the first son of *Ralph* for life, remainder to his first, and every other son in tail male, remainder to *Ralph* the second son of *Ralph* for life, remainder to his first, and every other son in tail male; remainder to *Charles*, the third son of *Ralph* for life, remainder to his first, and every other son in tail male, with proper limitations to trustees to preserve the contingent remainders, and for default of such issue, to the fourth, and every other son of *Ralph*, in tail male successively, remainder to the heirs male of the body of *William* in tail male, remainder to his own right heirs.

In 1681, *Ford Lord Grey*, by indentures of lease and release, conveyed all his lands out of settlement, to *George Earl of Berkley*, and others, and their heirs, in trust, as to part, of the value of £1600 *per annum* out of the rents and profits, or by mortgage, or sale, or otherwise, as they should think convenient, to pay off and discharge all his debts, by mortgage, statute, or recognizance, and then to raise £20,000 for the portion of his daughter *Mary*, in such manner as he should appoint; and if he should

die before any appointment, in trust, for her and her heirs; and after the raising of those sums, then to raise any other sum he should appoint, and for want of such appointment, in trust for those to whom the lands in settlement should come after his decease. And as to the other part, in trust to pay his debts, by bond, specialty, or note, and then in trust, for him and his heirs.

John Lord Ossulston, by his will, and codicil dated the 28th of *November* 1694, devised all his lands to his son *Charles* for life, without impeachment of waste, remainder to his first, and every other son in tail male, remainder to the heirs male of his own body in tail male, remainder to his own right heirs, with a power to his son, and the several heirs male, as they severally and respectively came into possession, to make a jointure for his wife, after the rate of £10 for every £100 of her portion, and to charge the said lands with portions for younger children.

The estates of *Ford Lord Grey*, and of *Charles Lord Ossulston*, standing limited in this manner, articles were entered into, dated the 19th of *June* 1695, between the said *Ford Lord Grey*, and *Charles Lord Ossulston*, reciting, Whereas a marriage was intended to be shortly had between *Charles Lord Ossulston*, and *Mary*, the daughter of *Ford Lord Grey*, and whereas *Ford Lord Grey* had conveyed part of his estate in trust, *inter al'*, to raise £20,000 for the portion of his said daughter, which money could not be immediately raised (because as I have already observed [148] to your lordship, the trust was in the first place for the payment of debts, which at that time were not fully satisfied), and whereas by the will, and codicil of *John Lord Ossulston*, the *Ossulston* estate was settled in such a manner on the Lord *Charles*, that he could not make a jointure so soon as the said marriage was intended to be had (for by the codicil, as the jointure was to be proportionable to the quantum of the portion, it could not be settled till the payment of the portion), *Ford Lord Grey* covenants, if the said marriage took effect, to enter into a security, for the payment of £1000 a-year interest, till the raising of the £20,000, in consideration whereof, *Charles Lord Ossulston* covenants, that on payment of the £20,000 he would assure lands in fee simple in the kingdom of *England* of £4000 a-year at least, to the use of himself for ninety-nine years, if he should so long live, without impeachment of waste, remainder as to part of the value of £2000 a-year to his wife for life, for her jointure, remainder of the whole to his first, and every other son in tail male, remainder to his own right heirs: and in case the said Lord *Ossulston* died without issue male, the said lands were to stand charged with the payment of £15,000 for daughters portions, but if he died, leaving issue, and one younger son, or daughter, he, or she, was to have £10,000 for their portion; if more sons, or daughters, they were to have £5000 a-piece, to be raised out of the said lands; and it was covenanted and agreed by and between the parties, that if Lord *Ossulston* died before the payment of the £20,000 or the settlement of a jointure, the jointure should not be made, or the portion paid to the executors of Lord *Ossulston*, but to the proper use of *Mary* herself: and if *Mary* died without issue in his life, he was to be paid only £10,000 within one year after her decease: and it was further agreed that if *Ford Lord Grey* died before the payment of the £20,000, the estate charged therewith should descend on *Mary* and her heirs, in lieu of the said portion and jointure. The marriage was afterwards had, and Lord *Ossulston* had six children by his said lady. *Ford Lord Grey*, afterwards Earl of *Tankerville*, died the 24th of *June* 1721, having made his will, and appointed Lord *Ossulston* his sole executrix: and *Ralph Lord Grey* his brother entered on the estate, as next in remainder, the 18th of *May* 1723, articles were entered into between the said *Ralph Lord Grey*, and Lord and Lady *Ossulston*, as sole executrix of her father, the late Earl of *Tankerville* deceased, reciting, That whereas differences had arose between the parties, *inter al'*, about several securities which *Ralph Lord Grey* had become bound in with his brother, the late Earl of *Tankerville*, in order to prevent and put an end to the same, it was agreed, that *Ralph Lord Grey* should pay off £8000 due by mortgage of part of the said *Grey's* estate to Lady *Grace Pierpoint*, and *John Savil, Esq.*, and £15,000 due by mortgage of another part of the said estate to the Earl of *Rochester*, and the said mortgages [149] were to be assigned to Lord *Ossulston* as a security for the payment of £15,000 agreed by these articles to be paid by *Ralph Lord Grey* to Lord *Ossulston*, and that he should indemnify Lord and Lady *Ossulston* from the said mortgages, and that he should pay an annuity of £100 a-year to Mr. *Ireton*, and £15,000 to Lady *Ossulston* in full of her portion, and of all her right and title to the premises so mortgaged by her late father as aforesaid: and more effectually to enable *Ralph Lord Grey* to make

these several payments, Lord and Lady *Ossulston* covenant, that lands of £2000 a year, part of the lands contained in the settlement of 1672, of which *Ralph Lord Grey* was only tenant for life, should by act of Parliament be settled on *Ralph Lord Grey* and his heirs; and that if there was occasion to raise money before the said act could be passed, they would join with him in the mean time in proper conveyances, and that on payment of the £15,000 they would reassign the mortgages, as *Ralph Lord Grey* should appoint; and Lord *Ossulston* for himself further covenanted and agreed, that on payment of the £15,000 he would settle in jointure on his lady £100 a year for every £1000 of her portion, and pursuant to these articles, 10th of April 1703, Lord and Lady *Ossulston*, by fine, and recovery, and indenture, conveyed the said lands to *Francis Eyles*, for the term of one thousand years (as a security for the repayment of £15,000 borrowed of the said *Eyles*, to pay off and discharge the Earl of *Rochester's* mortgage) remainder to *Ralph Lord Grey* and his heirs; and on the 24th of February 1703, an act of Parliament passed to confirm these articles, and *Ralph Lord Grey* entered into a bond of the penalty of £30,000 for the payment of the £15,000 and interest to Lord *Ossulston*; but before the same was paid, *Ralph Lord Grey* died, having first made his will, dated the 13th of March 1704, and thereby devised all his real estate to Lord *Sommers*, and others in trust, to pay all his debts, and then in trust to convey the same to *Henry Nevil*, alias *Grey*, the defendant, for life, remainder to his first, and every other son in tail male, with several remainders over; in 1709 Lady *Ossulston* died. The 25th of May 1716, *Charles Lord Ossulston*, then Earl of *Tankerville*, by deed poll, reciting the will and codicil of *John Lord Ossulston*, and his intermarriage with *Mary*, the daughter of *Ford Lord Grey*, by whom he had six children, and that a treaty of marriage was on foot between Mr. *Wallop* and his eldest daughter Lady *Bridget*, and that the said Mr. *Wallop* had agreed to accept £8000 in full of her portion: the Earl of *Tankerville* in order to raise the money, by virtue of the power given him by the said will and codicil, and of all other powers, appoints and sets over part of the fee farm rents of the *Ossulston* estate to *James Earl of Berkley* and Sir *John Bennet* for a thousand years, in trust, to raise £8000 as a portion [150] for the said Lady *Bridget*, payable at her day of marriage, or at his decease, or in his life-time, as he should appoint: and Mr. *Wallop*, now Lord *Limington*, covenants, that whereas the Lady *Bridget* was intitled to £10,000 by the will of her grand-mother, on payment of the £8000 he would give a release for the £10,000 to the Earl of *Tankerville*, and this deed of appointment is assigned to Lord *Limington* to secure the payment of the £8000, and the marriage being had, Lord and Lady *Limington* executed a general release to the Earl of *Tankerville*, and the Earl having assigned over the bond of £30,000 of *Ralph Lord Grey*, to Lord *Limington* as a security for the £8000, Lord *Limington* reassigns the said deed of appointment to Sir *James Misson*, in trust for the Earl of *Tankerville*, his executors, administrators, and assigns. The 10th of December 1716, *Charles Earl of Tankerville* by deed poll, reciting the will and codicil of *John Lord Ossulston*, and the marriage of Lady *Bridget*, and that her portion was paid, and the rest of his younger children were unprovided for, by virtue of the power given him by the said codicil, and of all other powers, assigns over several fee-farm rents of other part of the *Ossulston* estate to the same trustees for one thousand years, in trust, to raise £8000 a-piece for his younger children after his decease, or in his life-time, as he should appoint. *Henry*, one of the younger sons, died in the life-time of the Earl his father, *Charles Earl of Tankerville* made his will, 'whereby he recites the will and codicil of his father, and the two deeds of appointment, which he thereby confirms: and lest there should be any defect in the execution of his power, or that the said fee farm rents should not be sufficient to raise the said portions, therefore in further execution of his power, by the said codicil, and of all other powers, and authorities him in that behalf enabling, he devises all the *Ossulston* estate to the same trustees, for a term of two thousand years, if the fee farm rents should not be sufficient, with ease and speed, to raise the said portions to his daughter *Wallop*, and his other younger children, to raise the said portions, or so much thereof as the said fee farm rents should not be sufficient to raise; it being his intention that the real estate thereby devised, should be an additional security, but not to give them more than £8000 a-piece'; then he devises all the rest, and residue of his real and personal estate to his executors, Sir *George Coke*, Mr. *Ruth*, and Mr. *Mills*, in trust, out of the rents and profits, or by mortgage or sale, to pay Mrs. *Sydney* £200 a year for her life, and the surplus to *Gray Bennet* and Lady *Mary Wilmer*, two of his younger children; and after, by a codicil dated

the 16th of April 1722, he devises the said surplus to *Gray Bennet*, to be paid him at his age of twenty-one years, and if he died before that age, to his grand-sons the defendants [151] *Charles Bennet*, eldest son of the plaintiff, and *Charles Wilmer*; and if either of them died before the age of twenty-one years, then to the survivor of them, and soon after died, and *Gray Bennet* is since dead under the age of twenty-one years.

The first point to be considered arises from the marriage articles of 1695, whereby the late Earl of *Tankerville* covenants to settle lands of £4000 a year, and no settlement having been made, we have a plain demand against his executors, to have lands of that value purchased out of the assets of the said Earl, or to have his personal estate applied to that purpose as far as it will go, but it is said these lands were to be conveyed and assured on a condition precedent, on the payment of the £20,000, which not having been paid, the Earl is not obliged to perform the articles: but it plainly appears that this money was paid; for though it was not actually paid by *Ford Lord Grey* in his lifetime, yet the principal was charged on the estate, by the settlement in 1681, and *Ford Lord Grey* confessed a judgment defeasanced, for the payment of the interest, so that both the principal and interest were secured, which in equity is considered as a payment; besides *Lady Ossulston* was executrix of *Ford Lord Grey*, and possessed herself of all his personal estate, which was very considerable, though we do not know the exact amount of it, and therefore it shall be presumed, that the personal estate, with the £15,000 secured to her by *Ralph Lord Grey*, was a full satisfaction of the £20,000. But suppose the late Earl of *Tankerville* had compounded this debt for £15,000, yet in regard to the plaintiff, and his other children, who were no parties to that composition, it must be considered as if the whole was paid. But the executors likewise object, that the late Earl of *Tankerville* at the time of the articles, was not seized of any lands in fee simple, and therefore it cannot be supposed he designed to purchase lands, but that his intention was, that the *Ossulston* estate, which is about £4000 a year, should go as a satisfaction according to the articles. But how can the articles bear this construction? whereby he covenants to convey and assure lands in fee simple to such uses, now he was only tenant for life of the *Ossulston* estate, and it is no answer, that he would permit his son to enjoy it; for it was not in his power to hinder him, he claimed by the same will with his father, so this is not like the case, where the covenantor suffers lands to descend, but the plaintiff, notwithstanding the large portion of his mother, by these marriage articles would be the purchaser of nothing. But if the *Ossulston* estate being taken notice of in these articles, the nearness of the value, and the likeness of the limitations, should induce your lordship to think that these were the lands intended to be settled, that will determine the other question of the portions. By the codicil of *John Lord Ossulston*, the power of *Lord Charles* to make a [152] jointure is limited, but to provide for younger children is indefinite; yet regard must be had to the value of the estate, in the execution of it: the *Ossulston* estate is about £3800 *per annum*, and is charged by the deed polls with the payment of £40,000, so that if the power is considered in this light only, it is not well executed, for tho' the codicil gives the late Earl an unlimited power, this Court will never decree an unreasonable execution of it; for by that means, tho' he was only tenant for life, it would be in his power to disinherit his eldest son, contrary to the intention of the donor, that the bulk of the estate should go to him: but if the articles refer to the *Ossulston* estate, they restrain this general power; it was proper on the marriage to ascertain the portions of the younger children, it was therefore agreed, if there were daughters, and no issue male, they would have £15,000, if a son, and younger children, they should have £5000 a-piece, and if the father can say, I have made you a satisfaction by the *Ossulston* estate, for the lands to be settled by the articles, the plaintiff sure may say, your unlimited power over that estate is restrained by the same articles; for if the articles are taken in this sense, what advantage are they to the plaintiff, but by a restraint of the power; and the *Ossulston* estate cannot otherwise be taken as a satisfaction of the covenant, for if by the articles he covenants that the *Ossulston* estate should be limited to such uses, it can come to the plaintiff with no greater burthen than the articles charge it. But it is said, that the plaintiff in his answer to a bill filed against him by his late father, has admitted he had a power to charge £8000 a-piece for the portions of younger children, and submitted to the raising of them.

As to this objection, your lordship will please to observe, that *Lord Limington* having assigned over the deed poll of appointment of £8000 to *Sir James Misson*, in trust, for *Charles* late Earl of *Tankerville*, the said Earl filed a bill in the name of *Lord*

Limington and his lady, against the now plaintiff his son, to have the money raised : and also another bill, in the name of the other younger children, to have their portions raised : to which bills, the now plaintiff put in his answers, and insisted that the said sums were highly unreasonable, and no way proportionable to the value of the estate, and contrary to the intention of *John Lord Ossulston* the testator, who designed the estate should continue in the name and blood of the *Bennets*. At this time the plaintiff had no knowledge of the articles of 1695, and being under the displeasure of his father, and in great difficulties, upon some proposals from the late Earl, he agrees to put in other answers, in which he owns the £8000 a-piece for the portions, to be well charged, and submits to the raising of them ; but at this time too he was a stranger to the marriage articles, which were industriously concealed from him, but the case appeared to him singly on the will and codicil of [153] *John Lord Ossulston*. Under these circumstances, and ignorance of his title, he was induced to put in those answers. The late Earl died in 1722, and then upon examining his papers, several briefs were found, and cases for the opinion of counsel, wherein these marriage articles are taken notice of : upon which, the plaintiff applied to the defendant *Mills*, who was agent and solicitor for the late Earl, for the said articles, but he denied they were in his hands. The plaintiff filed a bill against him for a discovery, and in his answer he confesses that they were afterwards found among his papers, by one of his clerks ; so that the plaintiff's answer being put in, whilst he was ignorant of his title, and it was industriously concealed from him, shall not injure him ; for if under this ignorance he had joined in a mortgage or a conveyance, the Court would have relieved him, as appears by numbers of precedents ; and the case of an answer only, is stronger, upon which your lordship is to make a decree.

These are the general points in this case ; there is likewise another question, that particularly relates to Lord *Limington* : Whether over and above the £8000 he received as a portion with his lady, he is intitled also to £8000 by the will of the late Earl of *Tankerville* ? The will takes notice of the appointment of £8000 to Lady *Limington*, and lest the execution of the power should be defective, or the fee-farm rents not sufficient, the testator charges all the *Ossulston* estate with £8000 a-piece for all his younger children indefinitely, which words they say amount to a new devise of £8000 to Lady *Limington*, as she is expressly mentioned with the younger children. The deed poll of assignment to Lord *Limington* was reassigned by him to the late Earl, who intended by his will not to vary the portions, but to make a further security for the payment of them, it did not appear at that time that the portion was reassigned, and that the late Earl stood in the place of Lord *Limington*, but he has expressed himself in his will, as he did by his bill. But the words, That his intention was not to give them more than one £8000 a-piece, exclude all double portions ; therefore another question is, How this money shall go ? Whether it shall be raised for the executors, in trust for the residuary legatees, or sink into the inheritance for the benefit of the plaintiff ; because the power is to be executed in a reasonable manner.

Monday, March the 10th [1729]. The Lord Chancellor, being assisted by Sir *Robert Raymond*, Lord Chief Justice of B. R. and Mr. Baron *Comyns*, Mr. *Solicitor General* opened the case again, and argued to the same effect as before.

[154] Tuesday, March the 11th [1729]. Mr. *Lutwych*. The articles in 1695 were entered into previous to the marriage, and on a valuable consideration ; and if they are not construed to restrain the power to provide portions for younger children, they will be of little or no import ; and tho' it is agreed by those articles, that if *Ford Lord Grey* died before payment of the £20,000, the estate charged should go to *Mary*, in satisfaction of the portion and jointure. It is not said that it should go in satisfaction of the lands to be settled, and the descent of the lands is in itself a payment, tho' Lord *Ossulston* afterwards agreed to accept £15,000 from *Ralph Lord Grey* for the said portion, so that the plaintiff is plainly intitled to the benefit of these articles. The late Earl of *Tankerville* being by the will and codicil of his father, *John Lord Ossulston* tenant for life, with a remainder to his first, and every other son in tail male, and with a power to make a jointure, and provide portions for younger children, covenants by articles previous to his marriage, to settle lands of £4000 a year on himself, and the issue of that marriage, and £2000 a year for a jointure for his lady, and £5000 a-piece for the portions of younger children. If we consider these articles without any relation to the *Ossulston* estate, we are in the

ordinary case ; the plaintiff is a purchaser, and may come into this Court to have a specific execution of them, and the late Earl, though he had taken no notice of his power in the articles, yet his covenant to settle a jointure, would be construed to be an execution of his power, as was adjudged in *Lady Coventry's* case ; but it is hard to say, that the lands which the plaintiff holds under the will of his grand-father, shall be taken, as the lands which his late father covenanted to assure ; so that in consideration of marriage, and of a portion of £20,000, he covenanted to settle an estate he could not hinder him of : but supposing this estate to be named in the articles, and that the late Earl designed to refer to it, it falls short of the value, and is not an improvable estate, but consists in fee farm rents, which are not as valuable as other estates, because they are not capable of improvement. It is agreed by these articles, that the eldest son should have the lands subject only to £5000 a-piece for the portions of younger children, this covenant has abridged the late Earl's general power, and after the execution of these articles, he could no more appoint a larger provision, than he could make a sale of any part of the estate ; and if the *Ossulston* estate is to be taken as a satisfaction of the covenant, this is the only thing he parted with by these articles ; but supposing them out of the case, no unlimited power [155] will be established by a decree of this Court, if it is unreasonably executed. By the codicil it appears, that *John Lord Ossulston* designed the estate should remain in the family, and where the power is executed in such a manner as totally to defeat this intention : it is in the discretion of the court of equity to restrain it ; and it appears from the articles, that the parties thereto thought £5000 a-piece to the younger children a good execution of the power, tho' the lady brought so great a portion. As to the answer, a Court would relieve the plaintiff against it, even after a decree, as it was obtained from him, without knowing of the articles ; and by the plaintiff in that cause concealing from him what was material for him to know, for the bill was really brought by the late Earl, though in the name of the Lord *Limington*, who had assigned over the appointment to him.

Wednesday, March the 12th [1729]. *Mr. Attorney General for the defendants, Lord and Lady Limington, Mr. Paulet, and Lady Anabella his wife, and Mr. Wilmer, and Lady Mary his wife.* This case depends upon the codicil and articles, and may be considered under these two heads, First, Whether the articles ought to be carried into execution ? And secondly, In what manner ? and whether, so as to defeat the appointments for the portions of younger children ? It appears from the articles, that the late Earl was unable to make a present settlement, and these articles were afterwards laid aside, and the Earl always acted without any regard to them, which is a sufficient evidence that the parties waived them, and the setting them up now may create confusion, and defeat subsequent settlements. In 1681, *Ford Lord Grey* conveyed certain lands in trust to pay his debts, and raise £20,000 for his daughter's portion, payable as he should appoint, and if it was not raised in his life-time in trust, for her and her heirs, otherwise it was to go as the settled estate at *Chillingham*.

By the marriage articles, *Ford Lord Grey* covenanted to pay £20,000 for his daughter's portion, no provision is made for the payment of the principal, but he confessed a judgment to secure the payment of the interest ; and there was a proviso in the articles, that if *Lord Ossulston* died before the portion was paid, or a jointure made, the portion should not be paid to his executors, but to *Lady Ossulston* : and that if *Ford Lord Grey* died before the portion was paid, all the said lands should come to *Lady Mary* and her heirs in full satisfaction of her portion and jointure. The next consideration is, What has happened since these articles ? *Ford Lord Grey* died before the [156] money was paid, and controversies having arose between *Ralph Lord Grey*, who succeeded him in the honour and estate, and *Charles Lord Ossulston* and his lady, in relation to the estate and incumbrances. By articles dated the 18th of *May* 1703, it was agreed, that *Ralph Lord Grey* should pay off the several incumbrances, and £15,000 to *Lord Ossulston*, not only in satisfaction of his lady's portion, but of her right and title to the lands and premises in mortgage ; and that *Lord Ossulston* should settle £100 a year for every £1000. This was a new agreement, and *Lord and Lady Ossulston* covenant to convey the inheritance to *Ralph Lord Grey* and his heirs, which shews they proceeded on the proviso that had happened, by *Ford Lord Grey's* dying before the payment of the money. But allowing these articles are not waived, but are to be carried into execution, the next question is, Whether the *Ossulston* estate is to be deemed as a satisfaction of the covenant,

and whether these articles shall set aside the appointments in favour of the younger children ? It does not appear indeed that any lands descended in fee to the plaintiff from his father the late Earl, but his father could have hindered him from enjoying the *Ossulston* estate ; for no estate being limited by the codicil to trustees to preserve the contingent remainders before a son was born, the late Earl could have barred the estate by a fine or a feoffment, and this estate comes limited to him as by the articles. The late Earl under his general power appoints a term of a thousand years for raising £8000 to Lady *Limington*, and another term of a thousand years, for raising the like portions for his other younger children. The articles are general, they recite indeed, that the *Ossulston* estate was so settled, that the Earl could not make a jointure, but then he covenants to convey lands in fee ; so that this general covenant created no lien on any particular lands ; where it is agreed by articles to settle particular lands, they create a lien on that particular estate, and the parties are considered in equity to have the same interest, as if the articles were actually carried into execution ; but where the articles are general, the person intitled to the benefit of them, claims only as a general creditor by specialty, as was admitted in the case of Lady *Coventry* : in that case a particular power was recited, and the Earl covenanted to settle lands by virtue of his power (or otherwise) which words were adjudged to be only auxiliary ; besides settlements were drawn, wherein the particular lands were described, but the Earl died before the execution of them ; so these articles can no ways affect his power under the codicil, either in law or equity, which he has executed by these deeds of appointment ; and consequently the appointments are good.

And if the articles do not affect or restrain this power, I shall next consider whether it is executed in a reasonable manner. It is plain, *John Lord Ossulston* designed to trust his son with [157] the execution of this power, and there is no instance where a court of equity has controlled such a power legally executed by a father in favour of his children, and the testator gave this power to his son, not only with a view to the *Ossulston* estate, but also with regard to any other estate he might be seized of by marriage, or otherwise, at the time of the execution of it, and was the very reason why he gave him a discretionary power ; and when the late Earl executed this power, the *Grey* estate also of £3000 a year was descended on the family ; But this point is determined by the plaintiff's second answer, which I do not consider now as a good answer in respect of the articles, for if they were concealed from him, without doubt it shall not prejudice him as to them ; but as far as the point was open and known to the plaintiff, so far it is a good answer. Now the codicil is particularly stated and set forth by the bills, and there is no proof of any imposition on the plaintiff, and he has constantly paid the interest of the portions since his father's death. The next question relates to Lord *Limington*, who claims £8000 under the will of the late Earl, in which Lady *Limington* is expressly named, and if he does not take by this will, he will not have a shilling out of the estate of her father, though he compounded a debt of £10,000 and £9000 interest, for £8000, so it is natural to think the late Earl her father designed her a recompence, and therefore by his will he sets up the appointment, and discharges the trust thereof for himself, in favour of Lady *Limington* ; the portions are to be raised for all the younger children, and there is as full a declaration that the £8000 should be raised for Lady *Limington* as for the others, but they rely on the words, *But so as not to give them more than one £8000 a-piece*, they show his intention, that only one £8000 for every child should be charged on the estate ; but this is not to be applied to the other part of the case, that Lady *Limington* shall not have the £8000 because she before compounded a debt for another £8000, but the words as to her are to be taken in the same sense as to the other children. If his power was well executed, the appointment was good, and the assignment over of it to the late Earl was good, and he had a power to devise it to any person, as we think he has, to Lady *Limington*.

N.B. The Court would not allow parol proof to be read, of Lord *Tankerville's* intention to give the £8000 by his will to Lady *Limington*, though her counsel insisted, they might read proof of his having declared so, tho' they could not read it to charge the real estate by the will. (Post, Cas. 157.)

Mr. Wills. Two objections have been made to the raising £8000 a-piece for the portions of the younger children, the articles of 1695, [158] and the unreasonableness of the sums. But the articles do not affect this question for two reasons ; first, because they are at an end ; and secondly, because if they are still subsisting, and the plaintiff

is intitled to have them carried into execution, they create no lien on the *Ossulston* estate, but the plaintiff can have a satisfaction only out of the real and personal assets of the late Earl. The waiver of the articles depends on the words, and the subsequent facts. *Ford Lord Grey* died before the portion was paid, in which case the articles were not to be carried into execution, for then £1600 a year would descend on Lady *Ossulston*, in lieu of her jointure, and the plaintiff would have no occasion for a settlement, for those lands would come to him by descent from his mother, and the *Ossulston* estate also, by the will of his grand-father. The subsequent transactions also show the articles were not in being, because the parties take no notice of them, and the articles of the 18th of May 1703, and the act of Parliament to confirm them, make no mention of these marriage articles, but go on another foot, for if the £15,000 had been paid to make up the £20,000, the late Earl would have covenanted to make a jointure for the whole £20,000 and not for what he received; and though Lady *Ossulston* was executrix of *Ford Lord Grey*, if she had retained any assets, the value of them, as that they amounted to £5000 or the like sum, would have been mentioned.

But if the articles still subsist, the plaintiff is not intitled to a satisfaction out of the *Ossulston* estate, for tho' the codicil, and the *Ossulston* estate, are taken notice of in the articles, that recital does not shew he intended to settle that estate, but rather the contrary; for the words are, That *John Lord Ossulston* had so settled the estate, that Lord *Charles* could not make a jointure, so they cannot effect this provision, which we claim not by the articles, but by the will of our grandfather.

As to the unreasonableness of the sums, the case of a trustee and a father is very unlike, and all the parties seem to allow this a reasonable provision, because they thought £5000 a convenient portion when the family was possessed only of the *Ossulston* estate; and by the same rule, £8000 is a reasonable provision, when the *Grey* estate came into the family; for the plaintiff by his answer confesses both estates to be £8000 a year, and his answers are very consistent, for *Henry*, one of his brothers, died between his first and second answer, so that tho' he might think the sums unreasonable when he put in his first answer, yet after the death of one, he might submit to have them raised for the others.

[159] As to the claim of Lord *Limington*, it does not appear, that when the late Earl gave him security for his lady's portion, that he designed the appointment should be concealed, but rather that it should be kept on foot, for he might think it proper to raise the money in case any of the children died, or for other reasons, and it is plain by his will he did not design this money should sink into the inheritance, for he directs it to be raised, and has not given it to the other children, or any other person, and his intention might be answered, because it would be only putting her in the room of his son, who died between the marriage and the making of his will. And the words, *But not to give them more than £8000 a-piece*, are in our favour, they imply he designed all the younger children should have £8000 a-piece, therefore we must have £8000 by the will, for we had nothing before out of the estate. And if the portions are to be £5000 a-piece, Lord *Limington* never made any agreement to bar him of this portion, because he was also ignorant of the articles, and as he has had nothing from the late Earl, the portion he received shall not be taken as a satisfaction.

Mr. Mead. As to the question, whether the appointments are unreasonable, there is a material difference whether the younger children apply to the Court, to have a defective execution of this power supplied; in which case the Court may consider in what manner they will relieve them, or whether the owner of the inheritance comes to set aside the power, though it is well executed at law. It is necessary also to consider the time when these appointments were made. The *Grey* estate was then descended, and these appointments are in favour of the younger children of the same mother, by whom that estate came. They say we are volunteers; but it is, as I said before, a material consideration that we are not plaintiffs, nor are the younger children to be considered merely as volunteers, for *Mr. Paulet* and *Mr. Wilmer* married, and made settlements in prospect of these portions.

Mr. Fazakerley. If the power stood singly, the only objection would be, that it is unreasonably executed, though there are no cases to warrant what the plaintiff insists on. The Lord *John Ossulston* might have given his son *Charles*, the late Earl of *Tankerville* the whole estate; why then shall the Court control the indefinite power he has given him? and the execution is not unreasonable, if it be considered only in relation to the *Ossulston* estate, the eldest son must be satisfied with the less estate, the more younger

children there are, their quality as well as circumstances must be considered. The plaintiff owns the estate to be £5000 a year : it is probable too, that Lord *John* gave the late Earl this power, with a view to his having a greater estate, if the *Ossulston* estate was £8000 a year, no body could think the appointments unreasonable, and is it not the same thing since he has two estates of that value, and this is a provision for children.

The articles does not determine or restrain this power, because they are no lien on the *Ossulston* estate. The covenant is to settle lands in fee, the articles indeed take notice of this estate, but not as of the estate that was to be settled, but as of an estate that could not be settled ; and since it appears that the late Earl had it under his consideration, if he had designed to settle these lands in his covenant, to assure he would have referred to them.

Mr. Baron Comyns. John Lord *Ossulston*, by his will and codicil, devised the family estate to his son *Charles* for life, &c., with a power to make a jointure, and a provision for younger children. In 1695, *Charles* Lord *Ossulston*, on a treaty of marriage with *Mary* the daughter of *Ford* Lord *Grey*, covenants to settle £4000 a year in fee, and that if there was a son of that marriage, and younger children, they should have £5000 a-piece for their portions, and the *Grey* estate was charged with £20,000 the portion of *Mary*. By articles entered into between *Ralph* Lord *Grey*, and *Charles* Lord *Ossulston*, and Lady *Ossulston*, Lord *Ossulston* agrees to accept of £15,000 in satisfaction of his lady's portion, and of her right to any of the mortgaged premisses, and to settle £100 a year jointure for every £1000 of her portion, but these articles make no provision for younger children. Lord *Charles*, by two deeds poll, appoints £8000 a-piece to be raised for the portions of Lady *Bridget*, and his other younger children, out of part of the fee farm rents of the *Ossulston* estate, and afterwards by his will, for a further security, and to prevent any defect in the execution of his power, the rest of the *Ossulston* estate is made liable to the payment of these portions.

The first question is, Whether £4000 a year are to be purchased and settled on the plaintiff ? or, Whether the *Ossulston* estate is to be considered as an equivalent ? and I am of opinion that it ought ; for it was not the intent of the articles that £8000 a year should be settled, which would be the case if lands of £4000 a year should be purchased, but that the *Ossulston* estate should be settled, for notice is taken of it in the articles ; it is about that value, and it was in the power of [160] the late Earl to settle it, because no estate was limited by the codicil, to trustees to preserve the contingent remainders.

As to the next question of the portions, if it stood singly on the deeds of appointment, or the will, I am inclined to think that £8000 for every younger child ought to be raised, though I allow that this Court will take care a general power be executed in a reasonable manner, but will not interpose if the execution is not apparently unreasonable.

But then another question is, if the marriage articles do not restrain this power ? it cannot be denied, but a person may agree to confine himself in the execution of such a power ; let us then consider if by these articles the late Earl does not limit his power to raising of £5000 a-piece ; he plainly intended by these articles to settle £4000 a year in this manner ; £2000 a year for the jointure of his lady, £5000 a-piece for younger children, and the rest of the estate on the first, and every other son in tail male ; he takes care of all the children of the marriage, and if these articles had been carried into execution by a settlement of the *Ossulston* estate, the late Earl could not augment or increase those portions, to the prejudice of his eldest son ; for by the same rule, he might lessen or diminish them for his advantage : and when he has once executed his power, he cannot execute it again, as is resolved in 1 *Co.* in *Diggs's* case, of a power of revocation. But it is said that the articles create no particular lien on the *Ossulston* estate, but I think where a man has such a general power, and he confines himself in the execution of it, that must be applied to the estate over which he has that power.

The articles of the 18th of *May* 1703, seem to me only to confirm the former articles, which are recited as they could be performed at that time, and the agreement to accept £15,000 in full of her portion, is no variance from the marriage articles, because as there were differences about the raising of this £20,000 the rest might have been paid, or otherwise satisfied, and it does not appear that any variation was designed.

There is another question too, whether the £5000 for Lady *Limington* not being yet raised, as Lord *Limington* has agreed to take £8000 in full of her marriage portion, shall go to him by the will of the late Earl, or to the executors, but this I shall speak to hereafter.

Lord Chief Justice Raymond. The prayer of the bill is to have the benefit of marriage articles, and to set aside two deeds of appointment. The articles are not waived, but are to be carried into execution, and [162] they are not determined by the proviso of *Ford Lord Grey's* dying before the portion was paid; by the articles themselves it appears, that provision was made for the payment of the interest, and the principal before was charged on the estate, and by the articles in 1703 there was an agreement either for a composition, or the portion, and no other portion is mentioned, and therefore the first articles were so far carried into execution, that the interest was paid, and the principal compounded, and the composition accepted in full of her portion; and tho' it is said to be in bar of all *Lady Ossulston's* other demands, yet still it is in discharge of her portion too.

As these articles then are to be carried into execution, I think the *Ossulston* estate being permitted to come to the plaintiff, shall be taken by him as a satisfaction, and it looks as if the parties to the articles intended it, for they take notice of this estate, and that it was settled by the codicil in such a manner, that the late Earl could not make a jointure out of it, so soon as the marriage was to be had (which was three months after), but why was that codicil recited, but with a view to that estate, out of which he could not settle a jointure till the portion was paid, and which he covenants to do on payment.

As to the portions, no doubt the power by the codicil is under the influence of this Court, to see it executed in a reasonable manner; but I do not found myself on that point, because I think the late Earl has restrained himself by the articles; for if the *Ossulston* estate is to be taken as a satisfaction of the articles, it would be strange to say, that the Earl has the same latitude of power left him over that estate he had under the codicil; no; the articles are a purchase of those lands which he covenants shall be charged only with portions of £5000.

As to *Lord Limington's* demands, the late Earl of *Tankerville*, according to his power, has charged *Lady Limington's* portion on the estate, but it is not yet raised, the estate has not bore its burthen, the appointment has been reassigned by *Lord Limington*, in trust for the late Earl of *Tankerville*, his executors, administrators, and assigns. And the question is, Whether a new trust of this assignment is by the will declared for *Lord Limington*? But we shall consider further of this.

Lord Chancellor. The power to provide for younger children by the codicil, was subject no doubt to the direction of this Court; but the question now is, If the late Earl has not restrained himself: It appears by the articles not to be the intention of the parties, that £4000 a year should be purchased, *Lord Charles* was [163] then in possession of the *Ossulston* estate of that value, which would answer the articles, and they plainly refer to the codicil, and this estate; and the reason why the parties went upon articles, and that no settlement was made, was, because *Lord Ossulston* could not make a jointure till the payment of the portion. As to the power, by these articles all the children are purchasers; he has limited the estate to the eldest son, and laid on £5000 a-piece for the portions of younger children, and any further charge is null, and the appointments are void for so much. The articles are not waived, but by the plain intention of the parties are still subsisting; I question if they could be waived, supposing the proviso had happened, must the eldest son have nothing at all, because a greater estate descended to the mother.

Lord Limington agrees to accept of £8000, and the assignment is made over, in trust, for the late Earl, so the estate not having bore its burthen, this money must be raised *prima facie* for his executors; but the question is, If the will does not amount to a devise of the trust? and then *Lady Limington* will take as a legatee, and must be paid after creditors; but let this point be spoke to on *Friday*.

Friday, March the 11th [1729]. Mr. Solicitor General for the defendant Charles Bennet, commonly called Lord Ossulston. The will of the late Earl of *Tankerville* takes notice of the appointment for *Lady Limington's* portion, but not that it had been reassigned for his benefit, and that there might be a defect in the execution of his power, or that the fee-farm rents might not be sufficient, and to supply any such defect, or want of value, and for the speedier raising the portions, he devises all the *Ossulston* estate, &c., the will makes no variation of the right of the parties, but is rather a confirmation, and there appears no intention in *Earl Tankerville* by this will to transfer any right, or to give a new right; and if the security proved sufficient, and the power was well executed, nothing passed by the will, and the words, *But so as not to give them more than £8000 a-piece,*

were put in to evidence his intention, and to avoid the present question, because Lord *Limington* had accepted £8000 in full of his lady's portion. But it is objected, that the word *Give* shews his intention to give them something by this will; no; he does not design to give them any thing by the will, or to introduce a new devise, but to confirm what was already given, and uses no devising words. The assignment in trust for the late Earl was a secret, at least his will makes it so, and if he had designed to renounce the benefit of this trust, it is not to be supposed [164] but that he would have used words to that purpose; so that when this £8000 is raised, Lord *Limington* will stand a trustee for the executors of the late Earl, and it must go into the personal estate, for the benefit of the residuary legatees.

Mr. Attorney-General for the defendants, Lord and Lady Limington. The late Earl of *Tankerville*, by the assignment to Sir *James Misson*, was undoubtedly intitled to the benefit of the appointment of the portion of Lady *Limington*, and to have it raised, either for his own benefit, or for those to whom he should dispose of it; and the question is, Whether he has devised it to Lady *Limington*? It is admitted, he did not advance a shilling for her portion, but compounded a debt of £10,000 and £9000 interest for £8000, this therefore went to increase his personal estate, and it is to be presumed that in honour and justice he would put her on the same foot with her other sisters, and therefore the words shall have this construction put on them, if they are capable of it, as we think they plainly are.

The will recites the appointments he had made in execution of his power; it does not take notice indeed of the assignment to Sir *James Misson*, not because it was a secret in the family, for that does not appear; or that he would make it a secret by his will, for what purpose would that serve, when at his death it would appear, but because he designed to take no benefit by it, he says, that in execution of his power by the codicil, he charges the whole estate with the payment of £8000 to his daughter *Wallop*, and his other younger children. Suppose then the former execution to be defective, is not this a new execution of his power, expressly in favour of Lady *Limington*, and it is mentioned to be for her, in the same manner and form of words as for the other younger children, and therefore the testator shall be supposed to mean the same thing by the same words; he limits by the will a new term of two thousand years, this is a new legal estate, and a new trust is created for the benefit of Lady *Limington*, the sums are to be levied and raised for the benefit of his four younger children, and he makes no distinction between them, and the words are as plain as if he had said for the benefit of his four younger children, which would have admitted of no dispute. The words, *But not to give them more than £8000 a-piece*, shew, that he intended to charge the estate but with one £8000, not that he did not design to devise this £8000 to Lady *Limington*, because she had received £8000 composition money for a debt, and they cannot be taken in this sense in respect of Lady *Limington*, because they are equally applied to all the children, and the dispute in question is not, Whether two £8000 shall be raised, but to whom the trust of one belongs? and those words shew [165] he designed to give them something, and only manifest his intention, that they should not have two £8000 by his gift, he had given Lady *Limington* nothing before.

Mr. Fazakerly. By the express words of the will, the trustees are to levy and raise £8000 to his four younger children, so that he has explicitly declared the trust to be for their benefit, and he says afterwards, It being his intention that the portions should be raised for the benefit of his four younger children; so that to say he designed three of these sums for his younger children, and the fourth for his executors, is saying directly contrary to the words of the will, and the intention of the testator, and he had not in view the £8000 he had paid Lady *Limington*, but only the sums he had charged.

Mr. Baron Comyns. Lord *Limington*, previous to his marriage with Lady *Bridget*, one of the daughters of the late Earl of *Tankerville*, agrees to accept £8000 in full of her portion, and to shew that he did not expect any advantage from the sums to be raised for younger children's portions, pursuant to the power of the late Earl, he assigns all the benefit he might claim thereby to the said Earl: When the Earl made his will, it was certainly in his power to have relinquished this advantage, but the question is, Whether the words are clear to give the £8000 to Lady *Limington*? And from the construction of the whole will, I think they are not; the recitals do not shew any such intention, and it is plain by the directions, that he designed this will only to supply any defect in the power or value of the fee farm rents; this is his design in express words, and it is hard, by an implied construction, to put a different meaning on them:

it is objected, that when he creates new terms of 2000 years, he says the trust of those terms is to raise portions for his four younger children ; so doubtless it was, he designed the portion of Lady *Bridget* should be raised as well as other portions ; and it cannot be intended from the words, that these portions should be disposed of in any other manner, than if they had been raised by a decree, or otherwise, and then they who had transferred their right, would have held them in trust for those to whom they had assigned them, the testator could not well have expressed himself otherwise ; but he does not say how the money, when raised, is to be disposed, but leaves that to be explained by former agreements. He had made appointments, not only for raising the portion of Lady *Limington*, but of the other younger children, and recites both appointments in his will, and his intention was, that the estate devised should be only an additional security. It is [166] said that by the words, *But not to give them more than £8000 a-piece*, it is plain he designed to give them something, but I cannot see the inference, he gives nothing by way of devise, but uses those words to exclude any construction that he designed by those new terms, to give more than he had by former appointments.

Lord Chief Justice Raymond. I am of the same opinion with Mr. Baron *Comyns* : There can be no doubt as it stands on the assignment ; for Lord *Limington* has declared himself satisfied, and assigned over the appointment in trust for the late Earl of *Tankerville* ; but the question is, Whether the will gives this trust back again ? and we cannot by implication suppose so, contrary to the express words, the will recites the codicil and the appointments, and lest there should be any defect in the execution of his power, or that the appointment should not be sufficient, he charges all his estate with the portions of his younger children, and vests a term of two thousand years in trustees, for the speedy and easy raising of the said portions, that were to be raised by the appointments : and he says after, that they were to be a further security for the said portions, as to the words, *But not to give them more than £8000 a-piece*, he makes himself the giver by the appointments, and declares he designs to give them no more ; and this he had already given to Lord *Limington*, and the words are strongly against him.

Lord Chancellor. Lord *Limington* certainly made a disadvantageous bargain, his lady was intitled to £10,000 and interest, and he was not unapprized of her right, because it is recited in his marriage articles ; and he covenants to release it, and to accept £8000 in full of her portion, and afterwards he executes a release and assigns the deed of appointment for raising the money to Sir *James Misson*, for the benefit of the late Earl of *Tankerville* ; but the money must be raised in the name of Lady *Limington*, and she will be a trustee for the Earl : but the question is, Whether she is now a trustee for his executors ; or whether he has devised the trust to her ? he certainly has not in plain express words ; so that his intention must be made out by implication, which can never oust an express declaration. The plain intent of his will was, lest there should be any defect in the execution of his power, or the security, he charges all the estate with a new term, which was not in all events to be liable ; but if the fee farm rents were not sufficient, then to raise the portions, or so much as they would not raise, his intention was to raise the sums charged by the appointments. Then come the negative words, [167] *But not to give them more than £8000 a-piece*, to shew his intention not to give the children more, therefore since Lady *Limington* has received £8000. and the will says she is to have no more, we cannot construe it otherwise ; so her portion being assigned to the late Earl of *Tankerville*, must go to his executors when it is raised.

Mr. Peere Williams for the defendants, the younger children. The late Earl having devised £8000 a-piece to his younger children, and your lordship having determined he had a power to charge the estate with £5000 only, the residue ought to be made good out of his personal estate. If one grants an annuity out of his manor of *Dale*, and has no such manor, yet the person of the grantor will be liable to the annuity. Children are considered as creditors, and defective surrenders are frequently made good by a court of equity for their benefit. In the case of *Savil* and *Blackett*, decreed in 1722, lands were settled in trust to the use of A. for ninety-nine years, if he should so long live, remainder to trustees to preserve contingent remainders, remainder to his first, and every other son in tail male, remainder over, with a power to A. to charge the estate with portions for his younger children : A., the trustees, and his eldest son, join in a common recovery of the lands ; afterwards A. makes his will, and reciting his power, charges the estate with £1000 for the portion of his daughter, and also devises to her £1000. There the common recovery having extinguished his power, Lord *Macclesfield* decreed that the £1000 charged on the estate should be paid out of the personal estate

of the testator, because it was the case of a daughter ; and that it appeared by the will he designed she should have it. In that case the father executed a power he had not, here he has executed his power further than it extends.

Lord Chancellor. You need not labour this point ; for by the will of the late Earl of Tankerville, it appears that these portions are only to be raised out of the lands, and the whole personal estate is devised away. The Court therefore declares, that the articles dated the 19th of June 1695, are subsisting and obligatory, and ought to be carried into execution ; and that the *Ossulston* estate is the £4000 a year intended by those articles to be settled, which being limited by the codicil of *John Lord Ossulston* to the plaintiff in tail male, who was in possession at the death of his father, and *Charles* the late Earl, having done no act to defeat that limitation, it is to be considered as a [168] performance of the articles on his part ; and therefore, as to so much of the bill as prays a settlement of lands of £4000 a year, on the foot of the said articles, the bill is to be dismissed : And the Court also declares, that the power given by the codicil of *John Lord Ossulston* to *Charles* his son, to make provisions for younger children, was restrained by the said articles to £5000 a-piece, and that under the deeds of appointment, and the will, £5000 a-piece, and no more, are to be raised for, and as, the portions of his son *Gray Bennet*, and of his daughters, *Lady Limington*, *Lady Annabella*, and *Lady Mary*, with interest from the death of the late Earl.

[169] *Thursday, May the 1st.*

DE TERM. PASCH. 1729.

Case 86.—FILEWOOD & al' versus PALMER & al'.

[See *Robinson v. Duleep Singh*, 1879, 11 Ch. D. 831.]

In Court. Master of the Rolls, Lord Chancellor.

Mr. Attorney General for the defendants. This is the day for the defendants to shew cause, why an injunction should not be granted. The plaintiffs, who are tenants of the manor of *Walton* upon *Thames*, in the county of *Surry*, have brought this bill for an injunction, to restrain the defendants from digging clay to make bricks, from cutting down the furze, and hindering them from their right of pasture in the waste of the said manor, and from inclosing the common fields. The defendant *Mr. Palmer*, who is lord of the manor, granted a license to the defendant *Lord Shannon*, a tenant of the said manor, to dig for brick-earth to enlarge the offices belonging to his messuage within the said manor, under which license he has dug up about two acres of the waste, which consists of six thousand ; and the plaintiff's affidavits do not shew that sufficient common is not left, and they insist by their bill, that they have a right to dig the soil, and take the turf for their messuages, so that *Lord Shannon*, as a tenant, has a right also to the bricks, to be expended on the premisses.

The plaintiffs say, they have a right of common in the common fields, from the time the corn is taken away, 'till the lands are sown again, and that our inclosure (which is only [170] of ten acres) is an obstruction to this right, whereas it will not take away, or prejudice it, *Mr. Palmer* has only made a ditch and a fence on the side of the road, to prevent the cattle entering the said fields, as they pass to and from *Suckbury Ferry*, which carries them from *Middlesex* to *Surry*, and from *Surry* to *Middlesex*, and they are open in several places for the cattle to come in.

Mr. Wills. The lord has certainly a liberty to make brick in the waste, if he does no injury to the tenants ; and the statute of *Merton*, 20 H. 3, ch. 4, is in our favour, by which the lord may inclose, if he leave sufficient for the tenants, and if he may inclose, sure he may afterwards do what he pleases with the inclosure, and why may not he use the same liberty in part of the waste without inclosing, for that will be less damage to the commoners, for the grass and furze will grow again, and then they will have the benefit of them, whereas if these two acres had been inclosed, they would have lost all advantage of them.

Mr. Fazakerly. The waste of a manor belongs to the lord, and he is intitled to every thing in it, from which he is not excluded by the custom of the manor. The plaintiffs intitle themselves to the pasture, furze, and turf, but do not swear we have not left sufficient for them, whereas they ought to have made out very clearly that they were prejudiced. The lord may exercise his dominion, and inclose, though the tenants have a right in every part of it, and if the plaintiffs had brought an action against the lord, they must shew by their declaration, that they could not enjoy the common in so ample a manner. In the northern counties, the lords greatest estates lie frequently in their wastes, and it would be the greatest injury to them, if their tenants could restrain them from digging for coals.

Mr. Solicitor General for the plaintiffs. This bill is brought by the tenants to establish their customs, and to be quieted in the enjoyment of their common, against incroachments, and sets forth, that as well the freehold, as the copyhold tenants of the manor, have a right of turbary, pasture, and furze, and that the digging for brick by the defendants is an injury to this right, and more prejudicial, than if the lord had inclosed so much; if pits are dug in the inclosure, the damage reaches no further, but if they are dug up and down in the waste, they may prove very destructive to the tenants cattle; and these pits may be considered as a nuisance [171] in the waste, and the defendants ought to be restrained from digging, at least till they have put in their answers.

We do not desire the inclosure to be abated, but only an injunction to prevent further and future inclosures, and the lord cannot inclose, though he leaves gaps here and there for the cattle, because those are not so beneficial, as to have the fields lie open. But whatever right a lord who is owner of the inheritance has, the defendant is not such a one, but only a lessee under the grant of the Crown; so that what he is doing he has no right to do, and is injurious to the Crown, and this Court will take care that the right of the Crown shall not be prejudiced, by what means soever the right appears to them, and therefore will restrain the defendant by injunction from committing further injuries to the Crown.

Master of the Rolls. I think the defendants have shewn good cause, why an injunction should not be granted, because it would be a prejudice to the lord, who is owner of the soil. By the statute of *Merton*, he may inclose against the tenants, and by the stat. of *Westminst.* 13 Ed. 1, ch. 46, he may approve, against those who have a right of common, if he leave sufficient; if he does not, they have a proper remedy against him at law, but the plaintiffs in their affidavits, do not swear that there is not sufficient common left. I am not satisfied that injunctions as to lands, by the course of the Court ought to be granted before answer (unless the defendant prays time or is in contempt), only in two cases, to stay waste, because a writ of waste lies at common law, and to quiet a possession on the stat. 18 H. 6, ch. 9, where the plaintiff has been in the actual quiet and peaceable possession for three years last past before the filing the bill. And it seemed to him that this injunction could not be ranked under either of these heads, and he thought the Court should be extreme cautious in granting extraordinary injunctions before answer especially, for he remembered a case where an injunction to stay working a colliery till answer did irreparable damage. The inclosure is a benefit, rather than an injury to the plaintiffs. (1 Ven. 156; Curs. Canc. 450.)

Lord Chancellor. As to the inclosure, the plaintiffs having a right of common in the common fields, only by reason of vicinage (Co. Lit. 122 a; 7 Co. 5; 4 Co. 38 b) the lord may inclose; but if he had no right, this inclosure is a service to the plaintiffs. But the principal question relates to the digging for bricks. If the Court should be hasty in granting [172] these injunctions, the lord could not open a mine, for fear the tenant should file his bill, because he has a right to the turf. The soil is the lord's, and the commoner has no right to it, or can take it away, or kill a rabbit on it, but is intitled only to the herbage, and that not exclusive of the lord (unless by custom) or in an unlimited manner, but only for the cattle levant and couchant on his tenement; and shall the Court, before answer, restrain the lord from what is so clearly his right? the plaintiffs may bring their action, but in this they must declare the lord has not left them sufficient common; and he may prove and give in evidence they have sufficient, 2 Vern. 116, there the Court was so far from granting an injunction, that the bill was dismissed, and the plaintiffs left to their remedy at law; and therefore I allow the cause, and the order for the injunction must be discharged. 2 Vern. 301, 356.

And his lordship and the *Master of the Rolls* agreed, that the estate of the defendant could not be taken notice of by the Court. The *Master of the Rolls* said, that possibly

after answer, if it appeared the lord was making a very unreasonable use of his ownership of the soil, to the plain damage of the tenants, the Court might grant such an injunction as was now asked : but he was not satisfied it ought to be granted before answer, be the case what it will.

Saturday, May the 17th [1729].

PETITIONS.

Case 87.—ANONYMUS.

At the Rolls.

The clerk in Court may proceed here for his bill, either against the solicitor, or client, though he cannot sue the client at law for want of a retainer.

The Clerk in Court may pray payment of his bill of costs in this Court, either against the solicitor, or the client, tho' he cannot proceed at law against the client, for want of a retainer.

Wednesday, May the 21st [1729].

Case 88.—BARRY *versus* EDGORTH.

At the Rolls.

[1] Ab. Eq. Cas. 178 [2 P. Wms. 523], S. C.

A devise of all real and personal estate will pass a fee modern, Cas. 106.

Mr. Attorney General for the plaintiff. The bill is brought by Mrs. Barry, the sister of the testatrix, to have the deeds and writings brought into Court for their safe custody, she being intitled, as heir to her [173] sister, to the reversion of the lands devised to the defendant for life. And the single question for the judgment of the Court is, on these words of the will, 'I give and bequeath all my lands and estate in *Upper Catesby* in *Northamptonshire*, with all their appurtenants, to *William Edgworth, Esq.*' Whether they carry a fee, or an estate for life only, I allow that the word estate carries sometimes, not only the thing itself, but all the interest the party had in it ; as, where the testator devises all his real and personal estate whatsoever : and this was solemnly adjudged in the case of the *Countess of Bridgewater versus the Duke of Bolton*, 1 Salk. 256, Cas. 15, though till that resolution, this has been a point much doubted, and often debated ; but the word estate does not always, and necessarily carry a fee, for where it is coupled only with personal things, it will extend only to them. The word estate, in this will, is but a description of the thing the testatrix designed to pass ; all my estate in *Upper Catesby* is only a local description, but the legal interest cannot be said to lie there, for that is only in consideration of law ; and there is a great difference between the words, All my real estate, and the words, All my real estate at such a place.

Mr. Robins. In the case of *Wilkinson versus Merryland*, Cro. Ca. 323, the intention appeared plain to give away everything, yet the fee did not pass. In 4 Mod. 89, *Carter versus Horner*, no judgment is given, which shews it was no plain case. In *Smyth versus Tindal*, in 1706, it was adjudged in *B. R.* That by the words, All my lands, tenements, and hereditaments, a fee would pass, but that construction was made in favour of a perpetual charity.

Mr. Solicitor General for the defendant. I allow that a devise of all my lands passes only an estate for life, and the counsel for the plaintiff likewise agree, that a devise of all my real estate will extend to all the interest the testator had, and if he was seised in fee, will pass the inheritance ; and that there have been no variety of opinions since the case of the *Countess of Bridgewater versus the Duke of Bolton*, unless those words of the will are controlled by any other ; but in our case there are no other words to make a variance ; they say, if the word *estate* is coupled with personal things it will extend only to them ; but this argument turns against them, for here the word estate is coupled only with lands, [174] which passes the thing, and the testatrix made use of these words to prevent all doubt, and to shew she intended to pass away all her interest in those lands, which she had before devised by express words. The words in *Upper Catesby* are added by way of restriction of the lands, not of her interest, for

she might (for ought appears to the contrary) have other lands lying elsewhere ; and 1 Mod. 100, *Wilson versus Robinson*, is an authority in print. (3 Keb. 245, C. 64 ; 2 Lev. 91 ; 3 Mod. 45 ; Styl. 281 ; 1 Rol. Ab. 834.)

Mr. Peere Williams. In a will, no strict legal words are requisite ; but if the meaning of them is plain, they are to take effect, and no words in a will are to be rejected that can have a reasonable sense put on them. If the word *estate*, is not made use of in this will to pass a fee, it is useless, and put in to no purpose, in many of the book cases, the word may be satisfied by construing it to pass an estate for life ; but this is done here by the word *lands*, so that it must pass the fee, or nothing. In the case of *Wilson and Robinson* the same objection was made to the restriction of the place as here, but was over-ruled. In the case of *Norton versus Lad*, 1 Lutwyck 755, the words, I give the whole remainder of all those lands which I have given to my sister *Alice*, passed a fee ; but *All my estate*, are more proper words to pass the inheritance, than my whole remainder ; and the intention of the testatrix is plain ; for she has given the defendant, whom she designed to marry, all her personal estate, even her wedding cloaths, and she takes notice of the plaintiff, her sister, and bequeaths her £100, and I have known many cases adjudged at *nisi prius*, on the authority of the case of the *Countess of Bridgewater versus the Duke of Bolton*.

Mr. Attorney General's reply. The words, *whole remainder*, are of the same import, as remainder in fee ; and the case of *Wilson and Robinson*, though it seems against us, is very distinguishable from ours, there was a particular customary interest, and the words describe and pass all that customary, or tenant right.

Master of the Rolls. The case of the *Countess of Bridgewater versus the Duke of Bolton*, was often argued, and Mr. *Cowper* (afterwards Lord *Cowper*) who was of council with the Duke of *Bolton*, advised him not to bring a writ of error. It has been said that [175] several cases have been since adjudged accordingly at *nisi prius* ; and I have known many decrees made in this Court on that authority. In that case many former resolutions were cited that agreed with it, and none that clashed. By that resolution, a devise of all my real estate, or of all my real estate in such a particular place, will pass the inheritance of all the lands the testator had the fee of ; for according to Mr. *Solicitor General's* distinction, confining the words to such a place, does not restrain the interest of the devisee, but the thing ; so if the testator has lands in A. and B., a devise of all his estate in B. will pass the fee.

The word *estate* primarily imports the interest a person has in any thing, but secondarily the thing itself, because it is impossible to have the interest without the thing. The words of this will plainly shew it was the testatrix her intention to pass the fee ; she not only gives the thing by the word *lands*, but adds the words, *and estate* ; if the words had been, *All my lands, or estate*, I am of opinion that lands and estate would have been only terms synonymous ; but the word *estate* here has an additional sense, and is, as if she had devised all her lands, and all her interest in them.

The case of *Wilson and Robinson* does not come up to this case, for what was his tenant right, but a right to the inheritance *sub modo* ? I have no doubt on these words (2 Vern. 690, 564 ; 1 Chan. Cas. 262, 196 ; Styl. 293 ; 3 Mod. 45, 104 ; Show. 348 ; 4 Mod. 89 ; Post, Cas. 133) ; and though it is usual on a point of law for the Court to direct a trial, or a case to be stated for the opinion of the Judges, I shall not do either in this case, but will dismiss the bill, because the plaintiff, after the death of the defendant, may bring an ejectment.

Friday, May the 23d [1729].

MOTIONS.

Case 89.—ANONYMUS.

At the Chancellor's house, Lord Chancellor.

If the plaintiff is in the service of a foreign envoy, he must give security to pay costs.—

By the rules of the Court a *dedimus* is returnable the first return of the next term, but by the practice it is not returned till the second return of *Hilary* and *Trinity* terms.

Mr. *Lutwyck* moved that the plaintiff might give security to the senior six Clerks, not towards the cause, to pay costs, on affidavit of his being in the service, and under

the protection of the *Genoese* envoy, and produced a precedent, 8 *Ann.*, made by Lord *Cowper*. And the Lord Chancellor made an order accordingly.

[176] By the constant rules of the Court a *dedimus* to take an answer is returnable the first return of the next term, but by the practice it is not returned, till the second return of *Hilary* and *Trinity* terms, because the vacations between *Michaelmas* and *Hilary*, and between *Easter* and *Trinity* terms are so short, and this practice was allowed by the Master of the Rolls.

[177] DE TERM. S. TRIN. 1729.

Monday, June the 16th [1729].

Case 90.—NICHOLAS & al' versus SOUTHWELL & al'.

In Court, Master of the Rolls.

Where lands are devised for payment of debts, the creditors may bring a bill for the execution of a contract made by the testator, for a sale of part of the lands. How the estate in such a case is to be applied to pay the debts. Nels. 8vo. Rep. in Canc. 179; Swinb. part 6, sect. 7; Cro. Ca. 343; Moor, 213, Cas. 354.

Where lands are devised in trust, to sell to pay debts, the creditors are *cestuy que trust*, and may bring a bill for a specifick execution of a contract, for a purchase of part of the lands, or to have the benefit of any other agreement relating to the estate, made by the testator in his life-time. And it was decreed in this case, That the personal estate should be applied in the first place for the payment of debts if that was not sufficient, then the real estate in possession, next in reversion, then the specifick legacies, and lastly, the wife's paraphernalia.

Tuesday, June the 17th.

Case 91.—THOMAS versus WILLIAMS.

In Court, Lord Chancellor.

Mr. Attorney General for the plaintiff. Mr. Williams devised to his daughter *Gladis* £250 for her portion, and for the better security of the payment, he devised all his real estate to the defendant *Lewellin Williams* his son, and his heirs, in trust, out of the rents and profits, two years after his decease, to pay the money, and appointed the defendant his executor. *Michael Williams*, by articles, reciting, That a marriage was shortly intended to be had with [178] the said *Gladis*, and that she was intitled to £250 under the will of her father, and that her mother had agreed to give her £250 more, covenants, in consideration of the said £500, to assure lands of £200 a year on the issue of that marriage, and on £100 a year on *Gladis* for her jointure, the marriage was had, and the mother paid the £250. *Michael Williams* made his will, and appointed his wife *Gladis* executrix and residuary legatee, and having never received the £250 in his life-time, it still remained the estate of *Gladis*; some time after, *Thomas* the plaintiff made his addresses to *Gladis*, and pending the courtship, she gave a receipt to the defendant her brother, whereby she acknowledges to have received £250 in full of what remained unpaid as the consideration of her jointure, the marriage took effect, and *Gladis* is since dead, and this bill is brought by the plaintiff, as her administrator, to be paid the said £250 out of the real and personal estate of *Williams* the father, notwithstanding the said receipt, no money being really paid to *Gladis*; but it was executed by her voluntarily, and without consideration, during a treaty of marriage with the plaintiff, and therefore according to the usual equity of the Court, must be considered as a fraud on him.

Mr. Solicitor General for the Defendant. *Lewellen Williams* was but seventeen years of age when his father died, so that though he proved the will, the mother managed and received all his estate. The marriage settlement was made by Mr. *Williams* a few months after the father's death, and the mother voluntarily agreed to add

£250 to the portion of *Gladis*, though at that time she had no fund to pay it out of, but the estate of the son. In 1720, *Michael Williams* died, and *Gladis* the wife, either in her own right, or as his representative, was certainly intitled to the £250 devised to her by the will of her father. The plaintiff *Thomas* afterwards made his addresses to *Gladis*, and she gave this receipt between the courtship and the marriage, and the only question is, Whether this receipt is a sufficient discharge of the legacy in equity ? or whether the Court will set it aside, as a fraud on *Gladis*, being executed by her without any consideration, or as a fraud on the plaintiff, who was then under a treaty of marriage with her ? But this bill is not brought by *Thomas*, as husband during the life of the wife, though she lived three years after the marriage, but as her administrator, and therefore he can have no better title than she had, but if the coverture was still subsisting, neither she or the husband could say there was any fraud in this case. Courts of equity indeed have relieved in many places, where the wife's portion has been considered by the husband as subsisting, and he has made a settlement in view of it, but there is no proof that this legacy was represented to the plaintiff, or considered by him as [179] any part of his wife's portion, or that he made her a settlement in consideration of it ; on the contrary, he had only a small collector's place, and no estate, and she brought him £100 a year in jointure, and £1000 in money, and it was the more reasonable, that *Gladis* should give this receipt, because the mother who advanced her the £250 had no fund to raise it out of, but the brother's estate, to whom she was accountable for it ; and it was but justice to her son and herself, to procure this receipt, so this receipt was given for good cause, and cannot be considered as a fraud either on *Gladis* or the plaintiff. In the case of *King* versus *Cotton*, Lady *Cotton* was in possession of a considerable real estate, and pending the treaty of marriage, she made several leases for a long term of years, in trust for the benefit of her children by her former husband : Mr. *King*, after marriage, brought a bill to be relieved against these leases, because Lady *Cotton* appeared to be the owner of the estate, but your lordship was pleased to leave the parties to the law, and the children recovered in ejectments ; in that case the lady was the visible owner of the lands, but the husband had no estate, and could make no settlement ; here the plaintiff had nothing, and got a great deal by his wife, and it does not appear that he knew she was intitled to this legacy. (Post. Cas. 151.)

Lord Chancellor. The plaintiff claims only as administrator, and indeed he has no other title, for he is not intitled as husband, because the legacy was never reduced to possession, but I think he has no equity as husband. A mother on an advantageous offer of marriage, adds £250 to the portion of her daughter, the husband dies, and his widow being greatly advanced, the mother prevails on her to return so much to her brother, whose money indeed it was, and to execute this release, before she threw herself on the plaintiff : Why should I set it aside ? It does not appear that the husband ever inquired after this legacy. Suppose she had been pleased to release to a stranger a sum of money she was intitled to as administratrix, I do not see why I should relieve against such a release ; and therefore the bill must be dismissed.

Thursday, June the 19th [1729].

Case 92.—CLEAVER & Ux', *versus* SPURLING.

[S. C. 2 Eq. Cas. Abr. 270 ; 2 P. Wms. 526.]

At the Rolls.

A child fully advanced is barred from her customary share.

The father of Mrs. *Cleaver*, a freeman of *London*, made his will, and thereby recites, That whereas he had no child but Mrs. *Cleaver*, whom he had fully advanced on her marriage, he had a power to dispose of his whole personal estate, [180] which he therefore devises as *per* will ; the testator dies, and the plaintiffs file this bill against the executor, for an account of the personal estate ; and the question is, Whether Mrs.

Spurling is intitled to her orphanage share ? or whether this declaration in the bill shall bar her ?

Master of the Rolls. I am of opinion that the daughter being married with the father's consent, and the husband having admitted in his bill, that he received £100 portion, and it being in proof, that the father portioned all his daughters on their marriage, though the witness did not know what the portions amounted to, especially, the marriage being about forty years ago, together with the declaration in the will, is a sufficient evidence, that the daughter was fully advanced, and is the best evidence the executor can give ; now the father is dead, and the husband is a party, and this advancement will bar her of her orphanage part, and I found myself on the writ *de rationabili parte bonorum*, Regist. 142 b, which is a topical writ, and lies in *Wales*, *York*, and *London*, where the children by the custom, are intitled to an orphanage share, and the words of the writ are, *Qui in vita patrum suorum non promoti fuerunt*, and it is said, the custom is the same in all these places, so that the writ lies only for children unadvanced, and therefore advancement is a bar : and the supposition is, that the child is fully advanced if the sum does not appear. In *London* a child advanced, whether she is a sole orphan, or whether there are more children, shall be let into her orphanage portion, if it appears under the freeman's hand, that she was not fully advanced, but if the certainty does not appear in that manner, it is presumed that she was fully advanced, and I never knew an inquiry directed by this Court, what the child received, but it must appear under the father's hand ; for how could such an inquiry be practicable after the death of the father, when it is the interest of the child to suppress the truth. The case of *Dane versus De la Warre*, 2 Vern. 628, was several times before the Court ; there the father had entered the sums advanced by him in his books of account, and upon the Master's taking an account, the advancement appeared not to be equal to a third part of the freeman's estate ; but if on the inquiry, it had come out to be equal, or more, it would have barred her. In the case of *Chase & ux*, versus the executors of Sir Ralph Box, Sir Ralph Box, in order to bar his daughter of her orphanage share, who had married the plaintiff without his consent, by the advice of Serjeant Pemberton, which was taken from 12 Co. 113, he declared by his will, that he had fully advanced his daughter in marriage, and mentioned the sum, [181] which upon an account before the Master, being found not to be a full advancement, she was admitted to her orphan part, by the very means her father proposed to have barred her of it. And it is no objection here, that if the father's will shall be taken as an evidence of the advancement, the child will be at the mercy of the parent, because there is other concurrent evidence to confirm it. 1 Vern. 61, 88, 216, 181 ; 2 Chan. Cas. 119, 129, 160 ; 1 Salk. 426 ; Co. Lit. 176 b.)

Mr. Peere Williams for the defendant. 'The testator gave his daughter the plaintiff a legacy of thirty-five pounds, in case she or her husband should not sue, molest, or trouble his executor for her customary share, but do or shall upon payment or tender of the said legacy, execute a good and sufficient release thereof ; and in case they or any of them shall sue or refuse or neglect such payment or release, then he devised it over to another.' This bill is plainly a breach of one word of the condition, which cannot be construed to be in *terrorem*, because of the devise over.

Master of the Rolls. In the case of *Clare versus Acmooty*, the testator gave a legacy to his wife, on condition she should not trouble his executor, or sue or molest him for her widow's share. She filed a bill against the executor for an account of the personal estate of her husband, and this was adjudged to be no forfeiture of her legacy, because she had a right to inquire whether her legacy or her customary share was of most value, which could not appear 'till the Master had taken an account, but here such an inquiry is unnecessary, for the plaintiff is barred of her customary share by a full advancement from her father, and so has no election. And the legacy being devised over, the Court can give the plaintiffs no relief, because it cannot mitigate the condition as to them, without injuring the right of the other ; and therefore I am of opinion that the plaintiff has forfeited this legacy.

[182] *Saturday, June the 21st* [1729].

REHEARINGS.

Case 93.—GREEN *versus* ROD.*In Court, Lord Chancellor.*

I devise to my wife all my lands, money, &c., to be freely by her possessed and enjoyed, provided, if she die without issue by me, that then £80 shall remain to my brother after her decease, the limitation over of the £80 is good.

The second point in the case is, whether the legacy is not lapsed by the death of the legatee before the contingency happened. *Swinburn* is of opinion that it is, but that author (tho' generally clear) is so perplexed on that head, pag. 313, and the resolution in 2 Ventr. 347, which is subsequent in time, being contrary, on considering both, I think, that notwithstanding *Swinburn's* opinion, the legacy in this case is not lapsed, but is transmissible, notwithstanding the death of the brother before the wife.

Mr. Solicitor General for the plaintiffs. 'Mr. Darley made his will, and thereby devised, *inter al'*, all the rest and residue of his goods, chattels, money, debts, plate, corn, grain, and implements of husbandry to his sister *Mary*, whom he made sole executrix of his will: But he declared, that his will and meaning was, that his goods, household-stuff, and implements of husbandry, and the farm in which he lived, for the remainder of the term, should be let and disposed of, and that the money arising thereby, should be put to interest for the use of his sister *Mary*, and if she died without issue, the money so put out, was to be equally divided between his sisters *Teresa* and *Frances*, after the decease of *Mary*, in manner as aforesaid.' The testator died, *Mary* intermarried with the defendant, and is since dead without issue, and the single question is, Whether the limitation over to *Teresa* and *Frances* is good? and I think it is; for the limitation over of a personalty on a contingency, to arise within a life, is allowed; the time of going over is after the death of *Mary*, and the will is to the same effect, as if the words had been, after the death of *Mary*, without issue living at the time of her death; and is the same with the case of *Pinbury versus Elkin*, 2 Vern. 758, 766. I devise to my wife *Hester*, all my lands, and tenements, money, cloaths and yarn, to be freely by her possessed and enjoyed, provided, if she die without issue by me, that then £80 shall remain to my brother after her decease, and made his wife executrix. And Lord *Macclesfield* adjudged the limitation over the £80 to be good, and said, that the words, dying without issue, in case of a devise of lands were construed to create an estate tail, to support the remainders over; but why should they be taken in that sense in the case of a personal estate, to destroy the remainder over, since the common acceptation of the words, *dying without issue*, is, if the party never has any children; or if they die in their life-time. Here *Mary* is made executrix, and it is plain she is not to take this legacy in that right, because it is given her for life, and therefore the remainder after her decease (if the [183] limitation over is not good) will belong to us, as the next of kin of the testator.

Mr. Attorney General for the defendant. If the words, *If she died without issue*, stood single, it is allowed the limitation over would be void, because the word issue will take in all the issues; but it is said, that the following words, *After the decease of Mary in manner as aforesaid*, shew the meaning of the former to be, if she died without issue living at the time of her death, but if the former words are to be understood of dying without issue generally, these latter words must have the same sense too, for they must be taken with reference to the former; so they make no alteration in the devise, but the will must be construed in the same manner as if they were away. And these words, *in manner as aforesaid* distinguish this case from *Pinbury versus Elkin*. In the case of *Forth versus Chapman*, the contingency was, *If he die, or shall depart this life, and leave no issue*, those words import, a dying without issue living at the time of his death, yet the present *Master of the Rolls* adjudged the limitation over to be void, but his decree was reversed on appeal by the Lord *Macclesfield*: and this bill is brought for an account against the husband, though he never administered to the wife, and it does not appear that any of the effects, or the money raised by the sale of them, came to his hands.

Lord Chancellor. A decree has been made against the defendant by default. The plaintiffs might as well file their bill against a stranger, and though they have taken out administration, *de bonis non, &c.*, of Mr. *Darley*, and so may inquire after his assets, into whosoever hands they are come; yet, as they principally claim the benefit of the devise over, how can they have an account without making the representative of *Mary* a party, to see what debts and legacies have been paid, for it is only part of the residue that is devised over; and if *Mary* has wasted the estate, the husband is not liable to a devastavit, but as her representative.

As to the devise over, a personal estate cannot be limited over after a dying without issue generally, but may after a particular dying without issue, *viz.* living at the time of their death.

[184] The first devise to the sister is general, and she is made executrix, if the will stopped here, it would amount to an absolute devise of the whole to her; but then the testator goes on, And my will and meaning is, &c., for the use of my sister *Mary*; he does not say, for her life; and by these words too she has an absolute property: But then the will says, And if she die without issue (not living at her death, but generally), then, &c., in manner as aforesaid: so the devise over is after an estate tail, and therefore the bill must be dismissed on the whole matter. (2 Vern. 38, 59, 86, 245, 324, 331, 151; 1 Vern. 461; 1 Chan. Cas. 129, 131, 229; 2 Chan. Cas. 209; 1 Vern. 234, 257, 304; Cro. Ja. 459; Sir Wm. Jon. 15; 2 Rol. Rep. 129; Palm. 48, Cas. 333; 1 Rol. Ab. 613, 610, cited in Sir Wm. Jon. 15, denied to be law in *Lamb* and *Archer's* case, 1 Salk. 225; Cro. Ca. 230, 343; Dyer, 358 b, Cas. 7; 2 Buls. 28; *Plowd.* 519, 53; 8 Co. 94; *Godb.* 26; 3 Leo. 89; 1 Anders. 61; 1 Roll. Ab. 611, 612; Nels. Fol. Rep. in Canc. 98, 279, 181, 116; Post, Cas. 99, Cas. 100; 1 Mod. 114; 1 Sid. 37, 451; 1 Lev. 25, 290; 3 Lev. 22, 264; 1 Mod. 50; 1 Ventr. 279; Bro. tit. Dev. pl. 13; March, 106; Own. 33; 37 H. 6, 30.)

If an issue is directed, and the defendant's answer is not falsified, or, by the one witness only, the Court often orders it to be read on the trial. (2 Chan. Cas. 8; 3 Chan. Cas. 123; 2 Vern. 555, 283; 1 Vern. 161, 137.)

Saturday, June the 28th [1729].

[S. C. 2 P. Wms. 529. See *Edwards v. Champion*, 1853, 3 De G. M. & G. 217.]

Case 94.—CRAY *versus* WILLIS.

At the Rolls.

N.B. In 1 Vern. 482, it is said, that it was decreed in the case of *Cox versus Quantock*, that the administrator should not have an account against the survivor, and it is so reported in Nels. Fol. Rep. in Canc. 176; 1 Lev. 164.

Mr. Lutwyck. Mrs. *Cray* devised all the residue of her estate to her son *Samuel*, and her daughter *Hannah*, their executors and administrators for ever, and made them executors. Mrs. *Cray* died, and afterwards *Hannah* died, and the question is, Whether on her death the whole survives to *Samuel*? The residue is left to them generally. In the case of *Taylor versus Shore*, Sir *Tho. Jon.* 161, the testatrix devised the residue to the disposal of her executrix, and Sir *John Shore* her brother, the executrix died, and it was adjudged that this being a legacy did not survive to the brother, and the same decree was made in the case of *Cox* and *Quantock*. 1 Chan. Cas. 238.

Master of the Rolls. The testatrix devises the remainder of all her goods and chattels to her son and her daughter, their executors and administrators for ever, both their executors cannot take, unless [185] they are tenants in common, but the will means, the executors or administrators of the survivor. A joint devise or legacy always survives, if there are not some words to create a severance, or tenancy in common. (Cartr. 2; 1 Salk. 838; Shower, 91.)

If a legacy is given to two, and one dies in the life-time of the testator, his share is not lapsed, but survives to the other, and therefore in this case the whole residue survives to *Samuel*. (1 Vern. 425; Calth. 3, 4, 5; 2 Chan. Cas. 64; 2 Vern. 514; 1 Vern. 482, and it is there said, that in the case of *Cox* and *Quantock*, it was decreed, That the administrator should not have an account against the survivor, and it is so reported in Nels. Fol. Rep. in Canc. 176; Carth. 15; 2 Show. 452; 2 Lev. 209.)

Case 95.—ANONYMUS. [1729.]

At the Rolls. Eodem die.

If a cause comes to a hearing on a bill of discovery, it must be struck out of the paper, and the bill cannot be dismissed, because it prays no relief.

A cause being brought to a hearing, where the bill was for a discovery only, the question was, Whether the bill should be dismissed, or the cause struck out of the paper? And his Honour the *Master of the Rolls* ordered the cause to be struck out of the paper, because a bill is never dismissed, where the plaintiff prays no relief; for the words of a dismissal are, The Court seeing no cause to relieve, &c.

*Monday, June the 30th [1729].*Case 96.—WILSON *versus* NORTH.*At the Rolls.*

A legacy to A. to buy mourning for himself, his wife, and children, if A. dies in the life-time of the testator, is lapsed.

The testator devises £100 to A. to buy mourning for himself, his wife and children, A. dies in the life-time of the testator, his legacy is lapsed. 2 Vern. 116, 466.

Case 97.—PEGG *versus* GREEN. [1729.]*At the Rolls. Eodem die.*

Where there is a mutual credit, the balance only is due to the executor in equity, but if a balance is struck in the life-time of the testator, or a bond given for it, the debtor cannot discount it out of the subsequent credit he has given the testator, unless the executor admits assets. Nels. 8vo. Rep. in Canc. 158; 2 Vern. 117.

The plaintiff on settling accounts with the defendant's testator, gave him a bond for the balance, and they had afterwards other dealings, and the plaintiff brought this bill against his executor, and insisted that the bond should be discounted out of the money, he afterwards gave the testator credit for.

Master of the Rolls. The plaintiff cannot set off the credit he gave the testator after the execution of the bond, in discharge of the [186] bond, but if mutual credit has been given since, one side of the account is to be set off against the other, and such decrees have been often made in this Court. The plaintiff, by giving the bond, has changed the nature of the debt, and taken from himself the advantage of setting it off by future credit, and to make such a decree might be compelling the executor to commit a devastavit, unless he admits assets, and I doubt if I could do it, if the account had been only stated, for then debt would lie for the balance, or an *insimul computasset*. The Master therefore must see what is due for principal, interest, and costs on the bond; and as to the plaintiff's demand for work done, or goods delivered, since the execution of the bond, the defendant must account for the assets, and the plaintiff is to be paid in a course of administration.

*Thursday, July the 3d [1729].*Case 98.—HALSEY *versus* SMYTH.*At the Chancellor's house, Lord Chancellor.*

A decree *ex parte* is made, on default of the defendant reading the affidavit of service, and a piece of the answer. But if a cause is heard, and the bill and answer opened, and then is adjourned, tho' the defendant make default at the next hearing, the decree shall be absolute, for the second hearing is to be considered as a continuation of the former, when he did appear.

This cause coming to be heard, and the bill and answer opened, was referred to arbitrators, but nothing being done on the reference, it came on again to be heard this day, and the defendant making default, the question was, Whether the Court should make

an absolute decree, or *ex parte*? and Mr. Lutwyche for the plaintiff insisted, that decrees *ex parte*, are only made, where the defendants make default on affidavit of service, and reading a piece of the answer, but that a decree *ex parte* was never made, where the bill and answer had been opened, and the cause adjourned over, and that this hearing was to be considered as a continuation of the former hearing, when the defendants did appear. And the Register being consulted, and of the same opinion, the Lord Chancellor pronounced an absolute decree.

Case 99.—BALGUY *versus* HAMILTON. [1729.]

At the Chancellor's house, Lord Chancellor. Eodem die.

'Mr. Hamilton by his will directed that his personal estate should be sold, and turned into money, and put out at interest, that his wife Ann should have £30 a year out of the produce of it, and that when, and so soon as his only daughter and child Ann should attain her age of twenty-one years, that then his wife should have £25 *per annum*, instead of the £30. Then the will goes on, *Item*, I give and bequeath to my daughter Ann all my personal [187] estate whatsoever, she paying the said £30 a year, and the legacies therein bequeathed, and I make my wife her guardian, and she is to receive the residue of the interest, maintaining my daughter thereout; but if my said daughter die before her age of twenty-one years, then my will is, that my wife shall have £400, and that on payment of the same she shall give a discharge for her said annuity, and that then, and immediately from and after my said daughter's decease without issue of her body, I give and devise all my personal estate to my brother James Hamilton, he paying the said sum of £400 to my wife, if then living.' The testator died, and Ann the daughter died an infant without issue, and the wife is since dead, and the only question is, Whether the devise over to the brother is good; or, whether the whole personal estate vested in the daughter, and on her death shall go in a course of distribution to her next of kin?

Mr. Solicitor General for the defendant. The first disposition to the wife of the £400 is indisputably good, and the words, *And that then and immediately, &c.*, are plainly relative to the preceding words, and as the devise to the brother is introduced with those words, so it is finished with the preceding burthen of £400, with this addition, *If the wife be then living*: And there can be no doubt on the whole clause, but that the testator meant, if she died without issue before twenty-one, and not if she died without issue indefinitely, and so the limitation over is good, and the case of *Martin versus Long*, 2 Vern. 151, is an authority in point.

Lord Chancellor. The only question is, Whether the devise over is good? A devise of a personalty after a dying without issue is certainly void, and it is as certainly good after a dying without issue in a limited time; now the words of this will can bear no other construction, but if the daughter die without issue before twenty-one; First, the whole estate is devised to the daughter, and the whole interest to the wife, part as an annuity for herself, and part for the daughter's maintenance, the first contingency is general, if she die before twenty-one years of age, the wife is to have £400, but who is to pay this £400? the brother; so that the latter words must have the same construction, and the will is to this purpose, If my daughter die without issue before twenty-one, my brother is to have the whole estate, he paying my wife £400. The wife is to have the £400 if the daughter die under twenty-one, and the brother being to pay it, if she die without issue, [188] the estate must come to him at the same time, as a fund out of which it is to be paid. (Ant. Cas. 93; Post, Cas. 100.)

Friday, July the 11th [1729].

APPEALS AND REHEARINGS.

Case 100.—BROOKS *versus* TAYLOR.

At the Chancellor's house, Lord Chancellor.

By an order of the Lord Chancellor, this case was stated for the opinion of the Judges of the King's Bench.

John Brooks made his will in the words following, 'I give to my dear wife all my personal estate, with this condition, to give to my three sisters five pounds yearly,

'for their lives, or the longest liver, presently after my decease, and after my wife's decease, the same I give to my daughter *Mary*, wife of Mr. *Taylor*, with the same obligations to my sisters, and then, after my daughter's decease, to the fruit of her body; but for want of such issue or fruit, to my brother and sisters then living, and after them, to their children, and the children of my brother.' *Quære*, Whether the subsequent limitations, after want of issue of the said daughter's body, or any, and which of them (the wife and daughter of the said *John Brooks* being dead without issue), are good, and to whom the estate belongs?

And the Judges certified their opinion in these words,

We are of opinion, that *John Brooks* being dead, and *Mary* his daughter being also dead without issue living at her death, the subsequent limitations are good, and that the estate in question belongs to the plaintiffs. And this cause coming now to be reheard, the Lord Chancellor upon this certificate, decreed the estate to the plaintiffs.

By the constant practice of the Court, acts of the Court, as a decree or order, in another cause between the same parties, may be read without an order.

[189] *Saturday, July the 12th* [1729].

APPEALS AND REHEARINGS.

Case 101.—*RAKESTRAW & al' versus BRUYER.*

At the Chancellor's house, Lord Chancellor.

[S. C. 2 Eq. Cas. Abr. 162, 601; 2 P. Wms. 511. See *Rajah Kishendatt Ram v. Rajah Muntez Ali Khan*, 1879, L. R. 6 Ind. App. 159; *Kinsman v. Rouse*, 1881, 17 Ch. D. 104,—50 L. J. Ch. 486,—44 L. T. 597,—29 W. R. 627; *Leigh v. Burnett*, 1885, 29 Ch. D. 235. See also on point of lapse of time, Statute of Limitations, 3 & 4 Wm. 4, c. 27, ss. 16, 28.]

Sel. Cas. in Canc. 55.

Disputes in the societies of law are to be determined by the benchers, and the Courts of Equity will not interpose.

Mr. Attorney General for the defendant. This bill is brought by the plaintiffs and their wives, the daughters of the late Mr. *Holford* deceased, to redeem three sets of chambers in *Gray's Inn*, for an account of the profits, and the benefit of a renewal of the term. And the chief question is, Whether this estate is redeemable? Mr. *Holford* in 1687 mortgaged these chambers for £600 to Mr. *Atwood*, and in 1700 the mortgage was assigned to the defendant Mr. *Bruyer*, but Mr. *Holford* not being a party to that assignment, it was not in the nature of a new mortgage. On the 25th of November 1700, Mr. *Bruyer* applied to the Benchers at a pension, for relief: and on the 27th, they made an order that Mr. *Holford* should account, and pay what was due on the said mortgage, or they would proceed against him as they saw cause: and another order was made with the consent of Mr. *Holford*, whereby it was ordered that Mr. *Holford* should pay off the principal and interest, and the duties of the house, and Mr. *Bruyer* assign the mortgage, or that he should deliver possession of the chambers: Mr. *Holford* did not pay the money, but in 1704 delivered possession only of two of the sets of chambers, and continued in possession of the other till the time of his death in 1708, the plaintiffs did not prove his will till the year 1724, though they came of age in 1714, which prevented us from bringing a bill of foreclosure against the representatives of Mr. *Holford*: In 1723 Mr. *Bruyer* obtained a renewal from the house, upon which in 1726 the plaintiffs file this bill; but we think the length of time is a bar to their title, the order of pension to deliver possession was in 1700, and possession of two chambers was accordingly delivered in 1704, so that from that time to the filing of the bill we were two and twenty years in quiet possession; and the time being begun in the father's life-time, will run upon the plaintiffs, though they were infants, and if this Court will dismiss the mortgagor's bill to redeem the fee, if the mortgagee has been in quiet possession for twenty years, though the equity of redemption is as valuable at the end of those years as at the beginning, it will much sooner do it, where a term only, which is a wasting security, is mortgaged: after such a length of time, [190] and the death of the parties, it is difficult to make up a strict

account, to set out the losses by tenants, and a mortgagee is not to be made a bailiff for ever to the mortgagor. The other chambers he died in possession of, may perhaps admit of another consideration, but they are not worth redeeming, because we have not renewed the lease of them, and these bills are not allowed by Courts of equity, to interrupt the repose and ease of these societies of law; and though the Benchers in this case have consented to give up their right, as an ejectment, or a bill of foreclosure will not lie for these chambers, so neither will a bill to redeem, for the remedy ought to be mutual. A bill of foreclosure is to bar the mortgagor of all right in equity to the estate, which by law is already in the mortgagee; but the legal estate of these chambers is in the society, and the Benchers who grant them out, are only their trustees.

But allowing the plaintiffs may redeem, they are not intitled to the benefit of the renewal, for where a renewable lease is mortgaged, and the mortgagee renews, the only foundation the Court has gone upon to give the mortgagor the benefit of this renewal, is the tenant right; but the chambers here were not renewed to *Bruyer* as a mortgagee, but as a Bencher, and the renewal was designed as a personal kindness to him, and the plaintiffs wives could not have renewed, though these chambers had not been in mortgage, because, by the rules of the society, the Benchers can grant leases only to their own members.

Lord Chancellor. To prevent disputes in these societies of law, all controversies concerning chambers ought to be determined by the Benchers; and Lord Keeper *Wright* refused to relieve the plaintiff, on a bill brought to redeem chambers; but the Benchers in this case desire the parties to resort to a Court of equity, and waive determining the question themselves. This term for years in the chambers, springs out of the estate of the trustees, which in equity must be considered as a legal interest; here then is a lease of chambers, with a power of renewal, mortgaged, and assigned to the defendant, and a conditional order of pension for the possession, which cannot be considered as a sale or foreclosure, but the estate is still to be considered as a mortgage, this order is not complied with, but Mr. *Holford* continued in possession of part, so no time run against him, for it must for all the estate in mortgage, or for no part, and no time began till his death in 1708, when the [191] plaintiffs were infants, and continued so till 1714; I think it reasonable, where a mortgagee continues in quiet possession for twenty years, that the mortgagor should not be let into a redemption, but the plaintiffs are in time, and therefore may redeem, not only the mortgaged term, but every thing excrement, for the additional term was granted to the defendant, only by virtue of his first term, and eleven years are added expressly to make up the remainder of the first term twenty-one years; so if the defendant is allowed what he paid for the renewal, no injury is done him, and though the plaintiffs are not capable of an original grant of these chambers, yet if they come to them by representation, they may assign them to a member, and the society will renew to him; and therefore the decree of the Master of the Rolls that the plaintiffs may redeem, and are to have the benefit of the renewal, must be affirmed. (1 Chan. Cas. 102, 190; 2 Vern. 84.)

Tuesday, July the 15th [1729].

MOTIONS.

Case 102.—*Ex Parte LEWIS.*

At the Chancellor's house, Master of the Rolls.

The Master of the Rolls would not order a supplicavit to be marked with the sum the sheriff should take security in, because there was no affidavit of the husband's circumstances, as a measure for him to go by. *Regist.* 89 a, 89 b; *Post*, Cas. 110. On a *ne exeat regnum* the sum is indorsed by the affidavit of the plaintiff. *Regist.* 89 b, 90 a.

Mr. *Mead* for the wife, moved for a supplicavit against the husband, and prayed the Master of the Rolls to order, what sum the writ should be endorsed with, for the sheriff to take in security, and said, that it was the constant practice since the case of *Clavering*, where Lord *Cowper* ordered the writ to be indorsed for two thousand pounds; but the Master of the Rolls granted the supplicavit without an indorsement, and said he had never known it ordered in that Court, or at least, not without an affidavit of the

circumstances of the husband, to guide the Court, as there was in the case of *Clavering*; that it was usual indeed, on a *Ne exeat regnum*, to indorse the sum, but there the oath of the party is the measure of the security.

Case 103.—ANONYMUS. [1729.]

At the Chancellor's house, Master of the Rolls. Eodem die.

The Court will not grant an order to prove exhibits at the hearing of exceptions, because you can offer nothing at the hearing, that was not before the Master.

A motion was made for an order to prove an exhibit *viva voce*, on the hearing exceptions to a Master's report, but the *Master of the Rolls* denied the motion, and said that no such order was ever made, because on arguing exceptions, you can offer nothing new, that was not before the Master.

[192] *Wednesday, July the 16th* [1729].

PLEAS AND DEMURRERS.

Case 104.—KING *versus* KING & al'.

At the Chancellor's house, Lord Chancellor.

If a bill is brought to be relieved against a deed fraudulently cancelled by the defendant, and to have another deed executed, the plaintiff need not make oath of the loss of the deed, because he could have no remedy at law, though the deed was in his hands. 1 Vern. 310; 3 Chan. Rep. 5. See the following case.

The plaintiff charged by his bill, that the defendant *King*, his father, was tenant for life of the lands in the bill named, remainder to the plaintiff his son in tail; that his father had fraudulently cancelled the deed of settlement, and sold the estate to one of the defendants, and prayed a discovery, and to be relieved.

To this bill the defendant the purchaser demurred, because the plaintiff, by the course of the Court, ought to have made oath of the loss of the deed.

And Mr. *Lutwyche* for the plaintiff insisted, that this case was not within the reasoning of that practice, for this bill was to be relieved against a deed, which had been fraudulently destroyed or cancelled, and to have another deed executed; and the plaintiff could have no remedy at law if he had the deed, and the *Lord Chancellor* was of the same opinion, and over-ruled the demurrer.

Case 105.—WHITWORTH *versus* GOLDING. [1729.]

At the Chancellor's house, Lord Chancellor. Eodem die.

If the plaintiff seeks to be relieved in equity on the matter of a deed, he must make oath of the loss of it, but not, if he prays only a discovery, or to have it produced at a trial, or the like. Nels. 8vo. Rep. in Canc. 78, 79; 1 Vern. 59; contra *Curs. Cancel.* 40, 217, 223, 229, 231; Nels. Fol. Rep. in Canc. 301. See the precedent case.

The plaintiff sets forth by his bill, that he was lord of a manor in *Kent*, and that the defendant was one of his tenants, that the manor house being repairing, he took all the deeds relating to the said manor out of a closet that lay open, together with a counter-part of his lease, in which there were several covenants, for a breach of which he could bring his action at law against the defendant, if the counter-part was in his hands, and prays a discovery and relief; the defendant makes a full answer to the discovery, that he had delivered all the writings back to the plaintiff, and demurs to the relief, because the plaintiff had not annexed to his bill an affidavit of the loss of the deeds, and the distinction allowed in 1 Chan. Cas. 11, 231; 1 Vern. 180, 247; Nels. Fol. Rep. in Canc. 266, was admitted in this case, that an oath is necessary, where the bill seeks to be relieved on the matter of the deed, because the want of the deed is the only foundation the plaintiff has, to draw the [193] cause from law to equity; but where the bill seeks no decree, but only to have the defendant discover, or to have the deed

produced at the trial, or the like, the oath is not requisite, because it is not to be presumed that the plaintiff would put himself to the expence of a suit, if the deed was in his own hands : and the demurrer was allowed as to the counter-part, and over-ruled as to the other deeds.

Case 106.—FALL & al' *versus* CHAMBERS & al'.

At the Chancellor's house, Lord Chancellor. Eodem die.

Mr. Solicitor General for the defendants. The plaintiffs dealt in tobacco from Virginia to Scotland, and insured on that voyage : the policy was taken out in the name of the defendant *Johnson*, and *Chambers* and others under writ it. The ship came into port, but the tobacco was greatly damaged, so that the insurees waived all title to it, and left it for the benefit of the insurers, and transferred it to them, and it was afterwards sold to the best advantage, and they were damaged in the sum of £1353, upon which the plaintiffs file their bill setting forth all this matter, and that the policy was taken in the name of a trustee, who refuses to let them sue in his name at law, to recover damages, and pray a discovery and relief. The defendants the insurers, by their answer admit the policy, and make a full discovery, but demur to the relief, because the plaintiff has a proper remedy at law.

It cannot be controverted, but that an action lies on a policy, and the only colour the plaintiff has for coming into this Court is, that the policy is taken in the name of *Johnson*, a trustee, but if this was sufficient to translate the jurisdiction, then all actions on policies would be turned into bills, the agents of foreign merchants always take them in their own name, and if this expedient should prevail, though the parties lived in London, they would take the same method. But if the trustee really refuses his name, this indeed is a foundation for the Court to compel him, but not to decree against the debtor, his refusal cannot alter the nature of the action against him, he has a right to have the witnesses examined *viva voce* at a trial, where their evidence can be more thoroughly sifted, and considered by a Judge and Jury, than on a commission. It is the common suggestion in every bill, that the witnesses are dead, or beyond the seas, out of the jurisdiction of the Courts of law, but here it appears by the plaintiff's own bill, that the loss was in Scotland, and that their witnesses live there, tho' this on a demurrer, has been adjudged [194] not to be a sufficient cause to have relief in a Court of equity, where there is a remedy at law ; but that it only intitles the plaintiff to have a discovery on the oath of the defendant, and a commission in aid of his action at law.

And the same demurrer was allowed by your lordship, in the case of *D'Silva*, where the ship insured was *Portuguese*, and bound on a foreign voyage, and the suggestions were, that the policy was taken in the name of a trustee, and that the witnesses were seafaring people, and beyond the seas.

Mr. Attorney General for the plaintiffs. This is a proper bill for relief, and the demurrer is not good ; the bill is brought by part owners, to have satisfaction on a policy, against *Chambers*, and other defendants, as under-writers, and against *Johnson* their trustee, on a ship bound from Virginia to the river Dunbar in Scotland ; in the voyage the ship and cargo were greatly damaged, and when they arrived at Dunbar, they proceeded to sell her, under proper protests, by a decree of a Court of Admiralty, for the benefit of the insurers, renouncing all right as to themselves ; we charge that the trustee refuses his name, that the transaction was in Scotland, and that it was a foreign voyage from Virginia thither, and that consequently the evidence must arise abroad. It is proper for a *cestuy que* trust to come into a Court of equity, on the refusal of his trustee, to have liberty to sue in his name. Suppose a bond is assigned, what is more common than to bring a bill against the obligor and obligee for a satisfaction, and the plaintiff is never sent back to recover the payment at law, tho' the defendant in that case might demur, for the same reasons the defendant here has, but they allow we are proper to pray relief against *Johnson*, but he might have demurred to our bill, if we had not made the other defendants parties, because they might have made us a satisfaction ; but if this demurrer is allowed, the bill will be out of Court as to them, and then *Johnson*, at the hearing, may object for want of parties. And as this matter arises in Scotland, and our evidence is there, it is the same thing as if they were beyond the seas, because the process of our courts does not bind them ; we design to examine the Custom-house officers in Scotland, and if we should serve them with a subpoena in Scotland, since they

are not bound to obey it, sure we have a right to a commission to examine them in *Scotland*. And the objection, that the examination of witnesses *viva voce*, is greatly preferable to an examination by Commissioners, is of no weight, because this Court, if they are not satisfied with the evidence, may direct an issue.

[195] *Lord Chancellor*. If I should give way to this attempt, no action would ever be brought on a policy, and a bill might as well be brought for payment of a bond, on suggestion that the witnesses were abroad, or dead; besides, these are transactions that in their own nature must arise at sea, and out of the jurisdiction of the Courts, and they that will take a policy in this kingdom, must be subject to our forms of trials; and who would insure if they were liable to bills? The jury will take the account and consider of salvage, and all proper allowances, and do it in all such trials; why cannot the plaintiff bring his witnesses from *Scotland*, as well as is done every day from *Northumberland*, which is the next county to it? The Commissioners will give their officers leave to come to the trial.

His lordship was going to allow the demurrer, but at the instance of the *Attorney General*, he made the same order he had done before in the case of *Dhegetoft* and the *London Assurance*, ant. Cas. 54. That the demurrer should stand over, till the trustee had put in his answer.

Case 107.—KILDESLEY versus D'FISHER. [1729.]

At the Chancellor's house, Lord Chancellor. Eodem die.

A defendant examined for the plaintiff, may demur to an interrogatory, because she is concerned in interest.

An order was made to examine the defendant as a witness, and she demurred to an interrogatory, because she was concerned in interest in the question; and insisted, that she was not obliged to prove the plaintiff's title against herself, and that the usual allegation, That the defendant was not concerned in interest, was left out of the present order.

Mr. Solicitor General for the plaintiff. This is no good cause of demurrer, since we have submitted to take her oath, though it may be supposed, that she is biassed against us; and her own depositions at the hearing may be read for herself, and the other defendants, though she could not read her own answer: and her testimony is unexceptionable, because she cannot be supposed to befriend us. It would be a good objection, indeed, for the other defendants, to say she is interested for us, and therefore it is usual to insert in these orders, that the defendant is not concerned in interest, to shew the Court that he is a competent and indifferent witness.

Lord Chancellor. The method of the Court is, where the plaintiff is obliged to make several defendants purely out of form, to give him [196] leave to examine those who are not concerned in interest, that is, who are not interested for the plaintiff; and it would be hard, when the plaintiff is obliged to make parties not interested, defendants, that he should lose the benefit of their testimony, and therefore the Court gives the plaintiff leave to examine them. But this defendant is not a formal, but a material party in point of interest, what you can expect from her examination, you may have from her answer, which will be evidence against her; and tho' she swears to tell the whole truth on her examination, she need not answer where her interest is concerned, of which she is to judge for herself; and therefore I allow the demurrer. (Post, Cas. 124; 2 Chan. Cas. 208.)

She likewise demurred to being examined to a deed, whereto she was a witness.

Lord Chancellor. If she be a witness, you can examine her to the execution, as to so much therefore, the demurrer must be over-ruled, but not as to any other questions; and therefore the demurrer must stand as to the rest. (Curs. Canc. 244, 284.)

Case 108.—DASHWOOD *versus* BITHAZEY. [1729.]*At the Rolls. Eodem die.*

Curs. Canc. 356. A bill of foreclosure being heard on a sequestration, and security being defective, the Court decreed a sale, instead of a foreclosure, because if the plaintiff sued the defendant on his bond, that would open a degree of foreclosure, and it is usual in such cases to refer it to a Master to set a value on the estate, and decree that the plaintiff should take it *pro tanto*.

The bill was to foreclose, the defendant appeared, and stood in contempt for not answering to a sequestration, and the cause came on upon the sequestration, for the bill to be taken *pro Confesso*. And Mr. *Solicitor General* for the plaintiff, prayed a decree for a sale, instead of a foreclosure, because the security was defective; and if they should afterwards sue the defendant on his bond for performance of covenants, that would open the decree of foreclosure; and he insisted that such decrees were usual. But the *Master of the Rolls* said, he had never known any, but that where the security was defective, it was often indeed referred to a Master to set a valuation on the estate, and the plaintiff was to take it *pro tanto*; as in the case of *Homden versus Tilby*, on a bill of foreclosure of the shops in *Westminster Hall*; but in this case he decreed a sale, because the decree is, that the bill should be taken *pro confesso*, and not according to the prayer of the bill; and the case of *Nosworthy and Serjeant Maynard* was quoted, where the security being defective, the cause stood over, and the plaintiff filed a supplemental bill, and prayed a sale.

[197] Wednesday, July the 23d [1729].

MOTIONS.

Case 109.—HOLEWORTH *versus* LANE.*At the Chancellor's house, Lord Chancellor.*

The word petition is to be understood of any summary way in opposition to the proceedings by bill. Acts of Parliament take notice of implied trusts. The heir of the vendee is a trustee by the 7 *Ann.* for the person who paid the purchase money.

On a motion made for the executor of the mortgagee, it was referred to a Master to see whether the heir of the mortgagee was a trustee within the act, 7 *An. ch.* 19, the Master reported him to be a trustee within that act, upon which report an order was made, that the heir should assign over the mortgage to such persons as the executors should appoint. And now a motion was made for the defendant to set aside the report, because the heir was not a trustee for the executor by the meaning of the act; and because the reference was made on a motion, whereas the statute requires it should be by petition.

Mr. Solicitor General for the executor. The constant practice is, to pray a reference by motion as well as by petition. Petition originally signified a bill, but a motion is a petition, and the word is to be understood of any summary way, in distinction to the proceedings by bill and answer.

But they say, this case is not within the statute, because the heir of the mortgagee is a trustee for his executor, only by implication of law. But the implied trusts are taken notice of by acts of Parliament, as by the statute of frauds and perjuries, and it was adjudged by your lordship in the case of *Bertie versus Vernon*, that the heir of the vendee was a trustee within this act, for the person who paid the purchase money. The heir of the mortgagee is a trustee both for the executor of the mortgagee, and for the mortgagor, and is doubly within the statute, as mortgagee and trustee too, and he is bound to convey, either at the petition of the mortgagor, or of the *cestuy que trust*.

Lord Chancellor. A motion is a petition, not reduced into writing, and presented, and I do not know that the statute requires those circumstances, and the general practice is to pray a reference by motion; and if the order is not according to the statute, it is void, and without authority.

[198] There can be no doubt, but a mortgage in fee descends on the heir of the mortgagee, but it is as certain that the money belongs to the executor, so that the heir is only

his trustee ; and this was the very inconvenience the statute was made to remedy, that the mortgagor might be willing to pay the money, or the executor might want it ; and that in either case, they should not be obliged as formerly, to wait the full age of the heir.

Thursday, July the 24th [1729].

Case 110.—*Ex Parte GIBSON.*

At the Chancellor's house, Lord Chancellor.

Lord Chancellor ordered a supplicavit to be marked, without affidavit, only upon enquiry of the husband's circumstances from the solicitor for the wife. *Ant. Cas. 102.*

Mr. *Solicitor General* for the wife, moved for a supplicavit against the husband, a mercer in *Pater-noster-row*, no affidavit was read, only the wife's solicitor told the *Lord Chancellor*, that the husband was in very good circumstances, and his lordship granted the writ, and ordered it to be indorsed with £400 for each surety.

Case 111.—Sir JOHN OSBORN *versus* COWPER. [1729.]

At the Chancellor's house, Lord Chancellor. Eodem die.

If a plea is ordered to stand for an answer, the defendant cannot move to dissolve the injunction absolutely, but only *nisi*.

An injunction was granted till answer, and further order ; the defendant put in a plea, which on arguing, was ordered to stand for an answer, with liberty to except, and the benefit was saved to the hearing ; and the defendant moved to dissolve the injunction.

Lord Chancellor. You can only move, as on coming in of your answer, that the injunction may be dissolved *nisi*.

[199] DE TERM. S. MICHAEL. 1729, IN CUR. CANCELLARIÆ.

Tuesday, October the 14th [1729].

Case 112.—BAMBRIDGE *versus* CASTEL.

At the Chancellor's house, Lord Chancellor.

Mr. Lutwyche for the petitioner. This is a petition to your lordship, to supersede a writ of appeal of murder, brought by the widow *Castel* for the death of her husband, against Mr. *Bambridge* and Mr. *Corbet*. The petitioner *Bambridge* was indicted for the said murder, on the 9th of *April* last, and on the King's evidence only, without examining his own witnesses, was acquitted ; and on the 9th of *July* following, this writ of appeal was brought, returnable *tres Michael'*, directed to the Sheriffs, to attach *Bambridge* and *Corbet*, the appellant having found *Wagstaff* and *Stary* pledges, setting forth their additions, and places of abode. The words of the writ are, *Quia Maria, &c., fecerit vos Securos, &c.* We have inquired after the security mentioned in the writ, and as it appears by our affidavit, they have entered into no recognizance, and therefore we pray your lordship to supersede this writ : it being an injury to the great seal, that any writ should issue which contains a positive falsehood ; these are not nominal pledges, but described in the very writ by their names, additions, &c. The law has appointed pledges to be given on every writ, and this writ has accordingly affirmed, that pledges were found, which upon inquiry proves false. The writ ought to have run, *Si fecerit, &c.* Here it is positively said to be done, and is not ; therefore the reason of the writ failing, the writ itself too ought to fall to the ground. *Rast. Entr. 46 b*, a writ of appeal of murder was brought returnable in B. R. (and run, *Si fecerit*) ; the [200] Sheriff returned, that the appellant had found no pledges ; this was adjudged a good return, and the party finding pledges in Court, the record says, an alias was directed : And the appellant shall not avoid what the law makes so essential, by a falsity, by pretending he has found

pledges, when he really has not, and the finding pledges is material, that if the appellee be acquitted, the appellant may answer damages *pro unjusto clamore suo*; and in *Rast*. Entr. 44 a, is set down the summary method the appellee has to recover those damages. If one is indicted for a trespass, and acquitted, he may bring his action, as was adjudged in *B. R.* in the Case of *Savil* versus *Roberts*.

Mr. Kettleby. The form of the Writ is set down in the appendix to the Register, 10 b, here is the difference of *Vos* for *Nos*, and *fecerit* cannot be the future tense, *Because she shall*, for that is not sense, but must be the præter tense. All the precedents are, *Nos*; Tremain, 16, 28; Co. Entr. 56 b, 59 b, only *Rastal*, 46 b, is *Si fecerit te*; but whether the writ ought to be *Vos*, or *Nos*, neither in this case is done. The statute of *Westminster* 2, chap. 12, 2 inst. 383, is strongly penned, to prevent the malice of appellants, and pledges on an appeal are more particularly requisite on this statute, than at common law; and it appears, that before this act of Parliament, where the appellee was acquitted, the abettors were formerly punished by death.

Mr. Wynne. In *Rastal's* Entr. 46 b, the writ is *Si*, &c. If pledges are found, you are to attach; if they are not found, you are not to attach. And there the appellant in person found pledges, which shews there is a necessity to find real pledges, to satisfy both the Crown and the party; so that finding pledges is a condition precedent, but they will say perhaps, that here is no condition precedent, because the writ does not run, *Si*, &c., but *Quia*, &c., but then the reason is much stronger, why your lordship should grant a supersedeas, because the writ contains a direct falsehood, but it is likewise an absurdity; for by what power, or for what reason should the Sheriff take security before the writ was delivered to him.

Mr. Strange. We do not move to quash this writ (for that is only proper after the return, in the Court where it is returnable) but to supersede it, whilst it is in the hands of the ministerial officers the Sheriffs. In the case of *King* versus *Dee*, in *B. R.* on a *De Excommunicato capiendo*, it was moved to quash the writ, because of those general words, *Sive al' Jur' Eccles.* and the Judges said they could not quash it, because it was not returned [201] into that Court: upon which they changed their motion, that it might be superseded, which was granted, because it appeared there was an entry in Court, that such a writ had issued, and they gave this remedy to the party, that he might not lie in prison till the return. In the writ of appeal, pledges are not mentioned, as in other original writs, which are directed to the Sheriff generally, to take security; but the pledges are particularly mentioned by name, &c., and in the body of the writ; and the design of pledges would be eluded, if it was sufficient to find them at any time before judgment, for the appellant would never require judgment if the appeal went against him, nor would the pledges stand.

Mr. Attorney General for the appellant. As this is a motion not to quash, but to supersede the writ, it must be, *Quia emanavit improvide*, or *erronice*, and the manner or irregularity must be some thing that does not appear on the face of the writ, because it is not returnable into this Court, but if there is any error in the writ itself, that will be a ground to quash it in the Court it is made returnable, after the return thereof; and this case is distinguished from the case *De Excommunicato capiendo*, because the 5 *Eliz.* chap. 23, requires, that upon the issuing of it, the writ should be inrolled in *B. R.* so that Court may take notice of it before the return, but the error, or irregularity in this case, must be extrinsic, because the writ is gone out of the Court, and is not now before your lordship.

There is no resolution whereby it appears, that appeals are distinguished from other actions, as to finding pledges, which by the old law ought to be real, to answer amerciaments and damages, but by the course of the Courts for many years (as the cursitor for *London* and *Middlesex*, who attends, is ready to certify to your lordship) no real pledges have been found on appeals; so that if this should be judged necessary, it may be the cause of the reversal of several judgments.

In an appeal of *Mayhem*, which is felonice, Co. Entr. 50, *Doe* and *Roe* are the bail, so in the case of *Faxe* versus *Lowe*, which record was settled by your lordship and Lord Chief Justice *Eyre* on an appeal of murder by bill. The construction of those words in this writ, *Quia fecerit*, &c., must be, *Because she will*, &c., which is of the same sense, as *Si*, &c., and then there can be no foundation to come here, *Quia emanavit improvide*, or *erronice*; for then the taking security, is subsequent to the issuing of this writ. But the plaintiff may find pledges at any time before judgment, and for this reason in *Sir Tho. Jon.* 154, where the appellee pleaded in abatement no pledges, and pleaded over,

his plea in abatement was [202] disallowed. And in *Hussy's* case, 9 Co. 71 b, and *Cro. Jac.* 413, Cas. 2, on error it was adjudged that the Sheriff might execute the writ if he pleased, though the appellant did not find pledges, and it was good, if the party found security while the writ was depending, and this answers the objection, that no pledges is a good return, because the Sheriff may execute the writ notwithstanding, if he pleases. So the 11 H. 4, Fol. 7 (8); *Bro. Abridgm.* Pledg. 8, on an appeal of *Mayhem*, and in 3d Lev. 344, 345, before the statute of amendment, the want of pledges was amended after error brought. The statute of *Westminst.* 2, relates to abettors, where the appellee is acquitted, and does not relate to pledges, and no enquiry could be had of the abettors, if this writ was quashed, because the life of the appellee was never in jeopardy. And this application is not proper here, but must be taken advantage of, on the return of the writ, by motion, or by a plea in abatement.

Lord Chancellor. Pledges were certainly requisite by the old law, and must be so still, where it is not altered by acts of Parliament.

Pledges on this writ are given in two places, either to the King in Chancery, or to the Sheriff, the writ in the register is, *Si fecerit te*, or *Nos*, &c., but this writ is in a third form different from both, *Quia*, &c., but then this objection is to the writ itself, which I do not think asserts a falsehood that pledges are given, but the *English* of the words is, *Because she will give*, &c., which is only conditional; and this objection, that the writ is not agreeable to precedent, is too early to be made here, but will be proper on the return of the writ. The Sheriff may return, that no pledges are found, and is not obliged otherwise to execute the writ, but the writ is still in force, and not abated, as appears by the precedent that has been cited in *Rast.* Entr. 46 b, for if the writ had not subsisted, the Court of King's Bench could not have granted an *alias capias*, but the Sheriff may execute the writ if he pleases, though the appellant find no pledges, and the appellee has no remedy till judgment, and cannot plead it: But this is something intrinsick to the writ, and proper for another Court, and therefore the petition must be dismissed.

Where an order is made upon hearing Counsel of both sides, there is no occasion to serve it.

[203] Case 113.—TREFUSIS *versus* Sir J. HIND COTTON, Lady COTTON, & al. [1729.]

At the Chancellor's house, Lord Chancellor. Eodem die.

The Court enlarged the time for a defendant to shew cause, after he came of age, why the decree should not be made absolute, till the plaintiffs in the first cause had put in an answer to a bill of discovery he filed against them, after he came of age.

Sir J. *Hind Cotton* and Lady *Cotton* filed a bill to have her portion of £6000 repaid, and £500 a-year for a jointure settled on her for life, pursuant to marriage articles, with Mr. *Trefusis* her former husband, and an account was directed to be taken of the personal estate of Mr. *Trefusis*; and a decree *nisi* was made against Mr. *Trefusis*, an infant, her son-in-law; and when he came of age, he was served with a subpoena, to shew cause why the decree should not be made absolute, and he now moved, to have the time for shewing cause enlarged, till Sir *Hind-Cotton* and Lady *Cotton* put in their answers to a bill he had filed against them, for a discovery, whether in articles of agreement between his late father and Lady *Cotton*, that her share of the personal estate of Mr. *Craigs* her father, which amounted to £100,000 should be at her own separate use and disposal, Lady *Cotton* did not, in consideration thereof, agree to waive the benefit of the former marriage articles.

The defendants insisted, that the execution of a decree ought not to be deferred on the bare allegations of a bill, not supported by any affidavits, and that (the decree having directed an account to be taken of the personal estate of Mr. *Trefusis*) he might have the advantage of this discovery before the Master on personal interrogatories, or might amend his answer.

Lord Chancellor. The time of six months, allowed by the course of the Court, for a defendant to shew cause why a decree should not be made absolute after he comes of age, is not so sacred, but that in particular cases, and where the matter is of consequence, the Court may enlarge it; it appears very probable, that there was such a private agreement, as is suggested, on Mr. *Trefusis* his consenting that so great an

estate should be at his wife's own disposal, which the son cannot come at by this decree, but only by a discovery from the answers of the defendants; and then he may amend his own answer, and make a better defence, and therefore after the six months are expired, I enlarge the time for three months *nisi*.

N.B. On the defendant's coming to shew cause the first day of *Michaelmas* term, this order was made absolute; and that time being out, and the defendants not having put in a [204] full answer, the time was twice enlarged on motion, *quo usque*. (Ant. Cas. 39; Post, Cas. 170; Post, Cas. 174.)

Wednesday, October the 15th [1729].

EXCEPTIONS, ETC., TO THE MASTER'S REPORT.

Case 114.—DAVY *versus* SEYS.

At the Chancellor's house, Lord Chancellor.

On a report of assets, costs are decreed generally against the defendant, and not out of assets.

The bill was brought by creditors against the administrator, and an account was directed, and costs reserved, till the account was taken; and by the Master's report it appeared, that the defendant had assets sufficient in his hands to satisfy the plaintiff's demands; and the Lord Chancellor decreed costs generally against the defendant, without directing an inquiry of assets, and said, that he knew no better rule to guide himself by, than that they proceeded on at law, where, if the defendant pleads *plene administravit*, and the plaintiff recover but two-pence, the Court gives judgment *De Bonis propriis, si non, &c.*, that otherwise no body would sue an administrator, or executor; and that there may be more assets than appear by the Master's report, for the plaintiffs might content themselves to prove sufficient to answer their demands. (Cro. Ja. 229; Yelv. 169.)

Case 115.—WALKER *versus* MEAGER. [1729.]

At the Chancellor's house, Lord Chancellor. Eodem die. [S. C. 2 P. Wms. 550.]

Mr. Solicitor General for the plaintiffs. Mr. Meager made his will *inter al'*, in these words: 'As to my temporal estate, I do hereby charge the same with the payment of all such just debts as I shall happen to owe at the time of my decease, and also with the several legacies herein after bequeathed; then he gives several legacies, and particularly £300 to his daughter; then taking notice that he had surrendered his copyhold estate to the use of his will, he declares it to be to the purposes following. I devise all my freehold and copyhold estate to my son *Thomas Meager*, and his heirs, subject to, and chargeable with all my just debts, and the several legacies by me given; and makes his son *Thomas* executor.' And on a bill brought by the creditors, an account was decreed, and a report has been made, and the cause now comes before your lordship on the equity reserved, and the only question is, since the estate is not sufficient to satisfy the debts and legacies, whether the money arising by the sale of the lands shall be divided equally among the creditors and legatees? or, whether the creditors shall be preferred? And as in natural [205] justice the testator ought to pay his debts in the first place, so it plainly seems by the will to have been his intention, tho' he has not declared so in express words. In the beginning of the will, he charges all his temporal estate with the payment of his just debts, &c., and also with the several legacies, &c., which words seem to introduce a second charge, and this further appears from the nature of the fund he had then in view; his personal estate, which was the fund subjected by law, was liable to his debts in the first place, and when he adds another not chargeable by law, he shews, he would have his debts and legacies paid out of this additional fund, in the same manner; then he makes his son, whom he devises his estate to, executor likewise; and if he had devised it to him to sell, for payment of debts and legacies, the money would be assets, and the debts must be preferred. 2 Vern. 248, *Greaves versus Powel*, and *Beak versus Brown*, Trin. Term. 1712. The testator, before the statute 6 & 7 of K. W. of fraudulent devises, bequeathed his lands

to his second son, and his heirs, subject to the payment of such debts as his personal estate should not be sufficient to satisfy, and of a legacy of £500, and made his second son and wife executors. This devise being before the statute, the debts amounted to more than the personal estate, and the value of the land; the bond creditors had no lien but by the will, but Lord Harcourt said, he would suppose the testator to mean what he ought, and that he designed to be just before he was charitable; and therefore decreed the debts to be paid in the first place. (2 Vern. 405; 1 Chan. Cas. 275.)

Mr. Attorney General for the defendant. If this money raised by the sale of the estate, should be applied in the first place to the payment of the debts, the daughter will be left wholly unprovided for. It is allowed, there are no express words in the will directing the debts to be first paid, but they would infer it to have been the intention of the testator: First, From the order of the words: but the order of the words has never been allowed a rule to explain the intention of the testator, which should be first paid; for all things cannot be said together: *And also, &c.*, do not imply a secondary consideration (1 Vern. 31), as has been often adjudged in the case of legatees, but that the first legatee must abate, in proportion with the second: And suppose legacies had been first mentioned, should they have been paid in the first place?

Secondly, Because the testator had his whole estate under consideration, and therefore as his personal estate was to go in a course of administration, it is plain he designed his real estate should go in the same manner. But one must go as the law directs; the other as the will.

[206] Thirdly, Because if this devise had been to his executor to sell, the money would have been legal assets, but this is a devise in fee, subject to, &c., and is only an equitable charge, and the executor in this case can be considered only as a trustee, for the devise being to him in fee, who was the eldest son of the testator, the lands descend on him, and it is not a constant rule to prefer creditors; but there are many decrees that they should be paid, *pari passu*, with legatees, because, as to the lands, the creditor takes only by the bounty of the testator, and it is only a legacy to him. 1 Vern. 482.

Though the devise in *Beak* and *Brown's* case was before the statute, so that the deviser had a power to defeat his bond creditors of the benefit of his lands, yet he not having done so, the Court might think proper to consider them in the same manner as they would have been intitled if the lands had descended.

Lord Chancellor. From a view of the whole will, there appears to be no *prius* or *posterius*, nor which it was the intention of the testator should be first paid, the debts, or legacies; but it is plain he intended the one as well as the other: All his estate is given to his executors, and his copyhold estate is particularly surrendered to the use of his will, and his whole estate is made subject to debts and legacies, and is given to his executor to enable him to pay them; so, whether the money arising by the sale of the lands is legal, or equitable assets, it must be considered as legal assets, and applied in a course of administration. If *Cestuy que trust* of an estate devises it to his executors to be sold for payment of debts and legacies, this is equitable assets, and yet it has often been decreed to be applied in a course of administration. (Ant. Cas. 61, Cas. 78; Post, Cas. 181; 1 Vern. 63; 2 Vern. 133; 1 Chan. Cas. 32, 248; 1 Vern. 69; 1 Lev. 224; Nels. Fol. Rep. in Canc. 88, 195; Nels. 8vo. Rep. in Canc. 202; Ant. Cas. 34.)

[207] *Friday, October the 24th [1729].*

Case 116.—ANONYMUS.

In Court, Lord Chancellor.

If the defendant obtains an order for time to answer, he may put in a plea, if the order is not, to answer only. 1 Chan. Cas. 279; 2 Chan. Cas. 208; 1 Vern. 275.—A second plea of want of parties, is not good, for at law, if the defendant pleads want of parties, he must give the plaintiff a good writ, but this plea cannot be suppressed on a motion, but must be set down to be argued.

Mr. Attorney General for the plaintiff. The defendant pleaded that such a person not named in the bill ought to be made a party, upon which the plaintiff amended his bill, and made him a defendant, then the first defendant obtained an order for time to answer, and then pleaded, that such a one also, not named in the bill, ought to be

a party; and I humbly move your Lordship, that this plea may be suppressed, being a second dilatory plea, and coming on irregularly, for by the order the defendant had only time to answer; and though the order is not for time to answer only, but to answer, and a plea has been adjudged an answer in Lord *Strafford's* case, that must be understood of a plea in bar, not of plea in abatement?

Lord Chancellor. If a defendant at law, pleads in abatement, the want of parties, he must shew who they are, and must give the plaintiff a good writ: But this plea cannot be suppressed on a motion, but must be set down and argued.

Saturday, October the 25th [1729].

APPEALS AND REHEARINGS.

CHARLES SELBY AMHERST, &c., *Plaintiff*; WILLIAM ROBINSON LITTON, & al', *Defendants*.

In Court, Lord Chancellor.

Upon the petition of the defendant, *William Robinson Litton*, both causes came on to be reheard, and the Lord Chancellor was pleased to declare his opinion in favour of the defendant, *William Robinson Litton*, but offered the plaintiff, if he desired it, to rehear the causes again assisted [208] with Judges, which the plaintiff desiring, it was ordered the said causes should come on again to be reheard on that day fortnight. (Ant. Cas. 83; Post, Cas. 120.)

Tuesday, October the 28th [1729].

Case 117.—STRAFFORD *versus* BERRIDGE

In Court, Lord Chancellor.

The general sense of the words of a will are to be restrained, by the intention of the testator, and the other words they are in company with. By the words, *All the rest and residue of my estate, chattels, real and personal*, only the residue of the testator's personal estate passes.

Mr. Solicitor General for the plaintiff. 'Mr. *Strafford* by a codicil, devised to Mrs. *Berridge*, his niece in these words, I give and bequeath all that my mansion-house, &c., to Mrs. *Berridge*, during the term of her natural life; also, all my goods, chattels, household-stuff, furniture, and other things, now being, and which at the time of my death shall be at, or in my said dwelling house, and the appurtenances; and also the use of all my plate during life; he also devised to her his coach horses, £600 and £20 for mourning,' and by this codicil Mrs. *Berridge* claims £260 in money, which was in the house at the death of the testator. The testator by first giving her his house for life, shews what he meant by his goods and chattels, and so do the following words, household stuff and furniture; for if the words, goods and chattels are to be taken in their full sense, then household stuff and furniture are comprehended under them, and those words would be superfluous, and in this sense the title deeds of his estate, or securities for money, if they were found in the house, would pass; whereas it is plain he did not design to comprehend even the plate under these general words, for he after expressly devises the use of it to her for life; and the words, *Now being, And which*, &c., plainly shew, he did not design to give her money, because it would be so very difficult to prove, that the money in the house at the time of his death, was the identical money he had there when he made his will.

Mr. Lutwyche. The general signification of the words of a will may be restrained by the intention of the testator, and other words they are in company with, as appears from the case of *Merryland and Wilkinson*, Cro. Ca. 323, and of *Markham and Twisden*, which was decreed by Lord *Harcourt*, after it had been spoke to two or three times. The testator made his will *inter al'* in these words, 'All the rest and residue of my estate, chattels, real and personal, I give to my wife': His lordship decreed [209] only the residue of the personal estate to the wife, tho' a fee would have passed, if the will had gone no further than the word estate. In this case, the testator, to shew it was not his intention to pass every thing the words would extend to, mentions afterwards particulars, as his coach-horses, and the use of his plate for life, and a pecuniary legacy

of £600, and though bonds will pass by a grant of *Omnia Bona*, yet here by the words *Goods or other things*, only furniture and things of the like nature will pass; and in the case of the Bishop of *Salisbury* and *Dormer*, it was adjudged by Lord *Harcourt*, that by a devise of *goods*, jewels, money, or pictures, did not pass.

Mr. Attorney General for the defendant. It is allowed, that all the words of this will are general enough to take in money, but it is said, they must be restrained to household goods and furniture, because if they are taken in the general sense, the words household stuff and furniture are superfluous; but this is the usual manner of wording wills, after general words, to enumerate particulars; and may not we with more reason say, Why did he use those general words, if he meant nothing by them? and that they shew his intention to pass more, and the words, *Other things*, shew he meant every thing that was personal; whereas the plaintiff, by other things, would have him mean only the same things, and the words will not comprehend the title deeds, for they follow the estate, and though he may be supposed not to have meant securities for money, which are choses in action, yet this money was a thing in possession, and actually in the house at the time of his death: And the express devise afterwards, of the use of the plate to her for life, shews, that he thought that it would otherwise have passed to her absolutely by the general words; and these words must signify more than furniture, for a library of books, wine in the cellar, &c., if any, would have passed. I agree, that where words, which by themselves would have carried the real estate, are mixed with words that will pass only the personal estate, that it is reasonable to restrain their general signification, but what authority can they produce to restrain the sense of these words, which all relate to a personal estate? The words, *Now being*, *And which*, &c., they say are a double description of what was to pass; but I rather think, his intention was to extend the words, either to such things as he had at the time of the making the will, or at his death, in the house; and though he had removed any of the goods, he certainly designed they should pass, and the money in his house at the time of his death, shall be taken to be there, when he made his will, unless the plaintiff can prove it came in since.

[210] *Lord Chancellor.* There is an opinion, that the Sheriff on a *feri facias* cannot seize money, because the money is to be levied *de bonis & catallis*, but money cannot be levied from money: But not to trifle, the testator cannot reasonably be supposed to have meant money by these words, but only goods of the nature and sort of household goods; and the words cannot be understood in their general sense, for that would take in bonds and securities for money, which there is no colour to suppose the testator designed to pass. (Swinb. part 7, sect. 10, n. 8; 1 Chan. Rep. 190; Ant. Cas. 69.)

Case 118.—HUNT versus STONE. [1729.]

In Court, Lord Chancellor. Eodem die.

Devise of an *East India* bond to be paid at 21, or marriage, and if the legatee died before it was devised over, the interest shall wait on the principal, and not go to the executor.

The testator devised to an infant an *East India* bond of £100, to be paid at twenty one, or marriage, and if she died before, he devised it over; and the question was, Whether the interest belonged to the executor, or should wait on the principal?

Lord Chancellor. The testator's intention seems to be, that the interest should follow the principal; he does not give £100, but a specific *East India* £100 bond.

Friday, October the 31st [1729].

MOTIONS.

Case 119.—VAUGHAN versus WELSH.

In Court, Lord Chancellor.

If the defendant pleads, the plaintiff is not obliged to elect till the plea is argued. Post. Cas. 166; 1 Vern. 103.

An order for the plaintiff to make his election, was discharged on motion, because the defendant had pleaded the statute of limitations, and the plea had not been argued.

[211] *Saturday, November the 8th* [1729].

APPEALS AND RE-HEARINGS.

Case 120.—CHARLES SELBY AMHERST, Esq., administrator of Dame MARGARET STRODE, his late wife, who was the widow of Sir GEORGE STRODE, deceased, *Plaintiff*; WILLIAM ROBINSON LITTON, Esq., devisee in the will of LITTON LITTON, Esq., deceased, who was the only son and heir of the said Sir GEORGE STRODE, deceased, FRANCIS MASCAL, and JAMES BEDINGFIELD, mortgagees of the estate in question, *& e contra, Defendants*.

[S. C. ante, p. 131.]

In Court, Lord Chancellor ; Sir Robert Raymond ; Chief Justice of B. R. ; Mr. Justice Denton.

Mr. Attorney General for the defendant, William Robinson Litton. These causes come before your lordship to be re-heard, on the petition of *William Robinson Litton*, whereby he insists that the equity of redemption of these terms belongs to him, and not to the plaintiff; First, For that the testator did not intend to give the Lady *Strode* the absolute interest in the terms, but only to give her the same, as a security for the money due upon those mortgages. Secondly, Because if it was his intention to devise the absolute interest in the terms to his mother, such a devise could not take effect in point of law. And, Thirdly, Because this point has been already determined against her by the decree of Lord *Harcourt*.

That this was the testator's intention, appears manifestly from the whole frame of the will, the devise to Lady *Strode* of these mortgaged terms being amongst the pecuniary legacies, and before the devise of his lands, and when he comes to devise his lands to the defendant *William Robinson Litton*, he describes them by the words, *All and every his manors, &c.*, which convey the lands in question to him, in as plain and ample a manner, as if the testator had devised them by express words.

[212] This intention is still the more evident, if it be considered, that the devise of his real estate to the defendant *William Robinson Litton*, is in the same words, as the devise to the testator's own son (in case his wife had been with child of a son), and it is not to be imagined that the testator could intend to give these lands from his own son to his mother.

No devise by the testator of these terms but as mortgage interests, could possibly take effect, till the determination of the estate to *Strode Strode*, and the estates tail to his sons, and the contingent estates limited to *George Darnelly* for life, and to his sons in tail: and it is hardly to be imagined that it could ever enter into the thoughts of the testator to give his mother a remote interest in lands, which she could never probably either enjoy or sell, and to sever such long terms of one thousand years from the inheritance of his estate, only in order that his mother might have the power of giving them away from his family to a stranger, as the fact has really happened.

The words of the devise in question are proper to convey these estates as securities, and to put his mother in the place of the mortgagees, and such interest only they must necessarily be supposed to pass, so long as any of the before-mentioned intermediate estates, precedent to the testator's reversion in fee, subsists; and there is no reason to imagine that the testator intended his words should have two different meanings.

If your lordship should reverse this decree, Dame *Margaret Strode* (under whom the plaintiff claims, and who had a jointure besides of £400 *per annum*), has by the will of her son *Litton Litton*, legacies to the amount of £3600, besides the rent-charge of £100 *per annum* thereby given to her, for her life, which is very near as ample a provision as he designed for an only daughter, in case he had left one. But if the decree stands, then the plaintiff in right of his wife, will receive out of *Litton Litton's* estate, four times as much as the provision made by the said testator for an only daughter, which can never be supposed the testator intended.

But secondly, Supposing it appeared never so plainly to be the testator's intent to devise the absolute interest in the terms to his mother, yet we humbly apprehend that such a devise cannot take effect in point of law, because those terms (or which is the same thing as to the present question), the equity of redemption of them would then

at the death of the testator stand limited in the following manner, *viz.* in trust, to attend the freehold and inheritance, so long as the estate [213] for life of *Strode Bedingfield*, the estates tail of his sons, and the contingent estates for life, and in tail of *George Darnelly* and his sons, shall last ; and the residue, after all those estates spent, not to attend the inheritance, but to be for the benefit of *Lady Strode*, her executors and administrators, as terms in gross : and we humbly conceive that such a devise of the remainder of terms after estates tail is void, as being too remote, when separate from, and not attendant on the inheritance.

Terms indeed attendant on the inheritance, by the rules of this Court may be limited in the same manner as the fee, because they may be barred by a recovery of the estates in tail, and in remainder ; but no act of the tenant in tail could cut off these terms, the terms themselves could not be barred, because the tenant in tail can bar only what arises out of his freehold, but these terms were raised precedent to his estate ; nor the trusts of them, for nothing puts them in the power of the tenant in tail, but their attendancy ; but by this will they are severed from the reversion : Equity considers the trust of a term, as to the limitations of it, in the same manner as a devise of a term, but a term could not be devised in this manner ; and there is no difference, whether the term was thus originally limited, or by the devise ; because the same consequences and inconveniencies would follow, and then that might be done by two conveyances, which could not by one. Suppose tenant in tail, with a term attendant, conveys to a purchaser, without suffering a common recovery, and the term is assigned in trust for the purchaser, and the tenant in tail dies leaving issue, the issue enters on the estate tail, and suffers a common recovery that will not bar the term, because it was not attendant at the time of the recovery.

But Thirdly, By the decree in the former cause, the Court has determined, that *Lady Strode* was intitled to the said terms, only as a security for the mortgage monies, by decreeing a redemption to *Strode Strode*.

Mr. Solicitor General for the plaintiff. In case the general devise to the defendant *William Robinson Litton*, and his heirs, may be sufficient to include the said premises in *Sussex*, by virtue of the general words (though not expressly mentioned), yet I humbly apprehend, that both devises of the said premises in *Sussex* being consistent, ought both to stand, and that the devise to the defendant is in nature of a residuary devise, and therefore cannot controul what he had absolutely given his mother before, but that the plaintiff is intitled to the said several terms of years absolutely, [214] and the defendant only to the reversion in fee of the lands in *Sussex*, the defendant having by the same will a very large estate given to him in possession in other counties. The plaintiff and defendant both derive their respective titles under the same will as voluntary devisees, and therefore it is highly reasonable that the same shall be construed in such a manner, as that an express particular devise of lands, fully and plainly ascertained and described, shall not be defeated or invalidated by a general indefinite clause, and the words *Whereof he was seised in equity, &c.*, does not shew that the testator designed the equity of redemption of these terms to the defendant, because the legal interest of most part of his estate stood limited to trustees, and this is not insisted on in the pleadings.

The testator *Litton Litton* having the remainder in fee of the estate in *Sussex*, which was mortgaged, had undoubtedly a power to dispose of the term of a thousand years, and the equity of redemption thereof absolutely, against every one except *Strode Bedingfield*, who had an estate for life by the will of *Sir George Strode*, and except the contingent remainders created by the same will, if they had happened to take place, which they did not.

As *Litton Litton* had such a power, he has by plain and express words given these terms for years to his mother absolutely, and without any condition, or subject to any redemption, so far as he had power, for he directs that his executors should pay off, and discharge all mortgages and incumbrances, laid upon his estate in *Sussex*, charged by the testator's father, and that the several mortgage leases should be kept on foot, and be assigned to his mother, for her sole use and benefit, during the remainder of the several terms in the said mortgages contained.

The defendant's construction of these words rejects the word *sole* ; for if the terms are liable to a redemption, she does not hold them *for her sole use and benefit*, but partly for her own benefit, partly for the benefit of another.

Though the mortgagees only are directed to assign, yet more than their legal interest passed by the assignments. Suppose a mortgagor directs the terms to be assigned

to another, is the assignee a trustee too? No, the interest of the mortgagor himself passes, as well as the legal estate of the mortgagee, and if the testator has an estate standing out in trustees, is it not the same thing? Whether he devises it to another, or directs the trustees to assign it to him for his sole use and benefit: as to the absurdity, that the same words should bear two meanings, the testator might reason with himself, that at [215] the worst she should have the £2000 he designed her indeed the terms, if he could, otherwise the money.

And if it was the intention of the testator to devise these terms to his mother absolutely, no rule of law or equity is broke thereby: Here is no devise or limitation of any term in tail, or any tendency to a perpetuity, but only a devise of these terms for years, which were capable of being disposed of by will, according to the interest that the testator had in them; and though *Strode Strode* had such an interest for his life, that he might redeem them by virtue of the will of Sir *George Strode*, in respect of such interest, yet subject thereto, they are well devised to the Lady *Strode*, her executors and administrators.

It cannot be denied but the owner of the inheritance may crave terms out of it, or if there are terms attendant on it, he may sever them from the inheritance by devise, as well as create new terms, or if there are mortgage terms standing out on his estate, he may redeem them and give them away, or direct by his will his executors to redeem them, and assign them absolutely to another; and none who claim under his will can complain; for why should it operate in favour of one devisee, and not of both?

It is not so clear that the trust of a term cannot take effect after an estate tail, that never vested. 1 Salk. 158; 2 Vern. 600. *Higgins versus Dowler*, A. demises lands for a long term in trust, for B. for life, then to his first son for the remainder of the term, and in default of issue of such son, to the second, and other sons of B., and for want of issue male, to the daughters of B. for the remainder of the term; when it appeared thus at the first arguing, that no estate tail vested, but was contingent to the son, and never happened; the remainder over to the daughters was adjudged good, tho' when it came out to be an estate tail vested in the father, a contrary judgment was given. But this is no contingent executory devise of the equity, but is a devise that vests immediately; contingent executory devises by law must vest in a short time, because they are not alienable till they are vested: if he had devised to her terms out of the inheritance, they would not be contingent devises, though they could not take effect in possession, but be remainders for years, and such limitations of terms have been disallowed as would create a perpetuity, or such estates as could not be barred. In the *Duke of Norfolk's* case, 3 Chan. Cas. 1; 1 Vern. 163, the declaration was of the trust of a term, derived out of the estate previous to the limitation in tail, and so could not be barred [216] by docking the intail; but here the devise is out of a reversion on an estate tail, and if *Litton Litton* had issue, they, or *Strode Strode*, by suffering a recovery, would have barred the reversion, and this interest created out of it, behind the estates tail.

I allow the case Mr. Attorney General put, with this addition, if the purchaser had no notice of the intail at the time of his purchase, for then the term will cover his purchaser, but not because it is severed from the inheritance, but from a new equity, that he is an innocent purchaser, and has got the law of his side.

As to the decree, *Strode Strode's* title being under the will of Sir *George Strode*, *Litton Litton* could not deprive him of his right of redemption, in respect of his estate for life, but the defendant *William Robinson Litton* claiming under the will of *Litton Litton* only, can have no greater interest than is given him by the same will, and by the decree of Lord *Harcourt*, before the said *Strode Strode* was to redeem the said mortgages, so as to have the said terms attendant upon his said estate for life, he was ordered to pay to Lady *Strode* the said several sums advanced for her benefit out of the assets of the testator *Litton Litton*, and applied in discharging the said mortgages; but the same is not decreed to her in lieu and satisfaction of all her interest in those terms, and therefore the assignments to be made were to be subject to the further direction of the Court, and such assignments were drawn accordingly. But where the Court intended that another mortgage, which was to one *Bridges* upon another estate, should attend the inheritance, it is expressly ordered so by the said decree; and by their way of reasoning, we might as well say, that no one is intitled to the equity but *Strode Strode*, for the decree has provided no further, and there was no occasion to determine this question ante diem, especially between co-defendants, because if *Strode Strode* had children, it would be at an end.

Mr. Lutwyche. The testator directs, that the mortgages should be paid off and discharged ; now if these are not absolute terms, they will be mortgages in the mother's hands contrary to this express direction ; though his will indeed might be controlled by those who had a prior title.

Suppose *Litton Litton* had taken up money on these mortgages, could those who claimed under him have redeemed without paying off all the money ? then that would have been [217] a disposition of the equity for so much, and could not he as well discharge the terms of the whole equity ?

If the testator designed his mother these terms as a security, why did not he direct that the other mortgages should be taken in with the £2000 he devised to her ?

And as to the objection of the same words passing two different interests, if *Litton Litton* had redeemed these mortgages in his life-time, he would have had a redeemable, and an irredeemable interest in him at the same time.

The general words that follow, cannot defeat our devise, no more than the several rent-charges granted by the testator. Cro. Eliz. 9, (2) if the testator first devises the fee, and after an estate for life, both devises shall take effect.

And this is not a void devise ; a term for years cannot indeed be limited after an estate tail, and therefore if the testator had devised these terms to Lady *Strode* for life, remainder in tail, remainder over, the remainder over would have been void ; but if one has a term for years after an estate tail, cannot he give it away ? Can a man have an interest that shall go to his executors, which he cannot dispose of ? but the defendant contradicts himself, for he claims these terms, and he is deceived in this point, that he thinks a term after an estate tail, cannot be disposed of.

And this severance of the terms will not create a perpetuity, but is a reversionary interest, which may be barred, for the equitable interest in these terms may be cut off by the several tenants in tail, because it is incident to their several estates, and therefore capable of their several qualities, to be barred, &c., and so as the recovery enlarges the estate, it will enlarge the trust.

If the decree has determined this question, then *William Robinson Litton* has no right to redeem, for the decree has given him none.

Mr. Justice Denton. It does not appear by the former decree, that this question was ever determined.

The testator had plainly a power to devise these terms, but from the whole scope of the will, I think it evident that he designed her them only as securities.

[218] *Sir Robert Raymond.* This question depends solely on the construction of the will, and being only a devise of an equity must be guided by the intention of the testator, and I think it plainly appears he intended her only the money.

He first gives several legacies out of his personal estate, and then he disposes of his real estate, and the last clause, *As for and concerning all his manors, lands, &c.,* explains his intention ; I do not mean that this could defeat the first clause, if it had been plain, but as it is obscure, I think it may serve to explain it, if the testator had a son, he was to have all his lands, if a daughter, she was to have £5000, and the defendant *William Robinson Litton* the estate ; he keeps all his lands together, and when he wrote this last clause, he thought he had made no disposal of any part of them.

The word *Discharge* imports no more than paid off, but the mortgages were then discharged as to the mortgagees.

Then he says the mortgages (which are material words) shall be kept on foot, and the words *For her sole use and benefit*, if the testator intended to secure her only the money, can be applied no further, but must be confined to that only ; and to decree her the terms would contradict the last clause, which certainly carries the reversion in fee ; for can any one imagine he would give the reversion to the defendant after such terms, if he had designed his mother the interest in the lands he would have used plainer words, and have devised them to her in fee. I ground my opinion on the intention of the testator.

Lord Chancellor. I shall consider the meaning of the will itself, as far as I can collect it from the words : The testator gives nothing to his mother he then had in him, but directs that his executors should purchase these two terms standing out ; and that they should be assigned to his mother, so that his intention was, to purchase these mortgaged terms for her : All his father's mortgages were to be paid out of his personal estate (and consequently they would sink into, or attend the inheritance), but these two were to be kept on foot for her sole use and benefit, not of those who were

seized of the inheritance, but these words can be understood only of that interest the executors were to purchase, *During the residue, &c.*, are words of course, and it [219] is pretty odd, to construe the mother to have two distinct interests, one from the mortgage, that could not be barred by the tenants in tail of the estate, and another out of the reversion that could ; or to suppose, that by the same words, the testator designed to give her a redeemable estate, which might continue as long as the terms themselves, and an irredeemable one, out of the reversion. Therefore the decree must be reversed, and be it adjudged, That the equity of redemption belongs to *William Robinson Litton* the defendant, and that he shall hold the mortgaged premises absolutely against the plaintiff, his executors and administrators, and all claiming under the said Dame *Margaret Strode* deceased, and the plaintiff's original bill be dismissed. (This decree was affirmed in Parliament, after great debate, by 31 lords against 16, on *Thursday* the 12th of *March* 1729–30. Ant. Cas. 83.)

Monday, November the 10th [1729].

Case 121.—*JAMES CLAVERING, Plaintiff; Lady CLAVERING and Sir FRANCIS CLAVERING, Defendants.*

[S. C. 2 P. Wms. 388. Followed, *Spencer v. Scurr*, 1862, 31 Beav. 337; *Elias v. Snowden Slate Quarries Company*, 1879, 4 App. Cas. 466.]

In Court, Lord Chancellor.

Sel. Cas. in Canc. 79, S. C.

Mr. Attorney General for the plaintiff. Old Sir *James Clavering*, on the marriage of his son *John*, settled his lands in the county of *Durham* in trust, to the use of *John* for life, remainder to his first, and every other son in tail male, remainder to *Francis Clavering* the defendant for life, remainder to his first, and every other son in tail male, remainder to the plaintiff in tail male, remainder to *John* in fee, with a power to the several tenants in possession, to make a jointure.

Sir *John* the son, by virtue of his power, settled the lands, out of which the points in question arise, on the defendant Dame *Clavering*, his wife, for her life, for her jointure, and died, leaving a son *James*, an infant, of about fourteen years of age, having first made his will, and thereby devised the guardianship of his said son to the defendant Lady *Clavering* who during the minority of her son opened the colliery of *Beckley* on her jointure lands. Young Sir *James*, the son, died abroad on his travels, before he came to the age of twenty-one years, and the defendant Sir *Francis*, who was next in remainder for life, entered upon the estate, and continues to dig in the same mine, and has also made several new pits, and has cut down several trees, and has carried away a great deal of the soil in laying a waggon way. Upon which the plaintiff, as next in remainder in tail (the defendant Sir *Francis* having no sons), has filed his bill for an injunction to stay waste.

[220] I shall first consider, whether the defendant Sir *Francis* has a power to dig and open new pits in the same seam. The soil of *Durham* is mostly coal, and if tenant for life might carry on a seam in this manner, and dig and open pits at his pleasure, it would in effect be the same thing as if he opened a new mine, because of the difficulty, if not impossibility, to distinguish.

I shall next consider this case as if the mine was opened by young Sir *James Clavering* the tenant in tail, and has it ever been adjudged, that tenant for life in remainder, can work, and carry on a mine so opened, to the prejudice of those in remainder ? If it had been opened indeed at the time of the settlement, we allow he might.

But we say, there is no evidence that young Sir *James* opened the mine, for he was not in possession of that part of the estate, but that it was opened by the jointress, who entered into partnership with one *Pit* for digging the coal, and she could not treat with him as guardian, on the part of the infant, for if it had proved a losing undertaking, as it was not carried on by the direction of a Court of equity, the infant would not have been bound by it when he came of age ; he died under age, and before he made his election, and shall she now say, I opened it as guardian, to give a right to one in remainder, after the determination of her jointure.

But supposing the defendant Sir *Francis* has a right, we are proper to pray an

injunction to restrain him from working in a wasteful manner, as from digging away the pillars, whereby several tuns of coals are lost, and the workmen afraid to go on, and from working in an unusual manner night and day, whereby the vein will be spent in two or three years time.

We likewise pray an injunction against a waggon way he has made, by which he has carried away a great deal of the soil, and several trees, which is waste in a tenant for life, and that things may be restored to their former condition.

Mr. Bootle. Prohibitions lay at common law against the tenant in dower, or by the courtesy before the statutes of *Marlbridge* and *Gloster*, Co. Lit. 53 b, and I do not know that a jointress can any more commit waste than a tenant in dower, unless she has a power expressly given to her; and though waste or trover lay in this case, we have a right to an injunction to hinder things for the time to come, but waste will not lie against the defendant *Dame Clavering* the jointress, because [221] of the intermediate estate for life of *Sir Francis*; nor against the defendant *Sir Francis*; for the writ must be brought either in the tenit or tenuit, but he neither is, or has been in possession, but is taking upon him before his time, and the damages given in trover would be but a small recompence for the loss of our inheritance.

Many hills have been levelled, and many tuns of earth carried off in making this waggon way, and the ground might have been arable before, and then it is certainly waste.

Mr. Solicitor General for the defendants. The chief question is, whether *Lady Clavering* opened this mine as guardian or jointress? the plaintiff has read no evidence to prove she opened it for herself, our evidence is very strong that she opened it by the advice of her son's friends for his use and benefit; that the books were kept in his name, and that on the death of her son, though her jointure continued, she put a stop to the works; she was in possession of the estate in two capacities, in one of which she might lawfully pen the mine, and not in the other; and therefore, if there is no particular evidence to the contrary, the law will presume she did it in the rightful manner: And tho' the son was not in possession, the opening the mine was an injury only to her, which she could, and did dispense with for his sake. So this case must be considered, as if the mine was opened by tenant in tail, but they say it might have turned to a losing undertaking, and that the infant would not be bound by it, but where a guardian acts *bona fide* with a good prospect for an infant, shall she suffer if any loss happens, and yet the infant have the advantage, if it proves a beneficial undertaking? and it is plain the plaintiff knew this mine was opened in right of the son; for on the news of his death he went directly to the colliery, and ordered the works (which were discontinued by the order of *Lady Clavering*) to be carried on for the benefit of the defendant *Sir Francis*, who was then in *London*, and advised him afterwards to let it, and shewed him where a waggon way might be made, which has been since laid at a great expence, and yet now he prays an injunction.

As to the law, I am far from contending that if one tenant for life commits waste, another in remainder for life may continue it; but we say, this mine was opened, not in her own right, but in the right of the tenant in tail, and it does not signify whether it was opened at the time of the settlement, if it was open at the time the defendant came into possession.

[222] They say the defendant can only work in the same pit, but not make new ones, but their argument will not hold, unless they can prove mines and pits to be the same, so far as the mine runs, so far the defendant has possession; but they say the whole country is mine, and yet complain that the colliery will be worked out in two or three years, it is no waste either in tenant for life, or for years, to pursue mines that are open; and though the defendant must agree with *Lady Clavering* for a liberty to work these mines, and to come over the soil, this is not waste.

Their next complaint is, that the defendant works irregularly, but if he has a right, though he should work the mine quite away, no injunction will lie, he may sink as many pits as he pleases, he may make the best advantage of it he can; and if the plaintiff could not bring waste, he might have brought an action of trover, and established his right to the coal, and then filed his bill for an injunction, and not have come here in the first place, when the right is so clear against him, and this injunction would oblige *Sir Francis* to break his contracts with his lessees, and subject him to several actions.

It is not yet settled at law, whether laying a waggon way is waste; but suppose it is, the real injury in this case is, only the taking away a few small trees; they own

it has been made at a great expence, and instead of impoverishing, it will improve the estate, and when the plaintiff's remainder takes place, will be ready laid for him; whereas injunctions are granted to prevent, not to cause waste; but the plaintiff himself first proposed the making of it, and never objected to it, though it was six months in hand, which is a bar to him in equity, though he had a right.

Lord Chancellor. The proof is express, that the plaintiff advised the waggon way, and stood still, and saw it done, and digging in the soil is only a trespass against the tenant for life, and I will not oblige them to pull down this way, after they have laid out £1500 on it, because they have cut down a tree or two, or carried off a little of the soil.

The case in short is this, tenant for life, remainder to his first and every other son in tail, with several remainders for life, and in tail, with a power, to the several tenants in possession to make a jointure, which the first tenant for life does accordingly, and dies, leaving the jointress guardian to his son the tenant in tail, and a pit is opened during her possession.

[223] And the first question is on the fact, whether this pit was opened for the benefit of the tenant in tail? And there is strong proof, that Lady *Clavering* opened it as guardian, and none to the contrary; and that when she had news of her son's death, she immediately ordered the men to cease from working: and the plaintiff went to the colliery, and ordered the works to be continued for the defendant *Sir Francis*.

Supposing then the tenant in tail opened this mine, the next question is, Whether the tenant for life, after his death, finding it open, though it was not so at the time of the settlement, may work it, and I am of opinion that he may. The cases in *Coke* upon *Littleton* are all of tenants under leases, but the reason of them will hold in this case; tenant for life cannot take the lands as they were at the time of the settlement, the vesture of the lands is taken away by him that had a power, and therefore he must have the mine in lieu of it.

And if he has a right to the mine, the next question is, whether he can sink new pits? and it was solemnly found at the assizes at *Wells*, on an issue directed out of this Court, in the case of *Helyar* and *Twynford*, of a coal mendippe mine, to the satisfaction of the counsel, and of Mr. Justice *Powel*, that tenant for life might dig new pits in the same seam of coal, and that the opening pits was for the benefit of the air, and the easier coming at the vein, this having been found in a long solemn trial, and before so able a judge, cannot be controverted. This is a new case, and as the plaintiff has set the works agoing for the defendant *Sir Francis*, the tenant for life, and he has been at a great expence, it would be hard to grant him an injunction, and it would be also hard to dismiss his bill; therefore I will retain the bill for a twelvemonth, that he may try his right at law in the mean time.

Mr. Lutwyche for the defendants. I hope your lordship will dismiss their bill, and not countenance them so far as to retain it, for that would be in effect to direct a trial, whereas though the plaintiff should have a verdict at law for him, he is not entitled to any relief in this Court. The laying the waggon way, as well as working the colliery, has been very expensive to the defendant, so that we have a strong equity against the plaintiff, though the law should go for him, because he led us into this expence, and he advised us to let the works, which we have done, and covenanted with our tenants, and would he force us now to break our covenants? and your lordship, by dismissing the bill, takes no right from him.

[224] In the case of *Mason* versus *Mason*, the mother was both jointress and guardian, and entered into articles for the sale of £1000 worth of timber, and these articles were carried into execution by this Court, but she had no power by her jointure to sell timber.

In *Savil's* case, the guardian by nurture, cut down seven or eight thousand pounds worth of timber, where the tenant in tail lay a dying, and I moved your lordship for the next in remainder for an injunction, and your lordship denied the motion, because the guardian had a power to make what advantage she thought proper of the estate for the infant, and after the death of the tenant in tail, a bill brought by the remainderman for relief was dismissed, because the tenant in tail had a power over the inheritance, and the guardian might exercise that power in any manner she thought proper, and the plaintiff here is in *Savil's* condition, he that is in remainder after a tenant in tail, must be subject to the power of the tenant in tail, and what he can do, the guardian

may do ; and the lands only were in jointure to Lady *Clavering*, for the mine was not open at the death of her husband, afterwards she opens the mine for her son, and agrees to give him a liberty to work it, the tenant in tail then was in possession of the mine, and after his death it came in possession to the next in remainder, and all we derive from the jointure is an excuse from trespass ; and as she might have surrendered to the tenant in tail, sure she might dispense with his taking part of the profits.

Mr. Attorney General for the plaintiff. We have a right to come into this Court to have the title deeds produced at the trial, and if the verdict goes for us, we shall be intitled to an injunction ; it is said our bill ought to be dismissed, because we encouraged the defendant *Sir Francis* to go on with the works, what we did was immediately upon the death of young *Sir James*, before we had seen the deeds, or knew our own title, which as soon as we were acquainted with, we brought this bill, and the greatest part of the expence the defendant has been at, was since the filing of it.

Lord Chancellor. It is too hard to dismiss the bill on this new point of law, and they cannot go to trial without the aid of this Court, let the bill therefore be dismissed, as to the waggon way. And as for the residue, let it be retained for a twelvemonth, 'till the plaintiff has an opportunity to try at law in an action of trover, to whom the property of the coals does belong. To which end, the defendant is to produce the deeds [225] at the trial, and if a verdict goes for the plaintiff, the parties may resort back : if against the plaintiff, or he does not proceed, the residue is to be dismissed with costs.

Friday, November the 21st [1729].

Case 122.—KNOWLES *versus* SPENCE.

In Court, Lord Chancellor.

Twenty years quiet possession is a bar to the equity of the mortgagor. whether the mortgagee was put in possession by the mortgagor himself, or by the Sheriff. Ant. Cas. 101.

Mr. Solicitor General for the defendant. *Mr. Knowles* the grand-father of the plaintiff, mortgaged the lands in question to *Lawson* for £138, and *Spence* the defendant entered into bonds with him, to secure the re-payment of the money, which *Spence* afterwards paid, and in 1676 the mortgage was assigned to him by *Knowles* and *Dawson* : In 1685, *Spence* advanced £8 more, which was secured by the said lands, by an indorsement on the mortgage, and in 1696 *Knowles* delivered possession to *Spence*, and in 1699 died, leaving a son the father of the plaintiff, of full age, who lived 'till 1705, and in all that time made no claim or application to the defendant, the plaintiff, his son, was nineteen at the time of his death, and in 1727 filed this bill twenty-two years after his title accrued, and about thirty-two years after *Spence* came first into possession : And the only question is, Whether he may redeem after this distance of time ?

It must be allowed that an equity of redemption may be barred by length of time, as well as by a foreclosure, or a release, and in conformity to the statute of limitations, Courts of equity have decreed, that twenty years shall amount to a foreclosure, which is the same length of time, that by the statute bars the party of his right of entry, here above thirty years are lapsed, since the defendant came into possession, and tho' the plaintiff was an infant in 1705, when his father died, his grandfather and father were of full age, and under no disability, and where once the time begins, no disability after can prevent its running on.

And where the mortgage continues so long in quiet possession, the law is the same whether he entered voluntarily, or on an ejectment ; nay, in the first case, the evidence is stronger against the mortgagor, that the security is defective. In the case of *Ord versus Heming*, 1 Vern. 418, a demurrer to a redemption, because the mortgage was sixty years old, was over-ruled, because it was expressly charged in the bill, that [226] the mortgagor agreed the mortgagee should enter, and hold till he was satisfied, and in that case, length of time is no bar ; and that being on a demurrer, the Court might be willing to look further into it ; but here it is not charged that possession was delivered to the mortgagee, that the mortgage might be paid by the perception of the profits : and the difficulty of accounting is the same, whether the mortgagee was put into possession by the mortgagor or by the sheriff.

The value of the estate, and the easiness of taking the account, are I allow considera-

tions of weight in a doubtful case ; the plaintiff says the estate is worth £400 to be sold, and £16 a year, it was valued only at £196 when we came into possession ; and though it may be of great value now, by our improvements, that will not give the plaintiff a better equity to redeem. We have made several improvements, we built a barn about twenty-eight years ago, and the workmen's bills are lost or mislaid ; so that we are under a disability of proving the sums, and the times they were laid out, to have interest allowed for them.

Lord Chancellor. I shall endeavour to come as near to the law, and a certain rule as I can ; by law the plaintiff is barred of his entry, or account of profits, why should equity then act contrary to law ? and since it is necessary to fix a time, no better can be pitched on, than that settled by the law, and therefore the bill must be dismissed. Mortgagees are subjected to too many hardships in this Court, without obliging them to account after such a length of time : Formerly they accounted only as bailiffs for what they actually received ; now they are obliged to account not only for what they actually receive, but for what they might have received without their wilful default, and they are allowed nothing for their care and pains, why should the defendant give the plaintiff thirty-two years labour for nothing ? (1 Chan. Cas. 102.)

If a cause is adjourned over, for want of parties, and the defendant is served with the order, yet he must be served with a subpoena to hear judgment.

The words, *All just allowances*, in a decree, do not empower the Master to allow for improvements, but the decree must particularly mention them, which it never does, unless the party lay before the Court some proof there have been any.

[227] *Wednesday, November the 26th [1729].*

PLEAS AND DEMURRERS.

Case 123.—COTTER *versus* LAYER.

[S. C. 2 P. Wms. 623.]

At the Chancellor's house, Lord Chancellor.

If a feme covert makes an appointment by will, and her husband dies, and she marries again, this is a revocation of her will, and appointment. 1 Mod. 117.

Mr. Attorney General for the defendant. Mrs. Layer being first privately examined, surrendered a copyhold in fee, to such uses as she by any writing, or by her last will and testament, duly attested in the presence of three or more credible witnesses, whether sole or covert, should direct and appoint. And in 1716, she, by her last will, declaration, and appointment, devised the use of it to *Christopher* her husband for his life, remainder to the defendant her daughter, and the heirs of her body. *Christopher* the husband died, and Mrs. Layer, in 1724, by articles previous to her marriage with the plaintiff, covenanted to surrender the premises to the use of her, and the plaintiff for their lives, remainder to the use of the plaintiff and his heirs. Mrs. Layer is since dead, and the plaintiff has filed his bill to have a specifick performance of these articles, and the estate surrendered to him and his heirs. To this bill the defendant has pleaded in bar, the appointment in 1716, and demurred, as to any right he claims by the deed of 1724, because of his own shewing he has no title. And the question on our plea is, Whether the writing in 1716 shall be considered only as an execution of her power, or as a will, which is revoked by her subsequent marriage ; and it cannot be considered as a will, for a feme covert cannot make a will, without the consent of her husband, but as executrix ; but she may execute a power, or an appointment.

As to the demurrer, it is good, because the plaintiff has not shewed, that she pursued his power. In his original bill he charged that the articles were executed in the presence of two witnesses, and our demurrer to it was allowed ; now he has amended his bill, and left out the number of witnesses.

Mr. Solicitor General for the plaintiff. This plea was put in to our original bill, and over-ruled, for the writing in 1716 must be considered as a last will, which is revoked by her marriage, she devises to her husband, the words last will are mentioned, and no use is limited to herself ; the defendant says, this is an appointment, not a will ; [228] it is an appointment by will, and so must have the same ceremonies as a will, and will partake of all the qualities of a will, as to be subject to revocation, and the like ; as was adjudged on an appointment by will to charitable purposes. 2 Vern. 597.

And as their plea endeavours to set out a title in themselves, so their demurrer is intended to shew we have none; in the original bill, the plaintiff only set out the articles of 1724, which were attested by two witnesses only, without alleging that they were executed previous to his marriage, or for a valuable consideration. and therefore the demurrer was allowed, because of his own shewing it appeared to be a voluntary defective execution of her power. But by our amended bill we charge, that Mrs. *Laver*, by articles previous to her marriage, covenanted for herself and her heirs to surrender to such uses, these articles were obligatory to her, tho' they were attested by two witnesses only, so that her power was not legally executed, and the Court would have obliged her to perform them, and we have a right to have them made good in equity by the defendant, who is to be considered only as her heir at law.

Lord Chancellor. The defendant demurs, because the plaintiff of his own shewing has no legal title, whereas the end of his bill is for relief, and to have the defective execution of the power made good in equity: Therefore the demurrer must be over-ruled, for the benefit of it is never saved to the hearing; and the plea is proper to be determined at the hearing, and therefore let it stand for an answer. (1 Vern. 478, cont.)

Case 124.—NIGHTINGALE *versus* DODD. [1729.]

At the Chancellor's house, Lord Chancellor. Eodem die.

Mr. Verney. In 1715, Mr. *Bohun* being appointed by the *East-India* Company the Governor of *Bombay*, made Sir *Robert Nightingale* and Mr. *Chamberlain* his agents in *England*, and on his return, filed a bill against Mr. *Nightingale*, the representative of Sir *Robert*, and Mr. *Chamberlain*, for an account of the profits of his real estate, and of his remittances; and Mr. *Nightingale* filed a cross bill against Mr. *Chamberlain* and Mr. *Bohun*, for an account of what remittances had been made him to the *East Indies*, and both causes coming on to be heard together, mutual accounts were decreed, and the parties to be examined on interrogatories. Pursuant to this decree, Mr. *Chamberlain* and Mr. *Bohun* were examined before the Master; then Mr. *Nightingale* exhibits this bill against Mr. *Chamberlain* only (which on his death was revived against his executor Mr. [229] *Dodd*), and the cause being at issue, examines Mr. *Bohun* as a witness, and he demurred to those interrogatories only, he had been examined to before the Master in the other causes.

A witness is not to be examined to his own interest, but may demur to the interrogatories, on affidavit, if he is not defendant in the cause, 2 Chan. Cas. 208. A reversioner demurred to his being examined as a witness, because his estate depended upon the same title, and the demurrer was over-ruled for want of an affidavit, because it did not appear he was concerned in interest by the acts of the Court; and though a defendant by answer must discover against himself, yet then he has the advice of counsel; but it is otherwise when he is examined on interrogatories, and he has been already examined to these.

Mr. Attorney General for the plaintiff. This bill was brought by the plaintiff, as executor of Sir *Robert Nightingale*, for an account of his personal estate against Mr. *Chamberlain*, and is now revived against the defendant *Dodd* his executor. Mr. *Chamberlain* in his answer swore, that his own estate was so mixed with Sir *Robert's*, that he could not distinguish them; this made it necessary for us to examine many witnesses to Mr. *Chamberlain's* dealings, the value and nature of them. Mr. *Bohun* demurs, because other suits are depending; he states his demurrer as a plea, and does not rely on the interrogatories being bad in law, but on matter dehors the former decree, and the examination before the Master on the same interrogatories, so his demurrer is not good in form, and he does not demur because he is concerned in interest, and though he has been examined on interrogatories as a party in the other causes, his depositions cannot be read as evidence against the defendant in this cause, because he had no liberty to cross examine him, and he ought to shew he is concerned in interest.

Mr. Verney. If a witness could not demur for matter extrinsic to the interrogatories, he could seldom demur, because he was concerned in interest, but the case of the affidavit shews the course of the Court to be otherwise.

Lord Chancellor. A defendant cannot demur to a bill, but for matter appearing in the bill itself, but a witness may demur for matters dehors to the interrogatory, because he has no other way to relieve [230] himself, but by demurrer; but then the facts must be verified by affidavits: Mr. *Bohun* in the other causes is to account for, and be examined what assets of Sir *Robert Nightingale* came to his hands, yet sure in this cause he may

be examined what assets of Sir *Robert* came into the hands of Mr. *Chamberlain*, and he cannot demur because the interrogatories are the same in both causes, because they may be proper to discover both points.

Thursday, November the 27th [1729].

Case 125.—NIGHTINGALE *versus* LOCKMAN, & ux'.

In Court, Master of the Rolls.

Mr. Attorney General for the plaintiff. This bill is brought by the plaintiff, as executor of *Joseph Gascoign Nightingale*, who was executor of Sir *Robert Nightingale*, against the defendant Mr. *Lockman*, and his wife *Elizabeth*, executrix of her former husband Mr. *Chitty*, for payment out of his assets of £500 *East India* stock, which Sir *Robert Nightingale* transferred to the said Mr. *Chitty*; and the only question in this cause is, Whether the share of the defendant *Elizabeth* of £10,000 which was brought before the Master by Sir *Robert Nightingale* in another cause survives to her, or is to be considered as part of the assets of Mr. *Chitty*?

And the case is shortly this. Mr. *Ralph Sheldon*, heretofore husband to the defendant Mrs. *Lockman*, on the 28th of *February* 1708, made his will at *Calcutta* in the *East Indies*, and thereby gave to the defendant *Elizabeth* one third part of his whole estate, and the remaining two thirds to his two sons, *Ralph* and *Gilbert*; and in case his two sons died under age, then he gave one half of their said two shares to the said *Elizabeth*, and the other half to his three sisters, *Ann*, *Mercy*, and *Winifred*; and appointed the said *Elizabeth*, Mr. *Russel*, and Mr. *Freak*, his trustees, to collect his estate in the *East Indies*, and to remit it to *England* to Sir *Robert Nightingale*, and made Sir *Robert* and his wife *Elizabeth* executors: *Ralph* the son died in the life-time of his father, and *Gilbert* the son, soon after his death, under age. In *Hilary* term 1711, *Prideau Sutton*, who intermarried with the said *Ann Sheldon*, and the said *Ann*, and also the said *Mercy*, and *Winifred* exhibited their bill against Sir *Robert Nightingale*, the defendant *Elizabeth*, and *Josiah Chitty*, her then husband, to have a discovery, and an account of the estate and effects of the said *Ralph Sheldon* the testator, and to be paid their shares, [231] and on the 28th of *May* 1715, the cause coming to be heard before the Lord Chancellor *Cowper*, his lordship declared, that the defendant *Elizabeth*, then *Elizabeth Chitty*, was intitled to two thirds of the estate of the testator *Ralph Sheldon*, after payment of his debts, and that the other third belonged to the plaintiffs, or those whom they represented, and ordered the same to be distributed accordingly; and further ordered, that Sir *Robert Nightingale* should forthwith bring the sum of £10,000 before a Master, part of the testator's estate admitted by his answer to be in his hands, and the Master was to place it out at interest, on government, or other securities, for the benefit of the parties, to whom the same should appear to belong; and an account was to be taken, and pursuant to this decree, Sir *Robert Nightingale* brought the £10,000 before the Master.

Mr. *Chitty* was intitled to a share of this £10,000 in right of his wife, and it having been paid to a Master, it ought as much to be considered as his assets, as if it had been paid to him, and otherwise, the plaintiff who is a just creditor shall have no satisfaction; he was intitled to this share indeed only in right of his wife, and if it had not been recovered by him in his life-time, it would have survived to her; so the question is, Whether the property was not altered? A bill was brought, and a decree made, that the parties should account, and an express declaration, that Mrs. *Chitty* was intitled to such a share, and that she should be paid accordingly; this is sufficient to vest a property in the husband, but the £10,000 is also directed to be placed out at interest for the benefit of the parties, one of whom was Mr. *Chitty*, in right of his wife, and this money was paid to the Master in the life-time of Mr. *Chitty*, only 'till it appeared to whom it was payable, and the case of *Oglander versus Baston*, 1 Vern. 396, is an authority in point, where it was adjudged, that a sum of money awarded to the husband, which he was intitled to in right of his wife, should go to his executor, and not survive to the wife. Another authority is the case of *Packer versus Windham*, decreed the 9th of *November*, 2 Geo. 1. Mr. *Packer* was committed to the *Fleet* for marrying a lunatic without consent of this Court; and by an order made on a petition of the mortgagor, her portion of £10,000, which stood out on a mortgage, was paid in to a Master; after, by an order of Court, Mr. *Packer* was discharged out of custody, and

part of this £10,000 was to be applied to pay off the incumbrances on the real estate of Mr. *Packer*, which he was to settle to the use of himself for life, remainder to his wife for life for a jointure, remainder to the first, and every other [232] son of the marriage, and upon his making such settlement, the remainder was to be paid to Mr. *Packer*; and the commission of lunacy was superseded, Mr. *Packer* never made any settlement, but assigned this money to several of his creditors, and growing lunatick, a commission of lunacy was after taken out against him: Mr. *Packer* died, and his wife survived him, and died without issue; and the question between the creditors of Mr. *Packer*, and the representatives of Mrs. *Packer* was, Whether this £10,000 should be considered as the assets of the husband, or whether it should survive to the wife? And Lord *Cowper* declared, that Mr. *Packer* not having complied with the terms of the order, by making a settlement, the order was quite out of the case, and it ought to be considered as if no such order had been made; and that though this Court would not suffer the husband to touch the wife's portion, without making a proper settlement on her, yet the receipt of the Master ought to be considered as the receipt of the husband, because the Court laid hold of the money only for the security of the wife, and that though choses in action could not be assigned by law, they might in equity, and therefore the wife being dead without issue, so that there was no occasion for a settlement, his lordship declared it to be the assets of the husband to satisfy his creditors. There the wife's portion was brought into Court, and there was no decree, that the husband had any title to it, and tho' this was a *chose in action*, and the husband died first, yet his lordship considered the payment of the money to the Master, as if it had been paid to the wife; in which case the husband would have had an undoubted right to it; here Mr. *Chitty* was intitled in right of his wife, and Sir *Robert Nightingale* might have paid it to him.

Mr. Wills. If the decree had expressly directed the share of the wife to be paid to the husband, from that time it would have been his money, though it was not actually paid to him, by the case of *Oglander* and *Baston*: But they say, the decree declares the right to be in the wife only, and not in the husband; but then by parity of reasoning from *Packer's* case, as payment to the Master was adjudged payment to the husband, so here, a payment to the Master shall be adjudged a payment to the wife, then from that time it is no more a chose in action, but becomes the property of the husband.

Mr. Solicitor General for the defendants. Though the plaintiff is a creditor, he is only a creditor of Mr. *Chitty*, and not of the defendant *Elizabeth*, who is no further accountable than she has assets, and the question is, Whether her share of this £10,000, which is not ascertained at [233] this day, shall be accounted such? The £10,000 is only directed to be placed out at interest, for the benefit of those to whom it shall appear to belong; it is not directed to be paid to any one, £1700 has been paid out of it to the children of Mr. *Halsey* (as creditors of Mr. *Sheldon*), the defendant *Elizabeth's* first husband, to whom she was executrix, whose effects came into the hands of Mr. *Sheldon*, this money was brought in only as part of the assets of Mr. *Sheldon*, for the payment of his debts and legacies. It is admitted, that if money is due to the wife, and is not recovered by the husband in his life-time, it survives to her; but at law, if judgment is recovered by husband and wife, in right of the wife, and the husband dies, the judgment survives to her; and if this decree had been to pay the money to the husband and wife, his representatives would have no more right than on a judgment at law; but in this case the husband and wife are only defendants, and the payment is directed to be made to the wife only. It is said that this payment to the master is payment to the wife, as in *Packer's* case: The decree in that case takes notice, that by an order of Court, the husband was to make a settlement, and if he had, though he is not legally intitled to the wife's choses in action, yet he is considered in this Court as a purchaser of them, as appears by many decrees; he was bound by the order to do it, but being grown lunatick, and the wife dead without issue, his not doing it was of no disservice to her, or his family; though I allow indeed, that Lord *Cowper* put the order out of the case. But if money out at interest is paid to the servant of the wife, this is a payment to the wife, or if it be paid to her Committee, which was the case of *Packer*, there was no cause in Court, but an order on a petition to pay the money to a master, who in this instance was to be considered as a special committee for the wife. But the payment of this £10,000 cannot be considered as a payment to the wife, it is paid as part of Mr. *Sheldon's* assets, liable to his debts and legacies, and the surplus

only is distributable ; it is only a deposite of so much of Mr. *Sheldon's* assets, and is not a payment either to the plaintiffs or defendants.

Mr. Verney. This payment to the master makes no difference in the case. If husband and wife have a decree in right of the wife, the benefit of it survives to the wife, 1 Chan. Cas. 27. *Nanny versus Martin*, here the husband has done no act to shew his right, and Lord *Cowper's* reasons, in the case of *Parker versus Windham*, make strongly for us ; there the wife's portion was actually paid in to a master, which gave the husband an indisputable right to it ; but he was prevented by the Court from laying hands on it, without making a provision for the wife and children, but she being dead without issue, his [234] right was to be considered as it stood at law, and as if he had actual possession (Nels. Fol. Rep. in Canc. 145) ; but here, the creditor comes while the wife is living, and this money remains as much unapplied as if it was still in Sir *Robert's* hands. No sum is liquidated, that the wife herself is intitled to, as in *Packer's* case, so far it remains a chose in action, and must be considered as so much of the assets of Mr. *Sheldon* not distributed ; suppose the husband himself had applied to have had this share paid to him, the Court would have obliged him to make a settlement, we have no provision from him

Master of the Rolls. The question is, Whether the defendant *Elizabeth's* share of this £10,000 ought to be considered as the assets of Mr. *Chitty* ? I acquiesce in the authority of *Packer versus Windham*, which is founded on several settled rules of this Court ; but then let us consider whether this case comes within the reason of that : Mrs. *Packer* was a lunatick, under the care of this Court, whom it generally intrusts to a committee, but may take care of them in another manner by provisional orders ; so, in that case, as Mr. *Solicitor General* observes, the Court committed this part of her estate to a master, as to a special committee ; and the payment to him was a payment for the use of the lunatick, and vested a right in the husband to the money, though he could not lay his hands on it without making the wife a provision ; but she being dead without issue, it is as if no such order had been made, then she being a lunatick, and the money paid to her committee, it is the same as if she had been sane, and the money paid to her, and then the husband would have been intitled to it : But here is no payment to the wife, the decree declares the wife intitled to such a share, and that after the account was taken, and the debts paid, the estate should be distributed accordingly ; suppose the decree had been, that the share should be paid to the husband and wife, if the money was not paid 'till after the husband's death, she would be intitled to it, as at law on a judgment, the right survives to the wife, and the executors of the husband cannot bring a *scire facias* ; and the case sure is not the less strong because this decree says it shall be paid to the wife. As to the other part of the decree, the Court only provisionally directs that the money shall be brought before the Master ; can this be considered as a payment either to the husband or wife ? No, the Court cautiously declares it to be for the benefit of the parties, to whom it shall appear to belong, without determining who they were, but another act of the [235] Court was to pass on that question, who had the right to it ; in the first place, it belonged to the creditors, and it appears, that some of them have been paid out of it, and this £10,000 is only part of the estate, not the liquidated sum to be distributed, that depended on the master's report, which must be confirmed by the Court, so that this decree, is like an interlocutory judgment, *Quod computet*, by which the husband acquires no right ; but if he dies, the wife must revive : But if the sum had been liquidated by the master's report, and confirmed by the Court, in the life-time of the husband, still the Court would have considered on what terms the husband should have received it. But there is no foundation to say, that this decree, or the payment to the master, which is only an execution of the provisional part of it, vests any interest in the husband ; and therefore the defendant *Elizabeth's* share of this money, cannot be considered as part of the assets of Mr. *Chitty*. (1 Vern. 161 ; 2 Vern. 190, 707, 68, 401, 501 ; 1 Chan. Cas. 41, 181, 189 ; 4 Inst. 85, 86, 87 ; Suppl. to Wentw. 310 ; Swinb. part 2, sect. 9, n. 13 ; Moor, 339, Cas. 359 ; Bro. Ab. tit. Test. n. 11 ; Fitz. Ab. tit. Ex. n. 109 ; Post, Cas. 200 ; Swinb. part 6, sect. 7, n. 7.)

Friday, November the 28th [1729].

MOTIONS.

Case 126.—MOLINEAUX & ux', versus BIRD, al' COLLINS.

In Court, Lord Chancellor.

Mrs. *Molineaux's* mother was divorced from her husband *causa adulterii* with the defendant, and the father, after the death of her mother, intermarried with the defendant, and by will devised to her all his personal estate, and made her executrix; the defendant proved the will in common form, and the plaintiffs instituted a suit in the spiritual Court, to set aside this will; and the probate granted to the defendant was ordered to be brought in: And the plaintiffs filed their bill for satisfaction out of assets, of £1000 due to the wife by her mother's marriage articles, and for a distributive share of the personal estate of her father, in case he made no will, and the defendant having prayed a month's time to answer, the council for the plaintiffs on affidavit of the insolvency of the defendant the executrix, moved the Court, that she might be enjoined from receiving any more of the personal estate 'till the suit in the spiritual Court was determined, and to bring before a master what she had already received, and said, that Lord *Harcourt* had frequently made such orders on a certificate only that the bill was filed.

[236] *Lord Chancellor.* I do not think that the defendant, being to set out an account, has affected any delay; but why should not I take care to secure the effects before answer (as I grant injunctions to stay waste, on a certificate of the bills being filed), since a suit is depending in the spiritual Court to set aside the will? and that it was adjudged by the Delegates, in the case of *Powis* and *Andrews*, that the spiritual Court cannot impound the assets *pendente lite*; so let an injunction go, to restrain the defendant from receiving any of the effects till answer; and further order, but not till the suit in the spiritual Court is determined. (Post, Cas 171.)

Case 127.—TREACLE versus HARRIS.

In Court, Lord Chancellor. Eodem die.

Two are appointed guardians by will, one marries the ward at nine years of age to his own son of 15, the Court delivered the child to the other guardian till she came to the age of consent, but would not commit the guardian because he was not appointed under the great seal, but being in Court, obliged him to enter into a recognizance to appear in the King's Bench, to any information should be filed against him.

The infant by her prochein amy, brought this bill against the defendant Mr. *Harris*, for an account, and to remove him from the guardianship. The prochein amy, and the defendant Mr. *Harris*, were appointed guardians to the infant, by the will of her father. The defendant, who was very poor, married her when she was about nine years old, to his own son, a boy of fifteen; she had an estate in lands of about £60 a year, and £1000 in money: The defendant, in obedience to an order, produced her this day in open Court, and the *Lord Chancellor* ordered, that she should be delivered the next day, at such a time and place (for he would not order her then to be delivered in Court, to prevent any disturbance, for the child wept sorely, when she found she was to be parted from her husband), to her clerk in Court, to be delivered over by him to the prochein amy, who was then in the country, the other guardian, who had not misbehaved himself; and his lordship declared, that since the marriage was voidable, he was resolved to keep the parties asunder till the wife came to the age of twelve years; but if she then consented to the marriage, and would go to her husband, it was not in his power to hinder her, but he would not make it part of the order, that the husband should not visit her, till he saw how he behaved himself, and that he would not commit the guardian, though he had been guilty of a gross treachery, because he was not appointed under the Great Seal; for every crime punishable by law was not to be punished by that Court, but only contempts; but as he was in Court, he should enter into his own recognizance of £100

before a master, to appear to any information should be filed against him and his wife, by the *Attorney General*, and that though it was not reasonable that the infant's estate should be at the charge of that application, yet he would not order the defendants to pay the costs, for the [237] Court of *B. R.* if they were found guilty on the information, before they set a fine, would send the parties to agree together, and if they did not, would consider it in their fine.

The council for the infant would have had the child delivered to the serjeant at arms, till the prochein amy came to town, and said, such orders had been often made ; but the *Lord Chancellor* would make no such order, and asked, who would pay him ?

Case 128.—ANONYMUS.

In Court, Lord Chancellor. Eodem die.

Lord Chancellor, as one of the Commissioners of Oyer and Terminer, gave leave to serve Mr. *Huggins* with a subpoena, who was in confinement in *Newgate* for murder, of which he was indicted at the *Old Bailey*, and a special verdict found.

Mr. *Solicitor General* moved for a subpoena returnable immediate against Mr. *Huggins* (who was committed to *Newgate* for murder, of which he was indicted, and a special verdict found, but not yet argued), and that service of it on the turnkey or keeper of *Newgate*, might be good service, because his servant had denied them access to him.

Lord Chancellor. No process can be served on a prisoner committed at the suit of the Crown, without leave, though if he once appears, you may go on against him ; but as I am one of the commissioners of oyer and terminer, before whom he was tried, I will make an order, that the keeper of *Newgate* shall admit you in, to serve the process on Mr. *Huggins*.

Thursday, December the 4th [1729].

MOTIONS.

Case 129.—ANONYMUS.

[See *In re Barrington*, 1886, 33 Ch. D. 527.]

At the Chancellor's house, Master of the Rolls.

If a stranger cuts down timber, or commits waste, it belongs to the tenant for life without impeachment of waste, and not to the tenant in tail, or in fee, in remainder.

Tenant for life, without impeachment of waste, remainder to his first, and every other son in tail, becomes a bankrupt, and a commission is taken out against him, and the commissioners sell his estate to the defendant, against whom the son of the bankrupt, on certificate of his bill being filed, and affidavit, obtains an injunction to stay waste, which upon coming in of the answer was to be dissolved nisi, and the plaintiff shewed for cause, that he, as tenant in tail, had a right to injoin any one from committing waste, but the tenant for life himself, and even him in a Court of equity, from pulling [238] down the mansion house, or cutting down timber ornamental to it, though he has a power by law.

Master of the Rolls. The injunction must be continued as to pulling down the mansion house, or cutting down the timber ornamental to it ; but dissolved, as to cutting of timber generally, for though there have been great variety of opinions formerly, it is now settled at law, that if a stranger cut down timber, or commit any other waste, it belongs to the tenant for life, who is punishable of waste, and not to the remainder-man in tail, or in fee.

Case 130.—ANONYMUS.

At the Chancellor's house, Master of the Rolls. Eodem die.

An answer of two defendants underwrit jurat', was suppressed on a motion for irregularity.

The joint and several answer of two defendants, was on motion suppressed for irregularity, because it was underwrit jurat', and not jurati, or ambo jurati: And the Master of the Rolls said, he had known such an answer adjudged irregular.

Case 131.—ANONYMUS.

At the Chancellor's house, Master of the Rolls. Eodem die.

A sequestration, which is a kind of a suspension, nisi, &c., was granted against the warden of the *Fleet*, for not answering. No attachment lies against him because he is supposed to be always in Court, and tho' it is directed to the Sheriff, the body when brought in, is turned over to the *Fleet*. In C. B. if the warden will not appear, they forejudge him his office.

A Sequestration, nisi, &c., was moved for against Mr. *Gambiere*, the warden of the *Fleet*, for not putting in his answer.

Master of the Rolls. It is common to suspend clerks of Courts, and the wardens of the *Fleet*. The warden of the *Fleet* attends this Court, and the Court of Exchequer by two deputies, and therefore no attachment will lie against him, because he is supposed to be always personally in Court, but he cannot be sued by bill in either Court, but only in the Common Pleas, where if he will not appear, they forejudge him his office. The attachment is directed to the Sheriff, but when he brings in the body, the prisoner is turned over to the *Fleet*. Take your order for a sequestration, which is a kind of a suspension, nisi.

[239] *Friday, December the 5th [1729].*

APPEALS AND REHEARINGS.

Case 132.—MAYEW *versus* COPPING.

At the Chancellor's house, Lord Chancellor.

The heir cannot redeem without paying the mortgage money, and the money due by bond too.

Mr. Solicitor General for the defendant. This is an appeal from a decree of the *Master of the Rolls*, and the only question is, Whether a mortgagee, who is also a creditor by bond, shall foreclose the voluntary assignee of the heir at law, unless he pay the money due on the bond? The mortgagor himself might redeem paying only the mortgage money, unless it was agreed that the mortgage should stand as a security for the money due on the bond; the heir indeed must pay both, not because the bond is a real lien on the estate, but to prevent a circuitry of action, because the equity of redemption is assets in equity by descent, but if the heir conveys away the lands before a bill is filed, or an action commenced against him (and it does not appear that this bill was brought before the alienation of the heir), to a purchaser, by the 4 & 5 of W. 3, the purchaser is not liable, but only the heir, and so if he makes a voluntary conveyance, the heir only must answer; but here the heir is not brought to a hearing, and it does not appear that he is insolvent, and the plaintiff ought to receive no further help than the statute gives him, and this assignment cannot be within the statute of *Eliz.* for it cannot be said to be made to defraud his creditors, but his father's, and before the 4 & 5 of W. & M. tho' a man bound himself and his heirs in a bond, he might defeat his creditors by a voluntary devise of the lands.

Lord Chancellor. Suppose before the statute, one sued the heir on a bond, and he pleaded an alienation before the action was brought, and produced a voluntary conveyance in evidence, would not the jury have found that to be fraudulent? and the statute

of *Q. Eliz.* makes such conveyances void, the obligor himself before the statute might devise the lands, because they were not bound in his hands; and this is a mortgage in fee, so the equity of redemption is not assets at law, but in equity only the mortgagee files a bill of foreclosure, which must be considered in the same manner as to the heir, as if he had brought a bill to redeem, which he could not have done without paying off both debts; The heir has transferred his right without a consideration; Is not such an assignment fraudulent? The [240] defendant is not an alienee at law, the plaintiff comes into this Court to get nothing from him, and he cannot redeem but on the same terms with the heir, so the decree must be reversed.

N.B. The *Master of the Rolls* decreed the defendant to redeem, on paying the mortgage money only, because the plaintiff had not made a case of it, or insisted on the statute. (2 Vern. 44, 61, 177, 691, 698; 2 Chan. Cas. 164; 1 Chan. Cas. 97; 1 Vern. 244, 245, 174; 3 Salk. 64, Cas. 7.)

Thursday, December the 11th [1729].

Case 133.—CANNING *versus* CANNING.

[See *Denn dem. Moor v. Mellor*, 1794, 5 T. R. 563.]

At the Rolls.

If a devise is loaded with a perpetual charge that will enlarge the estate, tho' there are no express words to pass the inheritance. 2 Vern. 106; Styl. 293; Moor 852, Cas. 1164.

Mr. Solicitor General for the plaintiffs. Mr. Canning made his will, *inter al'* in these words, 'All the rest, residue, and remainder of my messuages, lands, tenements, or hereditaments, whatsoever and wheresoever unbequeathed, after my just debts, legacies, and funeral expences are fully satisfied and paid; I give to my executors, in trust for my daughters.' And the question is, Whether these words pass an estate in fee, or for life, only to the executors?

As the testator had a power, so it appears to be his intention to pass the fee, which is the rule to construe wills by, and is the reason, why a devise to a man for ever has been taken to be a devise of the inheritance, and the intention is to be gathered, not from one clause only, but from the whole will, the testator plainly designed to make a full disposition of his whole estate; he considers his eldest son and heir at law in the first place, and he devises a messuage, called the *Royal Oak*, to him and his heirs, and thirty pounds a year for his life, to be paid him by his executors out of the lands of *Upper Illington*, in *Warwickshire* (the estate in question), then he bequeaths several pecuniary legacies, next he devises certain lands to his wife for life, remainder over in fee, and then comes the clause in question.

A reversion in fee may undoubtedly pass by the word hereditament, and a fee may pass from circumstances, and the testator, by making a particular provision for his heir, shews what he designed he should have, and where there is a general devise to executors for a particular purpose, such an estate must be construed to pass to them, as will enable them to execute that purpose; and where the estate is loaded with a perpetual charge, or annuities, it must continue as long as the burthen, though they are no express words to pass the inheritance, [241] this devise cannot determine with the life of the executors, because the annuity to be paid out of it to the son may last longer, and his intention further appears from hence, that though his heir survived his executors, he gives him only £30 a-year for life out of them, and if the estate is not to determine with the life of the executors, they can have no other interest but a fee, and the book cases are full of resolutions of this kind.

A devise of lands paying such a sum, as suppose £5 on the death of the testator, is a devise in fee, because the devisee may die before quarter-day; and so possibly by another construction he might be a loser. 2 Salk. 685, *Smyth versus Tindal*, the Court held the devise to *Margaret* a fee, because it was subject to a perpetual charge.

But the words themselves will carry the inheritance, hereditament is a more extensive word, and more clearly comprizes the inheritance than the word estate; and in 3 Mod. 229, *Willows versus Lydcot*, Mr. Justice *Powel* was of opinion, that the word hereditaments imported the inheritance; and if he had devised the inheritance not

before disposed of, the reversion in fee would have passed. 1 Salk. 234, Cas. 13, *Cole versus Rawlinson*. 1 *Lutwych*, 755, *Norton versus Lad*. A devise to A. for life, the whole remainder to B. if he survives A., if not, then the whole remainder and reversion of all the said lands to my sisters, and their heirs; it was adjudged that B. took a fee: Here all the remainder, &c., unbequeathed is the same as the whole remainder; and in the case of *Hopewell versus Ackland*, 1 Salk. 239, the Court were of opinion a fee would pass by the words, *Whatsoever I have not before disposed of*; here the words are, *Whatsoever and wheresoever unbequeathed*.

Mr. Abney. These words pass the fee, which appears, first from the word hereditaments, Co. Lit. 6, a hereditament is the largest word of all in that kind, for whatsoever is an hereditament, may be inherited be it corporeal, or incorporeal, real, personal, or mixt: But in Hob. 2, Cas. 2, *Widlake versus Harding* (2 Saund. 382; Moor, 873, Cas. 1218; Godb. 207), I do give and bequeath unto my cousin and her assigns my now dwelling-house, with all the lands belonging to it, for the term of ninety-nine years; and my said cousin shall have my inheritance, if the law will allow it; it was adjudged the cousin took a fee, by the word inheritance.

Secondly, from the words, *All the residue and remainder, &c.*, all the rest of my estate would plainly have conveyed the inheritance, and we think these words are as full and signifi- [240] cant, 2 Vern. 564, *Murry versus Wise*, *Nott* devised to his daughter £50 and all the rest and residue of his real and personal estate to his wife. The wife took a fee. Alleyn, 28, *Wheeler versus Waldron*. A. having a manor, and other lands in *Somersetshire*, devised the manor to B. for six years, and part of the other lands to C. in fee, and then came this clause, *And the rest of my lands in Somersetshire, or elsewhere, I give to my brother*; and it was adjudged that by the word (rest) the reversion in fee of the manor passed, as well as the lands not devised before, 3 Mod. 228. *Hyley versus Hyley*, all rest and remaining part of his estate he devised to his three grandsons, equally to be divided amongst them, that only excepted which he had given to *Peter, Charles, and John*, and to the heirs of their bodies; it was adjudged, that without the exception, the reversion in fee would have passed by these words.

Thirdly, from the words '*Whatsoever, and wheresoever unbequeathed, after my just debts and legacies, and funeral expences are fully paid, and satisfied*,' 2 Ventr. 285; 3 Mod. 229; Carthew, 50, *Willows versus Lydcol*. *William Shelton* seized in fee of the messuage in question, and divers other messuages in the parish of St. *Martin's*, and other parishes, made his will, and thereby devised his houses in the other parishes to divers charitable uses, and then devised to *Edward Harris*, and *Mary* his wife, the messuage in question, for their lives; and then in the following clause, the better to enable his wife to pay his legacies, he devised all his messuages, lands, tenements, and hereditaments whatsoever within the kingdom of *England* (not above disposed of), to have and to hold to her and her assigns for ever; and judgment was given in B. R. that the reversion did not pass, but that was reversed unanimously in the Exchequer Chamber, because there were words in the devise to the testator's wife that would carry the reversion of this house, as an hereditament not disposed of; and here the words whatsoever, and wheresoever unbequeathed are of the same import, 1 Salk. 239, *Hopewell versus Ackland*. *John Ackland* being seized in fee of the lands in question, devised an annuity to *H.* in fee; item, he devised his manor of *Bucknal* to A. and his heirs; item, he devised all his lands, tenements, and hereditaments to A.; item, he devised all his goods and chattels, money and debts, and whatsoever he had not before disposed of, to the said A., he paying his debts and legacies, and made A. his executor, and *per Trevor*, Chief Justice, by the concluding words, *And whatsoever I have not before disposed of, an estate in fee will pass, and this is further enforced by the following words* (Cro. Eliz. 744 (22)). He paying, &c., and by the annuity to *H.* in fee, here the personal estate is not sufficient to pay the debts and legacies, and where lands are devised for the payment of debts or portions, a fee will pass by words that [241] would not otherwise carry it. Co. Lit. 9 b. If a man devises twenty acres to another, and that he shall pay to his executors £10, the devisee has a fee-simple, 6 Co. 16 a, *Colyer's case*. A man devised part of his lands to his daughter, and other part to his wife for life, with the profits of which she was to educate her daughter; and that after her death it should remain to his brother, paying 20s. to one, and other small sums, amounting in the whole to 45s. and the yearly value of the lands was £3, and it was adjudged that the brother had a fee, 1 Vern. 104, where lands are devised to pay debts and legacies out of the rents and profits, the lands may be sold, otherwise,

if they are to be paid out of the annual rents and profits, and it is a rule in equity, that where lands are given generally to trustees, without mentioning for what estate, they shall be taken to have such an estate as will enable them to execute the trust : now, an annuity is to be paid out of this estate, which may out-last the life of the executors, and therefore their estate must be enlarged.

Mr. Yates for the defendant. These words pass only an estate for life. A devise to one generally, is but an estate for life, and where the Court enlarges it, the intention of the testator must be very manifest, from the words of his will in their common and ordinary signification ; and when a man uses technical words, they must be taken in the same sense the law puts on them. In the case of *Norton versus Lad*, the whole remainder was expressed, so the whole remainder was adjudged to pass. 1 Vern. 65. *Peiler versus Banks*, a devise to A. for life, reversion to B. and C., equally to be divided between them, B. and C. are tenants in common for life only.

Here no particular estate in these lands being before disposed of by the will, the words, *All the rest, residue, and remainder*, must relate to his lands, and not to the estate or interest remaining in them, and they are to the same effect as *All my other lands, &c.*

Hereditament is barely a word of description, and will pass only an estate for life, and *per Trevor*, Chief Justice, in the case of *Hopewell versus Ackland*, the word hereditament cannot be taken to denote the measure, or quantity of the estate, because it has a proper meaning, and extends to annuities, advowsons in gross, &c., which are not comprized by the words, lands and tenements.

As to the words, *After my just debts, &c.* The words to be sure must have such a construction put on them, that the devisees may not be losers. Cro. El. 330 (5). here the [242] persons of the devisees are not charged with the annuity, and the trust may be answered, though they have only an estate for life, the annuity is devised here to the heir himself, so that the reason fails, which might induce the Court to consider this an estate in fee, if the annuity had been to a stranger, because the reversion coming to the heir by descent, paramount to the will, he would defeat the annuity.

Master of the Rolls. I shall first consider the word *hereditaments*. Lord Coke, in his first institute, takes notice of the three words mentioned in this will, and that hereditaments is the most comprehensive, which must be understood of the things that pass by it, and not of the estate. I was counsel in the case of *Smyth and Tindal*, and that turned on the collateral warranty, by which the heir of *Margaret* was adjudged to be bound ; and the law is now settled in the case of *Hopewell and Ackland*, that a fee will not pass by the word hereditament ; and how can we better explain the words of a will, than by the statute of wills ? by which any person having manors, lands, tenements, and hereditaments of estate of inheritance, &c., may devise, &c., how absurd would those words be, if the words inheritance and hereditament had the same sense ; and in the statute, whereby estates tail are forfeited for treason, are the same words.

I shall next consider whether it appears from any of the other words, or from all together, to be the intention of the testator to give his executors a fee.

It appears by the case of *Wheeler and Waldron*, that if a man devises particular lands for years, and after devises the rest and residue of his lands, that the reversion of the lands devised for years will pass, as well as the lands not before devised ; but there was indeed no judgment in that case, for I had occasion once to search the record, there was a special verdict, and the devise was on condition, that his brother conveyed other lands, and the jury found the value of both estates, and that the lands devised would be just of the same value with the lands to be conveyed ; if the reversion passed, there was such a verdict in that case, tho' Lord Chief Justice Holt was of opinion, that a will ought not to be explained by matter dehors. (2 Vern. 624.)

In the case of *Cook versus Garard*, 1 Lev. 212 ; 1 Saund. 180 ; 2 Keb. 206, 207, 224. *Keep*, seized of *Spain's Hall*, settles part thereof on his daughter for life, and after by will devises the house to his wife, for a year after his death, and then devises all his lands. Not settled or devised to *Thomas* [243] *Keep*, *habendum* to him and his heirs, it was adjudged, that though this devise was of the lands, not devised or settled, and not of the estate not devised or settled, the reversion passed, though the land itself was settled and devised before ; and that the words were to be taken for the residue of the estate in the lands : So 2 Vern. 461, *Rook versus Rook*, A. seized in fee, devises *Blackacre* to B. for life, and to C. all his lands not before devised, to be sold, the reversion of *Blackacre* is well devised to C. : So 2 Vern. 559 and 621 ; but in these and the other cases, the inheritance was expressly devised, but in this case, the question

is not, Whether any lands he had before devised, shall pass, but what estate passes in lands he had before omitted to devise ? and this case is no more, than if he had enumerated all his several estates, and given them generally to his executors ; and these words, *All the rest, &c.*, comprehend the particulars only, and not the estate, and mean no more (as has been already well observed) than, All my other lands : Here the lands in possession are to pass, so that the words run only to the lands, and not to his interest.

But it has been said, that the testator shews his intention to pass the fee, by giving his son an annuity for life ; but if thirty pounds a year are given to the heir, they will not disinherit him, but the estate shall be expressly devised away.

As to the words, After my just debts, &c., the word paying, indeed will often pass a fee, because otherwise the devisee may be a loser ; and if the devise is to a stranger, it is a condition ; if to the heir himself, a limitation ; but in the present case, there is no condition or limitation, but only a charge in equity ; and the Court will take care the executors shall not be losers, by decreeing a sale of the estate for their lives only ; and I never knew the rule broke, that an heir is not to be disinherited, but by plain words, or by words of necessary implication. If a devise is for performance of such trusts as cannot be executed without a fee passes, they will enlarge the estate ; but here the trust is only for daughters, which may be understood only for the lives of the trustees, and therefore I think the executors have only an estate for life. In *Norton* and *Lad's* case, it is plain the testator designed to pass the whole remainder, not a particular interest in the remainder, and he explains himself when he further devises it over.

Why paying, &c., in a devise, passes a fee. 6 Co. 16 ; 3 Co. 20. *Bro.* title estate, pl. 38, 78, tit. Testam. pl. 18 ; *Cro. El.* 204 (39) ; 1 Vern. 425 ; 38 Ed. 3, 14 ; *Bridgm.* 84, 152 ; *Sir Wm. Jon.* 211 ; *Godb.* 280 ; *Cro. Ja.* 599 ; 2 Mod. 25 ; *Moor.* 464, *Cas.* 656 ; *Cro. El.* 497 (18).

An heir is not to be disinherited but by plain words, or by words of necessary implication. *Sir Tho. Jon.* 113 ; 2 Lev. 249 ; *Plowd.* 412 ; *Cro. Ja.* 415 ; 3 *Buls.* 193 ; *Ant. Cas.* 88.

[244] Case 134.—TILLY versus SIMPSON.

At the Rolls. Eodem die.

Lands were devised in trust, to maintain the infant till he came to 23, and then to account, and pay him the rents, and reconvey the estate to him, but if he died before, to reconvey it to another ; the infant is not intitled to an account till he come to 23, for that is a condition precedent, but the surplus profits, if he die before, go to the heir of the testator, not being devised over, but the infant and the heir, on suggestion of insolvency in the trustees, may bring a bill for an account. 2 Vern. 138, 247, 425, 571, 644, 645 ; 1 Vern. 21 ; 1 Chan. Cas. 98.

Mr. *Tolson* devised all his lands to the defendant *Simpson*, and others, in fee, in trust, to pay the plaintiff £50 a year for his maintenance at *Westminster* school, and £100 a year at College, and the *Inns of Court*, and when he came to the age of twenty-three years, to account, and pay him the rents and profits, and reconvey the estate to him and his heirs ; but if he died before that age, to reconvey the estate to the defendant *Simpson*, and his heirs ; and the plaintiff the infant by his *prochein amy*, brought this bill against the trustees, *inter al'* for an account of the rents and profits.

Master of the Rolls. The plaintiff is not intitled to the rents, unless he arrive to the age of twenty-three years, which is a condition precedent, but if he dies before, the surplus profits belong to the heir at law, or to the several heirs in succession, as so much of the estate not disposed of by the will ; for they are not given over with the lands to the defendant, and therefore the defendants are not obliged to account, but the infant and the heir at law might have prayed an account by a proper bill, suggesting insolvency in the trustees, and that there was danger of the profits being lost in their hands.

Friday, December the 12th [1729].

PLEAS AND DEMURRERS.

Case 135.—WORTHINGTON *versus* WILKINSON.

At the Chancellor's house, Lord Chancellor.

A plaintiff after six years is intitled to a discovery of a fraud. A fraud is a bar to the statute of limitations at law. Nels. Fol. Rep. in Canc. 14, 266.

The bill was brought for a discovery of a fraud and relief. The defendant pleaded the statute of limitations.

Lord Chancellor. The plaintiff, after six years, shall have a discovery of that fraud, which intitles him to his action, which would otherwise be lost by the length of time : So let the plea stand for an [245] answer, with liberty to except, and the benefit of it be saved to the hearing. When there is a plain fraud, the plaintiff may take advantage of it at law. I once tried a gold cause, where the defendant asserted, that between the line and the latitude of 40, the inhabitants fought with arrows pointed with gold, and took in subscriptions to provide ships and men, to make themselves masters of the place.

Case 136.—VAUGHAN *versus* GUY.

At the Chancellor's house, Lord Chancellor. Eodem die.

'All the rest and residue of my estate, after payment of my debts and funeral, I give to my executors,' &c.—Q. If this amounts to a new promise to the creditors ? Post, Cas. 201 ; Sel. Cas. in Canc. 57.

The testator made his will, *inter al'*, in these words, 'All the rest and residue of my estate, after payment of my debts, and funeral expences, I give to my executors,' &c. To this bill filed by a creditor, the executors pleaded the statute of limitations.

Mr. Solicitor General for the defendants. The plaintiff insists that the will, which was made before the six years were expired, whereby the testator has ordered that his debts should be paid, amounts to a new promise. But these are no more than words of course, and what the law says, where lands indeed are devised to executors, in trust, to pay debts, the testator creates a new fund, and the nature of the debts are altered, and they are to be paid equally, 2 Vern. 141, *Gofton versus Mill* ; and great inconveniences would follow, if this will should revive the debt, or prevent the executors from paying other creditors, and enable them to pay debts, that to pay otherwise would be a devastavit ; but where lands are devised, no creditor can complain, because a new fund is created. Why did the creditor lie by ? the debt was contracted in 1720, and the testator died in 1724, so this debt was not barred at that time, which makes the case much the stronger, and it is a known rule, that where the time begins to run, in the life of the ancestor or testator, it goes on, as to his heir or executor, and it was so resolved by the *Master of the Rolls*, and affirmed on an appeal to Lord *Macclesfield*.

It has been resolved that the statute of limitations will extend to attornies bills, though they are things done of record. The *Lord Chancellor* gave no opinion of this point, but over-ruled the plea for other reasons.

[246] Saturday, December the 13th [1729].

MOTIONS.

Case 137.—ANONYMUS.

At the Chancellor's house, Lord Chancellor.

If the goods sequestered are not sufficient to satisfy his demands the plaintiff may move to revive the order for a serjeant at arms.

An order was made for a sale of goods sequestered, and the money arising by the sale, not being sufficient to pay even the sequestrators, the plaintiff moved, that the order for a Serjeant at Arms might stand revived, and an order was made accordingly.

Case 138.—ANONYMUS.

At the Chancellor's house, Lord Chancellor. Eodem die.

On a decree of foreclosure, the Court will not oblige the plaintiff to lay the title deeds before counsel, for the defendant to get an assignment or sale of the lands (unless the plaintiff consents to a sale), but only to give a copy of the mortgage deed.

A decree for a foreclosure *nisi*, and the defendant moved, that the plaintiff might lay the deeds before counsel, in order to have the mortgage assigned to one who would advance the money; but the counsel for the plaintiff insisted that such an order was never made, but where the mortgagee consents to sale, for by that he submits to do every thing that is necessary to a sale: And the *Lord Chancellor* made an order, that the plaintiff should give the defendant a copy of the mortgage deed, at the defendant's charge, but would not oblige him to produce the title deeds, but said he thought it a good reason to enlarge the time to redeem, if the defendant should hereafter apply to the Court for it.

Case 139.—NEAL & al' *versus* the ATTORNEY GENERAL & al'.

At the Chancellor's house, Lord Chancellor. Eodem die.

If a mortgagor or *puisne* mortgagee prays to enlarge the time to redeem, he must pay interest for the whole sum reported due for principal, interest, and costs. But where a decree is made for creditors to be paid according to their priority, if the estate is deficient, the principal only shall bear interest, after the confirmation of the report. Ant. Ca. 14.

The bill was brought by the creditors of the Duke of Wharton, for a sale of his estate, and payment of their debts, and a decree made, the master took an account of what was due to the several creditors for principal and interest, and made his report, which was confirmed, and by a subsequent order, the Master was to carry on interest for the principal sums reported due, and Mr. Neal, one of the creditors, moved to discharge this order, because by the course of the Court, when principal and interest are liquidated into one sum by a master, the whole bears interest from the confirmation of the report, the estate may not be sold in many years, and the plaintiff has done all in his power to obtain his debt, and if this account had been stated by the debtor himself, it [247] would have carried interest. And on a mortgage, when principal, interest, and costs, are lumped into one sum by a master, if the mortgagor, or a subsequent mortgagee, pray longer time to redeem, they always pay interest for the whole sum.

Lord Chancellor. When the Court enlarges the time for the mortgagor, or a subsequent mortgagee, that is a favour (for they would otherwise be foreclosed), and it is but just and reasonable that they should pay for it, and that the mortgagee should be no loser thereby. The decree in this cause is, that the debts should be paid according to their priority, and it would be very unjust, when the estate is deficient, to add a surplus debt to a prior creditor, by the help of this Court, to defeat the others; besides you are only a co-plaintiff, and the order is general, to carry on interest on all the principals, and the rest of the creditors acquiesce under the order. The Duke of Wharton has affected no delay, but vested his estate in trustees, for the payment of his debts, and the plaintiff, who was a creditor by judgment, could not have come at his money without this decree; for how could he have extended his judgment against the mortgagees? If the case was between the creditor and the owner of the estate, it might have a different consideration: So the order must stand, but without prejudice, if there should hereafter appear to be a surplus.

Wednesday, December the 17th [1729].

Case 140.—BROADWAY versus MORECRAFT.

At the Rolls.

A covenant in a mortgage, that at the end of every year, if the interest is not paid within three months after it becomes due, it shall bear interest, is a void covenant. Or, that on non-payment of the interest at the day, it should be turned into principal, and bear interest. Or, that in default of payment, the interest shall be advanced from £5 to £6 *per cent.* Or, to pay £6 *per cent.*, but if the money is paid at the day, to pay only £5. And there is no difference in reason between the two last covenants. 2 Vern. 134, 289, 316, 402.

In 1693, a reversion was mortgaged, and the mortgagor never paid the interest money: In 1711, the mortgagor and mortgagee came to an account of what was due for principal and interest, and a new mortgage was made for the whole, with a covenant, that at the end of every year, if the interest was not paid within three months after it became due, it should bear interest.

Master of the Rolls. This is a void covenant, and the mortgagor may redeem on the common terms. In the case of Lord *Strutton* and *Meers*, Lord *Harcourt* set aside a covenant, that on non-payment of the interest, at the day it should be turned into principal, and bear interest: And in the case of *Mitchel* and *Pollexfen*, the covenant was declared to be void, that on default of payment, the interest should be advanced from five to six *per cent.*, and [248] though heretofore the Court made a difference between such a covenant, and a covenant to pay six *per cent.*, but if the money was paid at the day, to pay only £5, yet that distinction has been long out of doors, and both covenants have been set aside in equity. And though all these were cases of mortgages in possession, yet that will make no difference, for the mortgagee knew his security was only a reversion, and thought it sufficient, and he might have brought a bill of foreclosure, or put the bond in suit. This case was affirmed on appeal by Lord *King*.

Friday, December the 19th [1729].

MOTIONS.

Case 141.—ANONYMUS.

At the Chancellor's house, Lord Chancellor.

A purchase is made to the use of baron and feme and their heirs, and baron and feme join in a mortgage to the vendor to secure part of the purchase money, the mortgagee files a bill of foreclosure, baron and feme answer jointly, the baron dies, and the wife moves to amend her answer, and insists that the mortgage did not bind her for want of a fine, but the motion was denied, because an answer has been adjudged equal to a fine, and the mortgage is good in equity, the wife not pretending she was imposed on.—An answer in equity put in by a feme covert, is equal to a fine.

An estate was purchased, in trust, for the husband and wife, and their heirs, and the husband and wife joined in a mortgage to the vendor, to secure £500 part of the purchase money; the mortgagee brought a bill of foreclosure, and the husband and wife put in a joint answer, the husband dies, and now a motion was made for the wife, that she might amend her answer, put in by coercion during coverture, and insisted on the mortgage not being obligatory on her, because no fine was levied: And 2 Vern. 197, was quoted, where baron and feme exhibited a bill for a demand in right of the wife, and the cause proceeded to publication, the baron dies, and the feme marries a second husband, on a new bill it was adjudged, they might examine again the same witnesses, as were examined in the former cause; and 2 Vern. 249, *Shelberry versus Brigs, & ux'*, a bill was brought for a legacy against baron and feme, who was executrix; and it was adjudged indeed, that after the husband's death, the wife should be bound by the answer and depositions; but it was said that in case of the wife's inheritance it was otherwise.

Lord Chancellor. I shall not grant this motion ; for though the mortgage is insufficient at law, I shall consider it as a good mortgage, since the wife do not pretend she was any ways imposed on ; and an answer in this Court, has been adjudged equal to a fine.

[249] PETITIONS.

Case 142.—*Ex parte HALES.* [1729.]

At the Chancellor's house, Lord Chancellor. Eodem die.

Sir *John Hales* preferred a petition, supported by affidavits, praying that his grandson, an infant of tender years, who was tenant in tail in remainder after his death, of a very considerable estate, might be produced in Court by his mother, and that he might be appointed his guardian, and set forth, that his father a little before his death had embraced the *Roman* Catholick, and that the child was sent to *Bulloign*, to be educated in the same religion.

The mother being served with this petition, swore, that the child was sent by his father to *Bulloign*, in his last illness, by the hands of Mr. *Turner*, without her advice or persuasion.

Lord Chancellor. I cannot appoint a guardian 'till the infant is produced, and whatever crime they have committed by carrying him out of the kingdom, to educate him in the *Romish* religion, they are punishable for it in the proper Court, and not in this Court : But I will order an *homine replegiando* against Mr. *Turner*, who is sworn to be the person who carried him over.

Saturday, December 20 [1729].

Case 143.—*LONG versus ELWAYS.*

At the Chancellor's house, Lord Chancellor.

The plaintiff an infant, by Mr. *Freeman* her *prochein amy*, filed a bill against the defendant *Elways*, her trustee, for an account of the real and personal estate ; and by the decree an account was to be taken, and Mr. *Freeman* was appointed her guardian, and he was expressly ordered, not to marry her without the consent of the Court, and Mr. *Freeman* preferred a petition grounded on affidavits, praying, that it might be referred to a master, to examine all parties upon interrogatories, touching the marriage of the said infant, who were present at the said marriage, persuaders, abettors, and contrivers thereof ; and that they might be committed ; and that a proper settlement might be made on the lady, who had [250] £300 a-year in lands, with a very good wood on the estate, and about £5000 in money ; and set forth, that the young lady was brought up in his own family, and was at the time of the marriage at his own seat in *Hertfordshire* ; that about a fortnight before Mr. *Chremer*, a neighbouring gentleman, with his wife and daughter, came to dine with him, that after dinner, Mrs. *Chremer* complaining of night coming on, Mrs. *Freeman* offered them a lodging, which they accepted, and the daughter lay with Miss *Long* ; that about a fortnight after, Miss *Chremer* came to dinner, and there being a great deal of company, Miss *Long* and she, after dinner, slipt into the garden, and being missed, upon enquiry they found, they had gone out of the back door of the garden, to the end of a narrow lane, where a coach and six waited them, and carried them to a little ale-house, at about two miles distance, where Miss *Long* was married to Mr. *Cæsar*, and the messenger who was sent after them, found Mr. *Cæsar* and the lady, Mr. *Chremer* his wife and daughter, in Mr. *Chremer's* house, and Mr. *Cæsar* told him he was married to the lady ; and Mr. *Freeman* swore that he was no ways privy, or consenting to the match, but an utter stranger to it. And his counsel insisted, that the same order they prayed for, was made in the case of Mr. *Phipps* and Lady *Catherine Annesly* ; and that the Court granted a sequestration in the case of Lady *Shaftsbury* and Lady *Gainsborough*, that Mr. *Freeman* thought it his duty to make this application to the Court, to clear himself, and to have proper care taken of the lady's portion.

The counsel of the other side argued, that this Court would punish the persons concerned in the marriage, only as they were guilty of a contempt of the Court, and

that in this case, no body but Mr. *Freeman* and the lady knew of the order of guardianship, and that this was the reason why a sequestration was granted against Lady *Shaftsbury*, because she was guardian to the young Lord *Shaftsbury*, who was married, and that when her counsel came to shew cause why a sequestration should not issue against the Countess of *Gainsborough*, the order for a sequestration was discharged, because though she was present at the marriage, she was not privy to the orders of the Court, that here the parties were not proved to be in contempt, for it is not sworn that they were privy or assisting to the wedding; and that this Court never suffered persons to be examined on interrogatories to bring themselves into a contempt, but where a contempt was expressly sworn against them, gave them leave to be examined on personal interrogatories, by way of purgation, in order to clear themselves, and that this was the case of *Phipps* and Lady *Catherine Annesly*, for there it was expressly sworn, that Sir *Constantine* and Lady *Phipps* managed and brought about the marriage: That [251] in this case the ward was not disparaged, Mr. *Freeman* had discharged himself, and her portion was secure, her personal estate in the hands of trustees, and her real estate in a receiver's.

Lord Chancellor. It was proper for Mr. *Freeman* to apply to the Court, to shew he was not privy to the match. All who were parties, and privies to this wedding, are guilty of a contempt of this Court, though they were strangers to the decretal order; but I shall not set up a general inquisition to find out who they are, but some are probably affected by the affidavits, as Mr. *Chremer*, his wife, and daughter, for when they dined with Mr. *Freeman* a fortnight before the marriage, Miss *Chremer* and Miss *Long* lay together, the day they were married they went into the garden together, and were seen going out of the back door, and the servant who pursued them, found them altogether at Mr. *Chremer's* house after the wedding: Be it ordered therefore, that it be referred to a Master, to see what settlement Mr. *Cæsar* can make, and at the same time when the Master makes his report, let Mr. *Chremer*, his wife, and daughter, shew cause why they should not be committed; but I shall make no order for the commitment of Mr. *Cæsar*, since his uncle Mr. *Freeman* is willing to discharge his person, nor I shall not examine the persons, who was the minister that performed the ceremony: And as no objections have been made to the circumstances of Mr. *Cæsar*, but the lady has provided for herself as well as her guardian could, the Court will consider that in the punishment of Mr. *Chremer* and the others.

Friday, January the 16th [1730].

EXCEPTIONS TO THE MASTER'S REPORT.

Case 144.—CLAYTON *versus* LUCKIN.

At the Chancellor's house, Lord Chancellor.

If the lease, household, and shop goods, are assigned over to another, and he comes into possession, and carries on the trade, from that time they are to be considered as money. Debts are assigned in 1713, the assignee dies, those debts shall be presumed to be paid for which the securities could not be found.

A person indebted on several accounts, when he pays money may apply it to what debt he pleases. 1 Vern. 24, 34, 468; 2 Vern. 606; 2 Chan. Cas. 83; Cro. El. 68 (19); Forrester. 123.

The plaintiff filed his bill, to be relieved against a bond of £1000 lent to him by the testator of the defendant, and for an account of shop and household goods, a lease of the house, and of several debts, which he had made over to the testator, by assignment, and bill of sale, as a collateral security to pay £60 *per annum*, 'till the payment of the bond. And the defendant brought a cross bill for an account, and an account was decreed, and a report made, to which the plaintiff excepted, because the master had allowed interest for the bond, from the date to the time of the report; [252] but had not allowed for the goods, lease and debts, from the time of the sale, and assignment in discount of the interest and principal due on the bond: And the *Lord Chancellor* allowed the exception, and ordered that it should be referred back to the master, and that the defendant should account for the lease and goods, from the time of the assignment, when his testator came into possession, and carried on the trade, for they were to be

considered as money from that time, and for the debts, from the time they were, or might have been received without his wilful default : And that the assignment being in 1713, the testator should be presumed to have received those debts, for which the securities could not be found, and that the money arising thereby (the plaintiff being likewise indebted to the testator by simple contract), should be first applied to pay the interest due on the bond, then the debts by simple contract (for it was in the power of the plaintiff to declare how the money should be applied), and then the principal due on the bond.

Saturday, January the 17th [1730].

EXCEPTIONS.

Case 145.—MORELY *versus* BONGE.

At the Chancellor's house, Lord Chancellor.

The Court allowed the executrix sums under 40s., which the testator had fairly entered in an account-book, without proof. 1 Vern. 283, 470 ; 2 Vern. 167.

The defendant, as executrix of her husband, who was master of a ship, which traded between *Holland* and *Archangel*, in hemp and other commodities, brought an action of £300 against the plaintiff as owner of the ship for wages, and had judgment by default ; and the plaintiff filed a bill for an account, and an injunction, and she was decreed to account, and the master made his report, to which the defendant excepted ; because the master had not allowed her several sums for shovers, when the ship was under careen, though they were fairly entered in an account-book, kept by her husband, as master of the ship, and several witnesses deposed, he was a man of a fair character, that the expence was necessary, and that it was not usual for masters of ships to take vouchers for such small sums.

Lord Chancellor. All the sums under forty shillings would have been allowed by the master to the testator, upon his own oath ; and since they are fairly entered in his book, which was regularly kept, and cannot be supposed to be done to serve this turn, [253] and are proved to be necessary expences, and it is sworn he was an honest man, they shall be allowed to his executrix, especially after this length of time, and a judgment by default : And to object, that she may examine witnesses in *Holland* or *Archangel*, to the payment of these small sums, is in effect to say, she shall not have justice done her, such an examination would be so chargeable ; but though the defendant's case is very hard, I am tied up by the rules of the Court, and therefore can allow the exception only as to sums not exceeding forty shillings : The testator if he was alive must have produced vouchers for the other ; and in this case, the plaintiff has made no use of the testator's account-book by way of charge.

[254] DE TERM. S. HILL. 1729–30, IN CUR. CANCELLARIE.

Friday, January the 23d [1730].

MOTIONS.

Case 146.—*Ex parte* JONES. [1730.]

In Court, Master of the Rolls.

The under sheriff, under pretence of administering the oaths, swears a candidate coroner. The Court ordered him to shew cause why he should not be committed, and not to file a return to the writ without leave of the Court. But this is not a good cause at law, and therefore not in equity, to direct the new writ to the other coroner. Registr. 177 a, b.

Serjeant Shepherd. Moved to discharge a writ *de Coronatore Eligendo*, and to have a new writ directed to the other coroner, and that the under-sheriff and clerk of the county might be committed on the death of Mr. *Floyd*, one of the coroners for the

county of *Cardigan*, a writ was directed to the sheriff, to elect a new coroner in his room, and the clerk of the county writ notices, which were fixed up in the guild-halls of the several towns of the county, that on the 17th of *December*, the sheriff would hold a county court, for the election of a new coroner; Mr. *Jones*, one of the candidates, suspecting some foul play, went to the sheriff some time before the day, and desired him to be at the Court, but he told him there would be no occasion, for nobody opposed him; On the sixteenth, Mr. *Jones* came to *Cardigan*, attended with about two hundred freeholders, and the next day waited with them all the morning at the *Guildhall*, where the under-sheriff designed to put up Mr. *Williams*, and refused to hold the Court that morning, and also in the evening, on pretence that the notice was not given by him, or the sheriff, but by the [255] clerk; and therefore adjourned the Court till the 26th, at which time the freeholders required the under-sheriff to administer the oath of abjuration to Mr. *Williams*, upon which the under-sheriff, under pretence of administering the oaths, gave him the oath of a coroner, and then taking him by the hand, gave him joy, whereupon all the freeholders cried out they voted for Mr. *Jones*, and demanded a poll; but the under-sheriff told them the election was over.

Master of the Rolls. Let the under-sheriff and clerk shew cause why they should not be committed, and though the clerk's being present when the under-sheriff gave the oath, is no reason to commit him, there seems to be a practice and contrivance between them; he gave the notice, and to put off the Court when the freeholders were come, was an abuse, which he so far comes into, as to sign the new notices. As to the discharging the writ, let the under-sheriff bring it with him, and not file a return without leave of the Court, and let the consideration whether the writ shall be discharged, and a new one granted, be reserved till that time: But I cannot direct the new writ to the coroner, because you have not mentioned a sufficient cause in law, but the sheriff will take care that there be no such practice a second time.

Case 147.—EYLES *versus* WARD.

In Court, Master of the Rolls. Eodem die.

A motion of course cannot be opposed, though notice is given of it.

The plaintiff moved, on affidavit of the defendant's keeping out of the way, that service of his clerk in Court, with a writ of execution of a decree, and leaving a copy at the defendant's house, might be good service of the defendant, and that demanding the money of the clerk, might be a good demand on the defendant, and the council for the defendant would have opposed the motion, because the plaintiff had given notice of it, but the *Master of the Rolls* would not give them leave, because it was a motion of course, and though it is grounded on affidavits, it was the office of the Court to examine, whether they were sufficient or not, and he granted the motion, only as to the demand, for if a subpoena is taken out for costs, which must be served personally, if the party cannot be found, the order is only general, that service of the Clerk in Court shall be as good service, as of the party, and yet in that case there is a demand.

Then the council for the defendant insisted, that they must be at the expence to move to discharge this order his Honour was now pleased to make, because it was referred to a master to amend the inrollment: And he made a report, to which they [256] had taken exceptions, and they were set down to be argued; so that the plaintiff was putting a decree in execution before it was inrolled. But the *Master of the Rolls* said, those exceptions were irregular, for the order was for the master to amend, and he certifies that he has amended, and though the master's opinion cannot preclude the defendant, if he has any objections to it, he must move to discharge the report, but cannot except to it, for exceptions are to be taken only to reports, that must be confirmed by the Court, or to special reports, because the Court is to pass judgment on them; but this is barely a certificate, and there is no colour to except; the master has amended, and so the plaintiff is at liberty to serve the defendant with a writ of execution of the decree, and therefore I discharge these exceptions, tho' the *Lord Chancellor* has made an order to set them down to be argued.

Case 148.—RAY *versus* TANFIELD.*In Court, Lord Chancellor. Eodem die.*

The Court granted an injunction to stay an action of dower, the husband having devised to his wife £9 a-year for her better support and maintenance, and made her residuary legatee. 1 Chan. Cas. 181; 4 Co. *Vernon's Cas.*; 2 Vern. 365, 404; Freem. 211.

The plaintiff moved for an injunction, to stay an action of dower, the husband by his will having devised £9 a-year to his wife, for her better support and maintenance during life, and also made her residuary legatee, and insisted that this was devised to her in bar of her dower, and as an additional provision.

Lord Chancellor.—Though this devise is not within the statute, this Court has gone much farther than this case; so let an injunction go, on the plaintiffs giving judgment, with a release of errors, and consenting not to bring error, and to speed his cause; and giving security to pay the damages, and to deliver possession as the Court shall direct at the hearing.

*Tuesday, January the 27th [1730].*Case 149.—SLATER *versus* BUCK.*At the Rolls.*

If grantee of a rent-charge purchases part of the lands, the rent shall be apportioned in equity; especially if he was ignorant of his title to the rent when he made the purchase.

The plaintiff's father created a rent-charge out of the premises, to himself for life, remainder to the plaintiff in fee, with a power of revocation, and sold the lands to the defendant's father, which descended on the defendant, from whom the plaintiff purchased an acre of the said lands, and being after his father's death acquainted with his title to the rent-charge, he applied to the defendant, who paid it him several years, and the plaintiff for the rent-arrear distrained, [257] the defendant replevied, and the plaintiff filed a bill for an apportionment, and an injunction.

Master of the Rolls. If one, who has a rent-charge issuing out of lands, purchases part of the lands, the whole rent is extinguished; but if part of the lands come to him by descent, the rent shall be apportioned, because the law works no wrong: In the first case, the rent is extinguished, because the purchase is the party's own account, but since the law calls it a wrong, I think this Court would relieve him; but here the plaintiff was unacquainted with his title, when he purchased part of the lands, he was not ignorant of the law, but of the fact, and therefore according to the many precedents, and the common rules of equity, he ought to be relieved: If a man has a personal demand of which he is ignorant, and gives a general release, which in point of law is a bar to him of all demands, yet in this Court it shall release only those demands he was acquainted with, and not those he was ignorant of; but it is said, that it must be presumed the plaintiff knew of this rent, which was created in his favour by his own father; but it cannot be presumed so, for the rent-charge was £30 a-year in fee, and the acre of land he purchased was but fifteen shillings a-year, and since I am not to presume the plaintiff ignorant of the law, I cannot suppose he would have taken this small conveyance, if he had at that time been acquainted with this title to the £30 a-year, and he was no party to the deed, which would have been some presumption he knew it, though he never executed it, and yet in that case I should have expected some evidence of it, and his father might not think proper to acquaint him with the deed, because it was subject to a revocation, and the defendant paid this rent-charge for many years, and though he says he was not then acquainted with the advantage he had at law, shall I suppose him to be ignorant of the law, and not the plaintiff? Be it therefore decreed, that the lands shall stand charged against the defendant, and all claiming under him, with the £29, 5s., and that the plaintiff shall have his costs at law, and in this Court, and a perpetual injunction against the replevin: I will not direct a new conveyance of such a rent-charge, for fear of mesne incumbrances. (1 Chan. Cas. 31, 273.)

[258] *Wednesday, January the 28th [1730].*Case 150.—HILL *versus* BISSEL.*In Court, Lord Chancellor.*

Mrs. *Hill* brought a bill against Mrs. *Bissel*, administratrix, and second wife to her late father Mr. *Bissel* deceased, a freeman of *London*, for an account of his personal estate; an account was decreed, and the master made a special report; and the only question was, Whether a settlement made by Mr. *Bissel* on the defendant, was in fraud of the custom? Mr. *Brandon* by his will devised one third of his personal estate to his daughter, the defendant Mrs. *Bissel*, and the other two thirds to his four grand-children, and in case any of them died before twenty-one, or marriage, their share was to survive to the others, and made Mr. *Goddard*, and his son-in-law Mr. *Bissel* executors; Mr. *Bissel* only proved the will, and possessed himself of the estate, part whereof were two lease-hold houses, which he renewed as executor, on the same trust, and he paid off some incumbrances on the premisses, and took assignments of them in trust for himself; afterwards Mr. *Bissel* by deed, reciting the will and the trusts, and that two of the grand-children were of age, and had been paid and released their legacies, and that their legacies were secured for the others, till the contingencies happened, he conveys his wife's third, whereof the houses were part, in trust, to pay him the money he had discharged the incumbrances with, and then in trust, for himself for life, remainder for his wife for her life, remainder for their children. And Mr. *Verney* for the defendant insisted, that this settlement could not be said to be in fraud of the custom, because the custom never attached on it, and that it was resolved in the Court of Exchequer, in the case of *Shaw versus Vincent*, where a freeman had made such a settlement of an estate his wife was intitled to as executrix, that it was not a fraud on the custom.

Mr. *Lutwyche* for the plaintiff insisted, that it appeared by the recital of the deed, that a computation had been made of the personal estate of Mr. *Brandon*, and that the executor had paid, or secured the other two thirds, and that therefore his wife being a legatee of the other third, that vested in him at the same time too, for he could not make it more his own by any act of his, and that it appeared he looked upon himself as owner of it, and that therefore the settlement being made to take effect after his death, it ought not to take place in wrong of the plaintiff his daughter by the first venter.

[259] *Lord Chancellor.* I do not think this settlement is a fraud on the custom, the leases came to him as executor, and he renewed them as executor, subject to the uses and trusts of the will; which shews, he designed they should continue part of the testator's estate; his wife was a legatee, but the leases continue in him as executor, till he assents to the legacy, and at the same time that he assents to the legacy, he assigns it over, he might to be sure have disposed of it: I do not think the custom ever worked on this estate, it was not his wife's till he assented; but if he had died intestate, it would have gone to the administrator De bonis non of Mr. *Brandon*, and the deed is an assent to the legacy on terms, that he shall reimburse himself the money laid out, and have the estate for his own life: And I shall not construe the custom which is in derogation of the common law in so strict a manner. (2 Vern. 98, 272, 612, 685; 1 Chan. Cas. 310.)

You may move to discharge an order, though you are in contempt for not obeying it, and it was resolved by the Lords Commissioners, in the case of the *Earl of Suffolk* and Mr. *Howard*, where Lord *Macclesfield* made an order on the defendant, to produce the writings for the plaintiff's inspection, according to the submission in his answer.

Thursday, January the 29th [1730].

MOTIONS.

Case 151.—KING *versus* COTTON.

[S. C. 2 Eq. Cas. Abr. 53, 131; 2 P. Wms. 358, 674.]

At the Chancellor's house, Lord Chancellor.

Mr. *Attorney General* for the plaintiff. I am to shew your lordship cause, why our injunction should not be dissolved on coming in of the defendant's answers. This bill

is brought against *Lady Cotton*, and her younger sons by a former venter by *Mr. King*, her second husband, for an injunction to stay proceedings on ejectments, and to have two deeds set aside, which *Lady Cotton* made in favour of her younger children, in fraud of the marriage. *Lady Cotton* being tenant for life of several lands in *Cheshire*, *Lancashire*, and *Surry*, assigned the said lands in *Lancashire* and *Cheshire* to trustees for ninety-nine years, if she should so long live, in trust for herself during widowhood, then to the use of her son *Stephen*, and the heirs males of his body, remainder to her son *John*, and the [260] heirs male of his body, with like remainders to her other younger children ; and assigned her lands also in *Surry* to trustees for ninety-nine years, in trust, to the use of herself 'till marriage, then to her son *John* and the heirs male of his body, with like remainders over to the other younger children, and assigned over £1000 South Sea stock to the same uses, and after intermarried with the plaintiff. These voluntary conveyances, whereby two thirds of her estate are assigned, over and above the stock, were made during a treaty of marriage with the plaintiff, and therefore are a fraud on him, for she appeared to be the visible owner, and therefore the injunction ought to be continued 'till the hearing the cause. And as to the lands in *Surry*, the first limitation, in case of her marriage, being to her son *John* and the heirs males of his body, the whole trust vested in him, and consequently he being dead, will vest in the plaintiff, in right of his wife, who has taken out administration to him.

Mr. Solicitor General. The substance of our bill cannot be tried on these ejectments, but must be determined by this Court, on the hearing the cause : *Lady Cotton* appeared visible owner of these lands, and they were given in to the plaintiff in the particular of her estate ; *Stephen Cotton*, and the other younger children formerly brought their bill against *Mr. King*, to have the possession of these lands delivered up to them, and the deeds, and your Lordship decreed the deeds to be delivered to them, in order to their going to law for the possession, if they pleased ; and though in that cause he was only defendant, yet it appearing by his answer, he might have cause to be relieved against these ejectments, it is expressly provided by the decree, that it should be without prejudice to any relief he might be intitled to. There can be no doubt, but that by these assignments, however fraudulent, the legal estates are in the trustees, and the question, whether fraud or not, can never be determined at law, but is proper for equity, and the rather, because the younger children who claim the possession, have only an equitable title too ; so it is proper to be determined here, whether they or *Mr. King* have the best title in equity to these terms, and marriage being a good consideration, it is not material whether the plaintiff is a gentleman of fortune or not.

Mr. Lutwyche for the defendants, the younger children. *Mr. King* has none, the seven younger children a very good equity, and it was very commendable and conscientious in *Lady Cotton* to provide for them, especially since she married the plaintiff, who it does not appear had any estate to settle on her, though your lordship has been told a formal story of his making his addresses, and that she delivered him a particular [261] of her estate, and how much he is defrauded. In 1716 he came over from *Ireland*, courted, and was so fortunate to marry the lady ; but these settlements were made in 1715, a year before, when no treaty of marriage was on foot, nor could she have this fraud in contemplation.

The injunction they pray, must arise from some confession in our answers, against whom it is to be granted ; and not from the answer of *Lady Cotton*, who is an amicable defendant.

The bill by the younger children was brought to have the deeds produced, to enable them to bring ejectments. *Mr. King* insisted upon by his answer, what he now sets out by his bill, and examined several witnesses, and it appeared to your lordship that there was no fraud ; and your lordship decreed, not only that the writings should be delivered up, but that we might bring ejectments in the trustees names (which is all that the Court ever does on a voluntary settlement), whereas if the defendant had made out his case, the Court would not have given us that relief ; and why then should this bill restrain us from any privilege given us by that decree ? and though the whole equitable interest of the estate in *Surry* vested in *Lady Cotton*, as administratrix to her son *John*, yet the other defendants, by the statute of *Jam. 2*, are intitled to seven eighths of it, so that the *Cheshire* and *Lancashire* estates belonging entirely to them, and seven eighths of the estate in *Surry*, it is proper their trustees should take possession. But I think this settlement differs from the common settlements of a long term of years, and being determinable on her life, may be limited over in this manner, because all the limitations

are to be determined in the compass of a life, so that there is no danger of a perpetuity, which is the only reason why a term for years cannot be intailed.

Lord Chancellor. What I ordered as well as I remember, on the former decree was, that the deeds should be delivered by Mr. *King* to the younger children; he insisted that they were fraudulent, and that he ought to keep them. I could not say, a provision made by a mother for her younger children, who had no present maintenance, and small portions, was fraudulent; if she had made a voluntary settlement without a consideration, it would have been a fraud; but these settlements were executed some time before her marriage, and were no secrets, but very publicly known: On the other side, I would not take the possession from him, but left the younger children to their remedy at [262] law, and now they have recovered I do not see why I should grant an injunction, though perhaps there may appear sufficient cause at the hearing. But as to the *Surry* estate, the whole vested in *John* the son, and consequently on his death in his representative, and the law knows no difference between long and short terms; and this very point has been solemnly determined in this Court. Then the administratrix is seized of the whole trust of the term in the *Surry* estate, so the injunction must continue as to it, and it is not distributable till after his debts are paid, but let the plaintiff give judgment in the ejectment, with a release of errors, and consent not to bring error; and as to the other ejectment, the injunction must be dissolved. (2 Chan. Rep. 79, 81; Ant. Cas. 91; 1 Chan. Cas. 307; 2 Chan. Cas. 73; 1 Vern. 7, 18, 408; 2 Vern. 17, 270.)

Saturday, January the 31st [1730].

Case 152.—ALLEYN *versus* ALLEYN.

At the Rolls.

Mr. Attorney General for the plaintiff. *Samuel Stephenson*, on the 29th of October 1727, made his will, *inter al'*, in these words. 'And as to and for all the reversion and inheritance of my said messuages, lands, and tenements, I give and devise the same to *Samuel Alleyn* my grandson, for and during, &c., and as to and concerning my rents, arrear, interest, and money due, and all other my personal estate whatsoever, debts, funerals, and legacies being first paid and discharged, I give the same to my executors, to be laid out in a purchase of lands, to be settled in trust to the said *Samuel Alleyn* my grandson, &c., and made Mr. *Alleyn* the father of the defendant *Samuel*, and the plaintiff Mrs. *Alleyn*, his daughter, the wife of Mr. *Alleyn*, executors.' *Samuel Stephenson*, after the making of this will, on the 13th of October 1728, entered into articles, for the purchase of an estate for £2500, and the money was agreed to be paid on the first day of May following. The testator by his codicil dated the 29th of October 1728, devised to his daughter *Lydia* lands of £70 a-year, to be purchased for her by his executors, out of his personal estate. On the 3d of January 1728, the testator advances £500 to the vendor, and takes an assignment of a mortgage for £600 on the premises, and the deed recites, that whereas *Samuel Stephenson* had contracted for the purchase of these lands, it was thereby agreed, that if they were conveyed to him, the aforesaid sums should be taken as part of the purchase-money, and the term remain attendant on the inheritance, but if the premises were not conveyed, that the mortgagor should redeem on the common terms. 5 April 1729, the testator died, leaving two daughters, *Esther Alleyn* the plaintiff, and *Lydia*, who is since [263] dead; Mr. *Alleyn* proved the will, and by indenture dated the 30th of April 1729, the premises contracted for were conveyed to him and his heirs. for and in consideration of £1100 paid by Mr. *Stephenson* in his life-time, and of £1400 paid by Mr. *Alleyn* out of the personal estate of the said Mr. *Stephenson*; and Mr. *Alleyn* assigned the mortgage, in trust for him and his heirs: Mr. *Alleyn* died, and the lands descended on the defendant, as his eldest son and heir, and Mrs. *Alleyn* the sole surviving daughter and heir of *Samuel Stephenson*, filed this bill, to have the estate reconveyed to her, and the mortgage assigned as she should direct.

The testator having entered into articles for the purchase of this estate, it is considered in this Court from that time as part of his real estate, and cannot pass by his will, because it was purchased after the making of it, and there is nothing peculiar to this case to distinguish it from the common cases; for though after the execution of the articles, the testator took an assignment of the mortgage, that was relative to

the articles, and cannot be considered as part of his personal estate, but only as a payment of so much of the money; and the rather, because though the testator died, the conveyance was executed within the time. If these lands had been conveyed to the testator in his life-time, there could be no doubt, but they would descend on the plaintiff his heir at law, and this Court will consider this equitable estate in the same manner.

Mr. Lutwyche. This is a very plain case; if one articles for the purchase of lands, if the money is paid in part, or though no money is paid, it has been frequently determined that this is a purchase in equity, and that the lands will descend to the heir, and his executor must pay the money, because the covenant to pay it, binds the executor; as on the contrary, in case of a mortgage in fee, the heir of the mortgagee is obliged to convey to the executor, though he has no other provision; then the only question is, whether this estate will pass by the will? But it was settled in the case of *Sir Owen Buckingham*, where the devise was of all the lands the testator should be seized of, that the lands whereof the testator was not seized at the time of the making his will would not pass, for the statutes 32 H. 8, ch. 1, and 34 & 35 H. 8, ch. 5, enables only persons *Having lands, &c.*, to devise them (Moor, 404, Cas. 542; Gouldsb. 150; Cro. Eliz. 493 (11)). A man may devise all the personal estate whereof he is or shall be seized, for that is perpetually fluctuating, and therefore if the testator is to be considered as the purchaser of these lands, by entering into articles for the purchase of them in his life-time, [264] they must descend to his heir, and though the executor paid the money, and took a conveyance in his own name, he is but a trustee for the heir, and the testator devises only the residue of his personal estate after payment of his debts, &c. But this is a debt the vendor could compel the executor of the vendee to pay.

Mr. Wills for the defendant. The single question is, Whether the estate contracted for shall descend to the plaintiff, or be considered as part of the trust estate to be settled by the will on the defendant, when purchased with the personal estate? If a man devises his personal estate to be invested in a purchase of lands, it is considered as real estate in this Court, and shall go to the heir of the devisee, and not to his next of kin.

Another rule relating to wills is, that the intention of the testator must be observed, and particularly where any thing executory is to be done; in which case, equity will construe a will in the same manner as it does articles; and to fulfil the intention of the testator, will expound it even contrary to the words. It cannot also be denied, that when a man articles for the purchase of a real estate, it shall descend to his heir, and his executor shall pay the money; but this rule holds only between the heir and executor, or the heir and the next of kin, or the devisee of the personal estate; but here the defendant is not the next of kin to the testator, or the devisee of the personal estate, but devisee of the real estate; for the testator devises to him all his real estate, and then gives all his personal estate to his executors, to be laid out in lands for his benefit, which must be considered in the same manner as if the personal estate had been actually invested in lands; so that it is contrary to the intention of the testator that the defendant should have every thing, to call this a real estate, and is putting a different construction on these articles from what they bear at law, purely to defeat his intention, the articles not being carried into execution, the law would still consider this as so much of the personal estate, and did this Court ever put a construction contrary to law on a deed or will, purely to overthrow the intention of the testator, where the dispute is betwixt the heir and next of kin, his intention seems to be that his heir should have it, by his entering into articles, and therefore the Court in that case is carrying on his intention. In the case of *Orm versus Smyth*, 2 Vern. 681, where money due by bond was devised, and part was paid in the life-time of the testator, yet the legatee had the benefit of the whole money, there the legacy was changed by the party himself, here it remained the same, for it was trust money when he died, and the purchase was [265] afterwards carried on with that money, and therefore the estate and trust must go together.

Master of the Rolls. I am of opinion that the plaintiff is intitled to this estate contracted for, and the purchase whereof was compleated by the executor; and though the conveyance was taken by the executor in his own name, he is only her trustee; so the question is open, whether this estate shall be considered as real estate? The council for the defendant does not deny that it ought to be considered as real estate, if it was not for the directions of the will, to lay out the personal estate in lands. In

the case of Commissioner *Trimuel* who contracted for lands at a future day, and then devised all his lands; Lord *Harcourt* held the lands contracted for would pass, which strongly proves, that lands contracted for are to be considered as purchases, and then it is as clear, that these lands being contracted for, after the making the will, will not pass by it: The case of *Sir Owen Buckingham* was adjudged on an ejectment in the Court of Common Pleas, and afterwards on another ejectment brought in the Court of King's Bench, and that judgment affirmed in Parliament on a writ of error; and therefore since these lands will not pass by the will, and must be considered as part of the testator's real estate, they must descend to the plaintiff, his heir, and she cannot be defeated of them, but by the express words of the will, or by necessary implication; and I think the words of the will, that the residue of his personal estate shall be invested in lands, &c., is not either an express disinherison, or by implication. (Nels. 8vo. Rep. in Canc. 76, 106; Moor, 254, Cas. 401; 404, Cas. 542.) The personal estate is not to be considered as it stands at the time of the making the will, but at the time of the testator's death, because till that time, it is in a constant fluctuation, but so much of it as would serve for the purchase of these lands lost the quality of personal estate in this Court at the time of his death, and became real estate, and he has shewed his intention to alter the nature of this estate, having by a subsequent act controlled his will as to so much, and this is clear from hence, that if he had lived to complete the purchase, the lands would not have passed as real estate, because the purchase was subsequent to his will, nor as personal estate, because the nature of it was altered, and the accident of his dying before the purchase was compleated, makes no alteration: So here is no ground to say, it was his intention to give all his real and personal estate, because, he was going to apply part of his personal estate in such a manner, that it would not have passed by this will, either as his real or personal estate, and it would be the same thing, if he had given the defendant all his real and personal estate, for his intention plainly appears [266] to take so much out of his personal estate, and he shews no design to pass it as his real estate, because by law it could not pass by this devise. (1 Chan. Cas. 39; 2 Vern. 679, 688; Co. Lit. 392; Co. Entr. 364; Rast. 274; 34 H. 6 F. n. B. 199; 2 Chan. Cas. 144; 2 Vern. 621; Plowd. 342; 32 H. 8, 1; 3 Co. 25; Moor, 254; 1 Anders. 348; Poph. 87; 2 Leo. 120; 1 Anders. 188; Swinb. part 7, sect. 11,—Part 1, sect. 11; Fitz. Dev. 17; Swinb. part 3, sect. 6, n. 17.)

Wednesday, February the 4th [1730].

Case 153.—CHAPMAN & al', Plaintiffs; The Bishop of LINCOLN, MOUNSON, and DOBBS, Defendants, & e contra.

In Court, Lord Chancellor.

Mr. Wills for the plaintiff. This bill is brought by the plaintiffs, the occupiers of several parcels of meadow, and pasture ground, in the parishes of *Burgh* and *Winthorp*, in the diocese of *Lincoln*, against the Bishop of *Lincoln*, who is seized in fee of the impropriated tithes, Mr. *Mounson*, lessee of the Bishop for three lives, and Mr. *Dobbs* his under tenant, for the establishment of two moduses, and Mr. *Mounson* filed his cross bill, to have tithes paid to him in kind. One modus is, that it has been a custom time out of mind for the occupiers of land in *Burgh*, and who do not reside in *Burgh* or *Winthorp*, to pay four-pence an acre for the tithe of hay, and the herbage of pasture lands, not ploughed or sown, on *Good Friday*, or so soon after as demanded. The other modus is, That all those who occupy lands in *Winthorp*, and are not inhabitants of *Winthorp* or *Burgh*, should likewise pay four-pence an acre, &c. And the plaintiffs, though they occupy lands in the parishes of *Burgh* and *Winthorp*, yet they live in other parishes. The modus does not relate to those that reside, but to those that have lands, and are not resident; these two parishes contain near eight thousand acres of land near the sea, and the inhabitants are not sufficient to cultivate and manure them, so these moduses were settled to encourage the inhabitants of the neighbouring towns to occupy these lands, and they pay likewise and contribute to all the parish duties, and the same custom is observed in several adjoining parishes. We have proved a payment of this modus for fifty years, and that the parishioners who paid tithes in kind, on their removal to other parishes, have paid only this modus; and the defendants have not been able to prove, that tithes in kind have been ever paid, and therefore, as our evidence is sufficient, we have a right to have these moduses established, and if the defendants deny these moduses,

the Court will first enter into the proof of them, and if they are not fully satisfied with the depositions [267] will send them to a Jury, but if they insist that they are not good in law, they must admit them to be well proved, and this is the constant course in the Court of Exchequer, and it was lately so resolved in *Quavus's* case to establish a *modus* for fish, because they would not trouble themselves to give their opinion on an uncertain fact.

Mr. Solicitor General for the defendants. We have two defences (and if we prevail in either, the Court must decree for us), that there are no such *moduses*, or if there are, that they are not good in law, but they say, if we controvert the legality, we must admit the *modus*, but the old course of the Exchequer was, to consider the legality of the *modus*, on a supposition it was proved, and not on an admission of it ; and why should the Court put the parties to the trouble and the expence of trying a thing that is not material. By these *moduses* a difference is made between inhabitants and strangers, in a manner I never heard : In cases between residents and out-dwellers, the *modus* is generally in favour of the parishioners, and what reason is there for these *moduses* ; why must the first extend to all strangers but those that live in *Winthorp*, and the second to all but those that live in *Burgh* ? And they cannot be good in law, because it would depend on the occupier whether he would pay tithes in kind or not : A man indeed, by changing the course of his husbandry, may change the nature of the tithe, for he cannot be supposed to do it to defraud the rector ; but it must be presumed that every man will turn his land to the best advantage ; but here, though the land continues in the same plight and condition, the tenant, by removing out of the parish, has it in his power to alter the tithe ; and 1 Lev. 116, *Bawdry* against *Bushel*, a prohibition was moved for on a suggestion of a custom ; that all the occupiers and tenants of *Skegnes*, that were inhabitants of any place out of the parish, should pay to the vicar only four-pence a year for every acre ; and it was alledged that the plaintiff occupied lands in *Skignes*, but lived out of the parish, and the Court denied the motion, because the custom was unreasonable to give a greater privilege to foreigners than to inhabitants, who are at a greater charge in respect to their residency, to repairs and vestments for the Church : This case is reported likewise in 1 Keb. 602, Cas. 76, and it is there said, *per curiam*, that this was an unreasonable custom, and only invented by the country to cheat the parson, and that it was a leaping custom, not fixed to any person certain, or to the land, nor of any permanence : And by *Keeling*, there is no precedent of any *modus* so variable and dancing : And this case shews, the Court on a supposal of the fact, determined the law, before the *modus* had been proved, and would not [268] let them try the *modus*, because it was void in law : These *moduses* are in favour of foreigners, others of inhabitants, and would subject the rector to the greatest frauds, they have proved that they contribute as much as parishioners to the charges of the parish, and why then should they be eased as to the tithes ? and it is unreasonable that by their removal only the impropiator only should be a loser.

Lord Chancellor. It is contrary to the rules and methods of all Courts, to determine the law 'till the fact is either admitted or proved : On a motion for a prohibition, the Court is not possessed of the cause which makes the difference, but if it is once granted, the defendant must either demur, whereby he admits the *modus*, or plead the general issue ; and if the fact is found against him, he has afterwards the benefit of the law. The Court therefore declares, the plaintiffs have proved the *moduses* to their satisfaction : but having a doubt whether they are good in law, will be assisted by two Judges on Monday next, and defers giving an opinion till that time. (Post, Cas. 156.)

Thursday, February the 5th [1730].

MOTIONS.

Case 154.—ANONYMUS.

In Court, Lord Chancellor.

If a bill is depending here and the plaintiff files another for the same matters, the defendant may move to have them referred, and one dismissed. But if a bill is dismissed in the Exchequer, and then filed here, he cannot dismiss it on motion, but must plead to it.

The plaintiff filed a bill in the Exchequer, which was dismissed, and now brought the same bill in this Court, which the defendant moved might be dismissed with costs ;

but the *Lord Chancellor*, on consulting the register, said it could not be dismissed on a motion, but the defendant must plead to it, and then it is referred to a master, to see whether it is the same bill or not ; but if a bill is depending here, and a second brought for the same matters, the defendant may move, that it may be referred to a master to see whether they are the same, and to dismiss one.

[269] *Saturday, February the 7th [1730].*

APPEALS AND REHEARINGS.

Case 155.—HENRY GIBBS, administrator of his late wife ELIZABETH GIBBS, late ELIZABETH DAVIS, deceased, *Plaintiff* ; HENRY DAVIS, surviving executor of Dame MARGARET BOREMAN, deceased, and brother and heir of his late sister, the said ELIZABETH GIBBS, *Defendant*.

In Court, Lord Chancellor.

Captain *Wilkinson*, Lady *Boreman's* second husband, purchased an annuity of £100 *per annum* for ninety-nine years, determinable on the death of himself and Lady *Boreman*, and the longer liver of them, from *Robert Stanton* and *Elizabeth* his wife ; and for securing the payment of it, the said *Robert Stanton* acknowledged unto *Anthony Collins* (in trust for the said Captain *Wilkinson* and Lady *Boreman*) a statute staple of £1000, which was defeasanced for payment of the said annuity. And the said annuity being greatly in arrear to Lady *Boreman*, after Captain *Wilkinson's* death, the manor and farm of *Brobrick-Hill*, in the county of *Bucks* (whereof the said *Robert Stanton* was seized in fee), were extended by virtue of the said statute in Lady *Boreman's* life-time ; and she got into possession of the said manor and premises, which were about £60 *per annum*.

Thomas Young, Lady *Boreman's* fourth husband, before his marriage, by deed and fine, settled the manor of *Cranbrook*, and the lands thereunto belonging in the county of *Essex*, to the use of himself for life, remainder to Dame *Margaret Boreman* for her life, for her jointure, remainder to the heirs of their two bodies, remainder to his own right heirs : And covenanted, that the said jointure lands then were, and during Lady *Boreman's* life-time should be and continue of the value of £400 *per annum*, free from incumbrances.

In 1675, *Thomas Young* died without issue by the said Lady *Boreman*, and upon his decease, the said lady entered upon the said manor of *Cranbrook*, and the lands thereunto belonging, and enjoyed the same twenty-five years after her said [270] husband's death, but the same did not exceed above the yearly value of £200.

The said *Young* having before his marriage with the said Lady *Boreman*, viz. on the 5th of *March* 1670, demised the said manor and premises (except the house, coach-house, and stables, and hay for four horses, and all the wood, timber, and trees) to *Matthew Young*, for a term of fifty-one years, at a pepper-corn rent ; the said *Matthew Young*, in consideration of £342 paid by Sir *William Boreman*, Lady *Boreman's* fifth husband, assigned the said manor and premises unto *William Yardley* for the residue of the said term, in trust, to corroborate Lady *Boreman's* said jointure, and for the repayment of the said £342 to Sir *William Boreman*, with damages for the breach of the said covenants of the said *Thomas Young*, in the value of the said manor of *Cranbrook* and premises, for so much as the same fell short of £400 *per annum*.

Dame *Margaret Boreman*, widow, was also seized in fee of lands in *Kent*, and being so seized and possessed, she by her last will, dated the 20th of *March* 1719, devised in the words following.

' *Item*, I give, devise, and bequeath, all my manors, messuages, lands, tenements and hereditaments, and real estate whatsoever, with their, and every of their rights, members, and appurtenances whatsoever, situate, lying, and being within the several counties of *Kent. Essex. Bucks. Bedford*, or elsewhere within the kingdom of *England*, of which I shall be any way seized, or intitled unto, to my nephew *Henry Davis*, and his sister *Elizabeth*, my niece, now wife of Mr. *Henry Gibbs*, to hold to them, the said *Henry Davis*, and *Elizabeth* his said sister, equally, during their natural lives, to be equally divided between them, share and share alike, they jointly paying out of the rents, and profits of the said estate, unto my brother *Richard Davis*, their father, the full sum of £30 a-year during his natural life ; and from and after the decease of

'my said brother, nephew and niece, then I give all my said real estate to the right heirs of my said nephew *Henry Davis*, and my said niece *Elizabeth Gibbs*, equally, in equal parts, to hold to them and their heirs as tenants in common, and not as joint tenants: Always provided, that my said nephew and niece, during their joint lives, and by their joint consent, shall and may have full power to dispose, settle, and convey all, or any of the said real estate to them devised as aforesaid, for any purpose, or to, or for any other use or uses, as they shall both agree to and think meet, and their circumstances in this life shall require.'

[271] And by the same will, after having devised several legacies, she also devises as follows.

'All the rest, residue and remainder of my personal estate, plate, gold, jewels, medals, pictures, household goods, and furniture, and all my mortgages, bonds, specialties, and credits, whatsoever they shall consist of (my wearing apparel only excepted), I give and bequeath the same, and every part thereof (after payment of my debts, funerals and legacies), to be equally divided between my said nephew *Henry Davis*, and his said sister *Elizabeth*, part and part alike.' And she appointed the said *Henry Davis*, and his said sister *Elizabeth*, executors of her will. The 23d of April 1700, Lady *Boreman* died, and the defendant and the said *Elizabeth Gibbs* proved the said will, and the defendant possessed himself of the whole estate.

Some time after, *Theobald Thompson*, and *Mary* his wife, daughter and heir of the said *Thomas Young*, filed a bill against the plaintiff and his wife, and the now defendant pretending thereby, that Lady *Boreman* being dead, the said manor of *Cranbroke* descended to the said *Mary*. And the defendants by their answer insisted, that they were intitled to hold over, not only till they were satisfied the money paid for the said fifty-one years lease, with interest, by Lady *Boreman*, but also till they were satisfied the deficiency of her jointure, which was more than the reversion thereof would make good, and the cause being heard, the Court declared accordingly.

The 25th of November 1715, the plaintiff filed his bill against the defendant, in his and his wife's name, and after her death a bill of revivor, and supplemental bill for an account, and share of Lady *Boreman*'s real and personal estate, as administrator to his wife: And on the 28th of January 1728, this cause being heard *ex parte*, his Honour, the Master of the Rolls, decreed, that a moiety of the mortgage term, and of the lands extended, belonged to the plaintiff, as part of the personal estate of Lady *Boreman*, and did not pass by a devise of the real estate, and that a commission should issue to divide the said estate in *Essex* and *Bucks*; and this cause being heard again at the Rolls, the 21st of May 1729, his Honour in these points confirmed his former decree, and on the 5th of December 1729, on a rehearing, the same was affirmed by the Lord Chancellor; and this cause now came on again to be reheard.

[272] *Mr. Solicitor General* for the defendant. The chief question is, Whether the plaintiff is intitled as administrator to his wife, or the defendant, as her heir at law? and this depends upon two other questions, Whether the manor of *Cranbrook* and *Brobrick-hill*, is included in the devise to the defendant and his sister, and if it is, what estate they take by the devise.

The manor of *Cranbrook* was held by Lady *Boreman*, not only for the security of £342, but to make good the deficiency of her jointure, which would amount to more than the estate was worth, and the manor of *Brobrick-hill* was extended on a statute staple of £1000 security, for the arrears of an annuity of £100 a year, which would amount to more than the value of the estate, which was but £60 *per annum*, and Lady *Boreman* had been in possession of them many years, and these estates come under the words of the devise, for they are manors and lands, though they are chattels, and she having been so long in possession of them, and having them as a security for more than their value, might look on herself as the absolute owner, and design to pass them as real estate, and the subsequent words shew, that this was her real intention, *Within the several counties of Kent, Essex, Bucks, &c.*, and she had no other lands in *Essex* and *Bucks*, so otherwise those words must be rejected, *Of which I shall be any way seized or intitled unto*; sure he is some way intitled to these lands, and her intention to pass them was reasonable, her interest in them being as valuable as the inheritance.

But words improper to pass a thing have been allowed to carry it in favour of wills, 3 Leon. 165; Styl. 261; *Rich* versus *Saunders*. A man was seized in fee of a portion of tithes in *Holford*, and having nothing more there, devises all his fee simple lands whatsoever to his brother and his heirs, and it was adjudged, that the tithes should

pass by the word lands, for though they are distinct, and arising out of the land, yet the aptness of words is not so much to be considered as the intention of the testator, who must intend that he had a fee simple estate in *Holford*, for he had nothing there but this portion of tithes to satisfy that word (1 Rol. Ab. 614): That case is stronger than this in question; there, words that were improper were extended to things that would not fall under that description; but here the words are sufficient, these estates were manors and lands which she was intitled to, and lay in *Bucks* and *Essex*.

But the plaintiff objects the last clause, whereby she devises all her mortgages, credits, &c. But that is no answer to our [273] objection, that the words in *Essex*, *Bucks*, must be struck out, if these estates do not pass by the devise, and that is only a residuary clause, and cannot contradict a former devise, which will operate as an exception out of it.

The second question then is, Supposing these estates pass, what estate is given? If the plaintiff's wife is intitled only for life, then the plaintiff has no title to her moiety, but if she has an absolute interest in it, he has. First, She devises to them, during their natural lives, and if the devise had gone no further, no doubt but her interest would have determined at her death, then to shew that this was her intention, she begins with a new devise, *I give all my said real estate to the right heirs, &c.*, and therefore right heirs must be taken as words of description, and not of limitation, and then the right heirs of *Elizabeth* will be intitled to the one moiety, which belonged to *Elizabeth* for life, and the rather from the nature of the estates, which are only chattels, for if heirs should be taken as words of limitation, then her right heirs would take nothing, but the estate would go to her executors or administrators, but if they are construed words of purchase, heirs may take; and this is agreeable to the case of *Peacock* and *Spooner*, decreed by the House of Lords, and therefore the strongest authority, 2 Vern. 43, 195, and that was on a deed, this is the case of a will, and Lord *Sommers* decreed the case of *Dafforne* versus *Goodman*, 2 Vern. 362; on the authority of the case of *Peacock* and *Spooner*. *John Bolt*, possessed of a term for ninety-nine years, on his marriage with *Apolline*, assigns the term, in trust, for himself for life, remainder as to a moiety, to *Apolline* for life, for her jointure; remainder to the heirs of the body of *Apolline* by him to be begotten; remainder as to the other moiety, to the children of the body of *Apolline*; they had a son, and it was resolved that heirs of the body were words of purchase, and not of limitation; in this sense the words will have their intended effect, in the other they cannot; but the estates, instead of going to the heirs, will go to the executors. Therefore it was plainly the intention of Lady *Boreman* to pass these estates, and it was likewise her intention to devise them to the defendant, and the wife of the plaintiff for life only, and that those who were to take in the second place, should take as purchasers. (Wentw. Off. of Ex. 228.)

Mr. Lutwyche. Here is a single point of law, though we are in a Court of Equity, for your lordship's determination, which is plainly with us, from the authority of the case of *Peacock* and *Spooner*, which cannot be contradicted. A term for years was assigned, in trust, that baron and feme might receive the profits during their lives, and the life of the longer liver of them, [274] and after their death, to the heirs of the body of the wife to be begotten by the husband; and the Lord Chancellor decreed, that the whole interest of the term vested in the wife, but that decree was reversed by the Lords Commissioners, who held that the heirs of the body took by purchase, and their decree was affirmed on appeal by the House of Lords. The plaintiff says, only lands of inheritance will pass by the first words; but sure these chattels real may be considered in one sense as real estate, though they are personal estate, as they belong to the executors, and it is plain the testatrix intended that some estate in *Essex* and *Bucks* should pass, and she had no other in those two counties, and therefore this is within the reason of those cases where things in a will pass by the intention of the testator, though the words he uses are improper.

The second point is, What estate the devisees take: The plaintiff says, the whole chattle interest is in them, to whom the testatrix has expressly devised it for life only, and therefore that construction, if it can, must be prevented. A limitation of chattles real must have another construction from a limitation of an inheritance, and therefore, though in the case of a freehold, these words would make a fee simple, they will not in the case of chattles real, for since the right heirs can only take as purchasers of these terms, the other construction would wholly disappoint the intention of the testatrix. If a fee is limited to one for life, remainder to the heirs male of his body, this is an estate

tail ; for there though heirs male are taken as words to enlarge the first estate, yet the heirs take, though not as purchasers : But if a term is limited in that manner, if heirs of the body do not take as purchasers, they cannot take at all, but the estate goes to the representatives of the first taker.

And heirs at law are in all doubtful cases favoured, but wherever there is an express devise to an heir at law, that devise was never taken from him by doubtful words or by implication.

As to the last words, they are only general words, and can only be understood of what mortgages and credits, &c., were not before given away. And in the case of *Amherst and Lilton* (Ant. Cas. 120), great stress was laid on the last devise of all his lands, &c., whereof he was seized in law or equity, &c., because it was not of all the rest and residue of his lands, &c., as the words of this will are.

[275] *Mr. Attorney General for the plaintiff.* The decree that hath been made in this cause does not contradict former resolutions ; the second point now insisted on was not thought of or mentioned 'till this hearing. We must judge of the will not from the first clause only, but from the several clauses of it considered together. It is plain these two estates cannot pass by the first clause from the words themselves and the nature of the estates ; the words shew the testatrix designed to give away only what was properly her real estate, and which was capable in its nature of going and descending to heirs ; some chattles are indeed called real, because they favour of the reality, as they are interests derived out of the real estate, but they are only personal estate, and belong to the executors, and will not pass by a devise of the real estate. (Swinb. part 1, sect. 18 ; Bro. Ab. Tit. Done, n. 41.) The last words, *And real estate whatsoever*, shew the general words, manors, messuages, &c., are to be carried no further ; and when she devises it over, she gives her said real estate, and by the last clause it appears that she did not design to pass them ; by the first clause she makes a complete disposition of all her estate, both real and personal ; First, she devises all her real estate, then she bequeaths several legacies ; and in the last place, she gives All the rest, &c., of her personal estate, &c., and all her mortgages, &c., and though what was due on the securities was of more value than the estates, that will not alter the nature of the interests she had in them : But it is said that if these estates do not pass, there is nothing for the words in *Essex* and *Bucks* to operate on ; but it does not appear in the cause that she had no other lands there ; but if it did, the inference they have made is too strong, because there are other words which may be satisfied, and these are general words : Suppose the words had been, All my real estate in the kingdom of *England* ; if only real estate is to pass, let the words be ever so general, nothing else can.

The defendant says, the last clause is only a devise of the residue, but it is not a residuary clause, as to the mortgages, &c., but all her mortgages, &c., are expressly devised, so it is plain that she did not think she had given them away before. But suppose these estates pass by the first devise, then they pass by the last clause as a residue after the death of the daughter, for in the devise over to the right heirs, all the other words are dropt, and only the real estate is given over.

As to the second point, what estate the plaintiff's wife takes ; if the words are not sufficient to carry these estates over, the question is at an end ; but if they are sufficient, the whole moiety vests in her. But it is said, that right heirs are words of purchase, and only *Descriptio Personæ* ; children, or heirs of the body, indeed, may be taken as words of purchase, and [276] the testator may be supposed to mention them out of kindness or affection, but right heirs are too general words, and can be put in only to enlarge the estate, as words of limitation, for which reason, if a fee is devised to one for life, and then to his heirs, the interests join, and he to whom the devise was only for life, is seized in fee, and therefore freehold and leasehold estate being devised together, the plaintiff's wife must take an absolute estate in both, and the same words must be understood in the same sense as to both estates, and the words are strong words of limitation, and the cases that have been quoted do not come up to the present case. The case of *Peacock and Spooner* is greatly different ; that was the case of a term of the provision of the husband, assigned and settled by him, and there was not the same reason to adjudge the whole interest to vest in the wife as to vest in the husband, if it had been limited to the heirs of his body, because if a freehold had been limited in that manner, though the wife would have been tenant in tail, yet by the statute 11 H. 7, she could not have barred the issue, and therefore in that case the Court said, they would not assimilate it to the limitation of a real estate, and construe it an estate in tail, for then it

being out of that statute, she might bar her issue, whereas if it was a real estate she could not bar them, and heirs of the body do not take barely through the first taker, but per *Formam Doni* (though he may bar the estate on a supposed satisfaction), for the doner may be supposed to have a kindness for them, tho' not for heirs general, and therefore those words can be put in only to enlarge the estate : And the case of *Webb* and *Webb* is a later resolution, 2 Vern. 688, *Edward Webb*, on marriage of his son, and £250 portion, assigned a term to trustees, in trust to permit *Thomas Webb* to receive the profits for his life, and after his death to permit *Anne* his wife to receive the profits for her life, remainder to the heirs of the body of *Thomas* and *Anne*, during the residue of the term ; the wife dies, leaving issue ; it was adjudged at the Rolls, upon the reason of the case of *Peacock* and *Spooner*, that the heirs of the body should take as purchasers, and that the whole term did not vest in the father : But on an appeal to Lord Keeper *Harcourt*, and after search of precedents, it was decreed, that the whole term vested in the father, and that the heirs of the body could not take as purchasers, for if the legal estate had been limited in that manner, the father by law must have taken the whole, and the trust of a term must be governed by the same rule, and Lord *Harcourt* went upon this distinction, because the term was not limited to the heirs of the body of the wife, but to the heirs of the body of the husband, and if a freehold had been limited in that manner, the husband could dispose of it, but not the wife, and in all the cases that have been mentioned the words were heirs of the body, and no case has been produced where heirs general have been [277] taken to be words of purchase, because it is so uncertain who they are.

Mr. Solicitor General's reply. It is not denied, but that in the first clause there are sufficient words to pass these estates, if they are not restrained and tied up by the others, but it is said that the words real estate confine them : I agree that in a legal sense chattles real are not real estate, and therefore if a man have both freehold lands and chattles real in one place, by a devise of all his real estate only the first will pass, because they may satisfy the words, but if he has only chattles real there, they will pass, because otherwise the words would be void, as was resolved in the case of *Roe* and *Bartlet*, Cro. Ca. 213, 292, and it was her intention to pass them, and the words will carry them, and no answer has been given to our objection, that otherwise the words, *In Bucks and Esser*, must be expunged, for at the former hearings it was taken for granted the testatrix had no other lands in those counties (Styl. 279 ; Bro. Ab. Tit. Done, n. 41). As to the objection, that the testatrix hath dropt all the other words but *Real Estate* in the limitation over, it is strange that in one clause she should give them for life, in the other absolutely, but she devised over whatsoever she before intended to pass as real estate.

It is absurd, they say, that the same words should operate as words of limitation on the freehold estate, and as words of purchase on the leasehold interests, but that arises only from the different nature of the estates ; in one case the law unites the estates, and though the words are taken for words of limitation, the heir takes, if the tenant in possession does not defeat the estate ; but in case of a term, the heir cannot take if the words are taken only to increase the estate, and that right heirs are words of purchase is further proved, because there come afterwards words of limitation, *To hold to them and their heirs*, so this is the same thing as if a leasehold estate had been devised to two, and after their decease to their right heirs, their executors and administrators.

No such distinction as hath been made between the case of *Peacock* and *Spooner*, and of *Webb* and *Webb*, is mentioned in the report of either of those cases, nor is there any colour for it, the statute of *H. 7* does not extend to chattles real, and tho' *Webb* and *Webb* is a later authority, yet it is of less weight than *Peacock* and *Spooner*, which was determined by the House of Lords.

There is no difference whether the limitation is to the heirs of the body or to the heirs general, for it is natural for a man to have a regard and view to the blood and heirs of [278] his family, be they who they will ; as to freehold lands, the case is the same, whether the limitation over is in tail or in fee, and there is in both cases the same reason for the distinction as to chattles real, because if the heirs do not take as purchasers, they cannot take at all.

Lord Chancellor. One having terms for years as a security for money in two parishes, and an estate in fee in another parish, devises all her manors, lands, and real estate in those parishes, and the question is, Whether the terms shall pass ? I agree with the

resolution in the case of *Roe and Bartlet*, that where one has a substantive term only in such a place, and devises all his lands and real estate in that place, the lease will pass ; but in this case, there are some fee simple lands that can pass, which makes it differ from the case, where nothing can pass but the terms : But at the time of making her will, the testatrix had only a mortgage and an extent as securities, not substantive terms, and by a devise of all her lands in A., B., and C., terms as securities only cannot pass, and it could not be her intention to devise these estates by this clause, because she afterwards expressly devises *All her mortgages, bonds, credits, &c.*, and therefore that devise must extend only to her freehold lands.

But supposing the leasehold estates passed by this devise, the next question is, What estates the plaintiff's wife and the defendant took by it ? The defendant allows that in the case of a freehold, if an estate is limited to one for life, remainder to his right heirs, the heirs will take by descent ; but they say, that if a term for years is limited in that manner, they will take by purchase : In this case then, both a freehold and leasehold estate being limited, the same words in the same sentence by that rule must be taken as words of limitation of the freehold, and as words of purchase of the leasehold, which it can never be supposed the testatrix intended, and therefore the decree must be affirmed (2 Vern. 324). (This decree was affirmed in the House of Lords, on *Friday March 20th*, 1729-30 [3 P. Wms. 26].)

[279] *Monday, February the 9th [1730].*

Case 156.—CHAPMAN & al', *Plaintiffs* ; The Bishop of LINCOLN, Mr. MOUNSON, and Mr. DOBES, *Defendants*, and e contra.

In Court, Lord Chancellor ; Mr. Justice Reynolds, B. R. ; Mr. Justice Fortescue, C. B.
Ant. Cas. 153, S. C.

Mr. Solicitor General for the defendants. The question is, Whether these moduses are good in law. There is something on the face of them extremely particular, they do not draw a line between the parishioners and the outdwellers, but he that lives in either of the parishes, and occupies lands in one of them, pays tithes in kind, but if he lives in neither of the parishes, he pays only four-pence an acre.

No rule is more established that relates to a modus, than that it ought to be certain in respect of the lands, the person, the time, and the sum ; and that it ought to be as certain as the tithe in whose room it comes, but this modus is uncertain in all these respects, if to-day the lands are occupied by the inhabitants of either parish, tithes are to be paid in kind ; if to-morrow they are occupied by strangers, this modus only is due. Suppose these lands were jointly occupied by two, one of which lived in either of these parishes, and the other in neither of them, how are they to pay tithe, either both the tithe in kind, or both a modus, or one tithe, and the other a modus ? Or suppose the occupier lives one time of the year out of these parishes, and the other in one of them, what is he to pay ? and is a modus to depend on the residence of the occupier ? which is variable and uncertain, and intirely in his own breast, and the impropiator could not follow so variable a right.

And as a modus ought to be certain, so it ought not to be subject to any fraud : Tithes must follow the nature of the lands, and only change as they do ; but here the change depends on the will of the occupier whether he will reside or not ; how is it possible for the rector to deal with these people for his other tithes ? If they cannot bring him to their terms, they will threaten to remove to another parish and may cheat him, by removing only to the other side of the hedge, and we have proved this to have been really done, and that one went and built a house on the other side the road in another parish.

[280] As these moduses then have no reason to support them, and are liable to this fraud, and we have proved it to have been put in practice, your lordship will not establish them.

They say there are the like customary payments in *Skegnes* and other neighbouring parishes, with this difference, that the modus extends to all strangers, but the custom as to that parish was adjudged at law to be a void custom, 15 Ca. 2, in the case of *Bawdrie versus Bushel*, 1 Keb. 602, Cas. 76 ; 1 Lev. 116.

Mr. Lutwyche. There must be a certainty in a modus, that the parson may know what to demand, and it may be sued for in the Spiritual Court ; but can any one tell in this case what the parson will be intitled to ? A modus supposes an antient contract to

have so much yearly, in lieu and discharge of tithes, and it must be perpetual, but this custom is desultory.

There ought to be a certain and perpetual rule for the parson to go by in his demand ; this modus is uncertain too as to the place, it may be converted into arable land, and then it must pay tithe, but when it is pasture or meadow, by only stepping into the next parish, the occupier, instead of paying tithe is only to pay this modus, and the parish may combine together ; you shall live in my house, and I will in yours ; and there is no reason or foundation for this custom : If any privilege is to be allowed to the occupiers, the parishioners ought to have it, in respect of the burthensome offices they undergo, and as this is a discouragement to the inhabitants, so it is a loss to the parson too, for the more inhabitants there are, the greater are his small tithes ; in the case of *Bawdry* versus *Bushel*, the Court were so clear as to the illegality of the modus, they would not grant a prohibition, and this case is stronger, because the plaintiffs pray to have these moduses established.

Mr. Peere Williams. Tithes are the revenue of the Church, and due of common right, which it is unreasonable the parson should be defeated of by the act of the tenant, and so slight an act too as a removal, whereas no modus is good that depends on the act of the party, without it be some benefit to the parson. 1 Rol. Ab. 649 (8), to repair and beautify the body of the church, and to find necessities for it, is no good modus, because the parson has no advantage by it, yet that is a pious and expensive work ; but what does the parson gain by the removal ? or what expence is the party put to ? and if a reasonable [281] commencement if it cannot be shewn, it is not a good modus. The modus is to arise, though the occupier takes only a lodging in another parish, and though he leaves his house empty, what reason, what foundation can be given for it ? and it tends to depopulate and desolate a parish, for interest will always be a prevailing motive, a good modus must arise from the consent of the parson, patron, and ordinary, but how can we ever suppose the parson would consent to these moduses ?

It is a rule as to a modus, that no custom introductive of fraud is to be allowed, 1 Leon. 99 ; *Stebbs* versus *Goodlack* (Moor, 913, Cas. 1290). The custom was, that the parson shall have for his tithes the tenth land sowed with any manner of corn, and he shall always begin his reckoning at the first land which is next to the church, &c. the parson shewed, that the defendant by fraud and covin, sowed every tenth land which belonged to the parson, very ill, and with small quantity of corn, and did not dung and manure it as he did the other nine parts, by means whereof, whereas the other nine every of them yielded eight cocks, the tenth yielded but three cocks ; and for this matter the parson libelled in the spiritual Court, and confessed the custom, but for abusing the custom prayed to have his tithes in kind, the defendant prayed a prohibition (Moor, 913, Cas. 1290), and the parson a consultation, and the opinion of *Wray*, Justice, was, that the custom was against common reason, and so void. Cro. El. 446 (10). It was adjudged in Sir *Charles Morison's* case, quoted in the case of *Grysmen* versus *Lewes*, where one prescribed to pay the tenth part of corn in the sheaf, for the tithe of all which in the sheaf, and of all which is raked, that this was an unreasonable prescription, for then he may put the lesser part in sheafs, and leave the greater part to be raked.

Another rule is, that a modus ought to be certain and permanent, 2 Salk. 657, Cas. 4, *Startup* versus *Doderidge*, a modus, to pay 2s. in the pound of the improved rent, was held naught, upon a motion for a prohibition, for that is to rise and fall, as the land is let, and the parson cannot know it, 2 Salk. 656, Cas. 3. (11 Co. 15 B. ; 3 Lev. 255.)

And this custom is unreasonable, as it gives a greater privilege to foreigners than inhabitants, 1 Lev. 116, and though the reason given in that book is not law, yet the inhabitants are subject to burthensome and expensive offices, from which non-residents are exempt. for by the 43 of *Eliz.* the overseers and churchwardens are to be chosen out of the inhabitants, and therefore there is more reason to favour them.

[282] Is leaving the parish a good consideration ? the plaintiffs do not set out, for what time there must be a non-residence ; will a week or fortnight be sufficient ?

Mr. Attorney General for the plaintiff. Notwithstanding the defendants have said that a modus ought to be more clear and positive when the plaintiff prays to have it established than when it is set out by way of defence, yet in both cases it must be proved, and must be good in law, which is sufficient. We have proved these moduses beyond all contradiction, and the defendants have not produced one instance that tithe was ever paid in kind, and therefore they must shew very strong arguments against the legality of them, and after such long usage they must not be set aside on slight grounds,

to the prejudice of those who have purchased the lands, and whose interests must be considered as well as the parson's.

Two things are necessary to a *modus*, immemorial usage, and payment of *Quid pro quo*, which we have proved; and secondly, a reasonable commencement, and it is sufficient to shew that a *modus* might have a reasonable commencement, though we cannot positively prove that was the reason of it; the fact is, that these large parishes contained a much greater quantity of ground than could some years ago be occupied by the inhabitants, therefore that the lands might not lie waste, which would be a loss both to the parsons and the owners, for the encouragement of strangers to occupy these lands, and that the parson might have something, the parson, patron, and ordinary, came to an agreement with them, for the payment of the annual sum, and it is sufficient for us to shew that this might have been the reason for these *moduses*, but it is not necessary for us to prove it was so.

As to the case in 1 Lev. 116, the law makes no difference whether the *modus* tends to the encouragement of the parishioners or of strangers, and if the customs had extended to all strangers, they would have been more prejudicial to the parson, and the reason of them might have been to prevent any fraud from the two parishes lying so contiguous.

Most of the defendant's objections arise from the case of *Bawdry* and *Bushel*, but no conclusion can be drawn from that case that will govern this. *Keble* has not set forth the *modus* for pasture and meadow ground, but generally for every acre of land.

[283] Their first objection is that these *moduses* are unreasonable, but I have shewn there might have been a very good reason for their commencement, and therefore any objections to them are of no weight, and the same might be made to many *moduses* which have been adjudged good in law.

Secondly, It is said that these *moduses* were invented to cheat the parson, but this is no objection, unless they can prove that such a use has been made of them, that the occupier removed on any quarrel with the impropiator, or to distress him as to the other tithes, and all *moduses* are liable to fraud, but it is not easy for the parishioner, or probable that he would leave his abode on this account, and he would lose more by quitting his house, than he could save by the tithes.

Thirdly, They say these *moduses* are not certain as to the persons or as to the lands, but a prescription for a *modus decimandi* need not be more fixed than for a *non decimando*. The Cisterians were discharged of tithes *Quamdiu in propriis manibus*, &c., which was a variable prescription as to the persons, why may not lands be liable either to pay tithes, or a *modus*, in respect of the occupier, as well as by course of husbandry? *Godbolt*, 194, *Brown's* case; there was a *modus* for tithe hay in a particular field, which was sowed for seven years, that do not destroy the *modus*, but the rector shall have the tithes of the corn, the vicar the *modus* for the hay, it might be said in that case, shall it be in the power of the occupier, whether he will pay tithe in kind or not, or to whom he will pay them? that is as variable and dancing as the present customs, and puts it also in the power of the occupier, to whom he will pay.

Such a *modus* has been allowed good at law, *Cro. Eliz.* 136 (4), *Coteford* versus *Pease*, the parson sues the defendant for tithe in specie of certain pastures in *N.*, the defendant for a prohibition surmises, that he was an inhabitant in *S.*, and that time out of mind every inhabitant there that had pastures in *N.* had paid tithes for them to the vicar of *S.*, and that the vicar of *S.* had paid the parson of *N.* two-pence for every acre, and the Court held that the prohibition did lie, for it is as if he had prescribed to pay two-pence for every acre, *Cro. Eliz.* 136 (5), and there are many cases in the Exchequer in which this *modus* has been established.

The case in *Roll's* abridgment, that the occupiers used to repair and beautify the church, and therefore ought not to pay tithes, amounted to a *non decimando*, but here the parson has four-pence an acre,

[284] The case of *Startup* and *Doderidge* was to pay two shillings in the pound of the rack rent, or best improved value, which was uncertain, here the sum to be paid is fixed and certain.

Mr. Wills. The constant usage proves that there was such a contract, and we have proved that the same *modus* has been constantly paid in the parish of *Skegnes*, notwithstanding the prohibition was denied in the case of *Bawdry* and *Bushel*, and the inhabitants have more benefit than strangers, they have the instruction of the minister.

The first objection is, That these *modus*es are uncertain, which has been fully answered, but they are as certain and permanent as many others which have been established, where a *modus* is for tithe of hay, and if the lands are sown, to pay tithes in kind; in that case the parson cannot tell before-hand how much he shall have the next year; he cannot tell whether it will be mowed or sown while the lands are occupied by a parishioner, &c., tithes in kind are to be paid, if by a stranger four-pence, &c. A *modus* is not permanent when any one year nothing is to be paid to the parson, because that would amount to a *Non Decimando*; but here something must be paid, and these customs are certain as to the lands, they are for meadow and pasture ground, and as to the persons too, they must be paid by the occupier.

The second objection is, that they are liable to fraud, but *modus*es more subject to fraud have been established; for if they are made use of to cheat the parson, the Court will relieve him, and make them pay tithes in kind, which accounts for the case of *Stebbs* and *Goodlack*, where the Court would not grant a prohibition in support of a cheat, though the *modus* was confessed; but *Moor*, in the report of that case, 913, Cas. 1290, says a prohibition was awarded, notwithstanding the covin, because the parson might have an action on the case for the fraud at the common law. The glebe do not pay tithes to the vicar, yet if the impropiator put cattle when yeaning on that land, the vicar shall recover the tithes, because of the fraud. *Moor*, 909, Cas. 1277; *Cro. Eliz.* 467 (25); *Moor*, 863, Cas. 1186; *Hob.* 39.

The other objection is, That the parson must have a benefit, so he has by these *modus*es; they cannot mean that he must have as much as the tithe, for then the objection would run to all *modus*es, but that what comes in lieu of the tithes, must be paid to the parson himself.

[285] *Mr. Creuse*. There are many precedents of such a *modus* being adjudged good, *Hill.* 16 Ca. 1 [1641], *Rot.* 1548, in C. B. 2 Brown's Entr. 194, 195, 196. The vicar libelled for tithes in the spiritual Court, and a prohibition was granted, on suggestion that strangers who occupied lands in that parish should pay a *modus* of ten-pence an acre; and there are many decrees for the payment of such a *modus* in the Court of Exchequer. *Trin.* 12 Ca. 2 [1660-61], *Piggot* against *Lovel*. The vicar brought his bill to be paid tithes in kind, and the defendant suggested a custom, for foreigners to pay four-pence an acre for tithe of meadow and pasture, and an issue was directed, and a verdict found for the defendant, and the bill was dismissed, both these resolutions were prior in time to the case of *Bawdry* and *Bushel*, which was in the 15 Ca. 2 [1663-64], and there have been many such decrees since that time too, *Hill.* 25 Ca. 2 [1674], the rector filed his bill for such a customary *modus* of six-pence an acre, and the *modus* was established, *Trin.* 30 Ca. 2, a bill was brought for payment of tithes, the defendant pleaded such a custom as in this case, and two issues were directed, one, whether there was such a custom, and the other what lands the defendant occupied; and the custom being found, the Court decreed accordingly. 32 Ca. 2 [1680-81]. The bill was brought for tithes, and the defendant pleaded a *modus* of twelve-pence an acre for lands newly converted to tillage, and four-pence for antient pasture, there the Court were of opinion, that the *modus* was well proved, and ordered a case to be made for the opinion of the Judges, who were of opinion that this was a void *modus*, and certainly it was so, for being coupled with the twelve-pence for the new converted ground, it could not be good. But afterwards *Mich.* 2 Wm. and M. [1690], *Blaxton* versus *Langton*, the successor of the plaintiff brought a bill for tithes in kind, and the defendant insisted on the *modus* of four-pence an acre, the plaintiff confessed the custom, but claimed the benefit of the former decree, and declared that to be his only inducement for bringing his bill, but the Court declared it to be a good custom. In the case of *Row* versus the *Bishop of Exeter*, a *modus* to pay two-pence a hoghead for cyder was established. In *Roll's Abridg.* 649, Cas. 8; 650, Cas. 9, it is said the custom would have been good, if it had been to repair the chancel, because that would have been a benefit to the parson, here the thing to be paid is certain, and that is the certainty requisite in a *modus*. 1 Kebl. 612, Cas. 86, a prohibition was refused, on suggestion of a *modus* to pay four shillings for every day's ploughing of wheat, and two shillings for every day's ploughing of barley, for the uncertainty. But if the *modus* had been so much for every day's work with an averment that it was certainly known, and how much it contained, it would have had sufficient certainty.

[286] *Mr. Justice Fortescue*. I think there is no difficulty to determine this question, Whether these are legal *modus*es or not, and I am of opinion that they are, first

I would observe on what *moduses* are founded, the books say they are real compositions, and they are allowed both by the canon and civil laws, and as they are founded on agreements, they must be contained in some instrument, and if it is lost, the parties are allowed to prescribe, and this was the reason Lord Chief Justice *Holt* went upon, in the case of *Startup* and *Doderidge* (though he was against the *modus*), that as it was a contract between the parties, it was hard to break through it, when it was well proved.

But the defendants say, these *moduses* are unreasonable, I have seldom known this objection made to a *modus*, because no body can tell at this distance of time whether it was reasonable or not at its first commencement ; but the law supposes it was, 8 *Ed.* 4, 13 b. But they are not unreasonable, they are an ease to the parson, for he is not bound to attend foreigners, but it is said that they take more notice of foreigners than inhabitants, but was it not in the power of the parson, patron, and ordinary, to give them what privileges they pleased ? they create no burthen on the inhabitants ?

But it is objected that they are uncertain, and if they are, then indeed they are not good in point of law, for they would amount to a *Non Decimando*, but can any case happen in which the parson will not either have this *modus*, or the tithes ? and there is no uncertainty, but what is to be paid on every contingency is fixed : In Roll's Ab. 265, a *modus* to pay a shilling or thereabouts for every acre of arable land was adjudged uncertain, and as the customs are laid with relation to the two parishes, they are an advantage to the rector, and a foreigner may come and reside in the parish, and then he will pay tithes as well as one who occupies lands, and is a parishioner, may leave it, here is no uncertainty in the *modus*, but the only thing uncertain is, Whether the *modus* or tithes in kind are to be paid ?

In this case the parson has a benefit, he has four-pence an acre, and I do not know but once it might be a fourth part of the value of the lands. The *modus* to repair the church, in lieu of tithes, could not be good, because the parishioner was bound to do it without such a *modus*, and the doing it was no benefit to the parson ; but if it had been to repair the chancel, it had been a good *modus*, for that would have been an advantage to the parson.

[287] I cannot rely on the case of *Bawdry* and *Bushel*, it was determined on a motion, and the prohibition might be denied for other reasons, it is a strange resolution, sure a man may give up his right on what terms he pleases, and the reason mentioned in *Lev.* is not good at law, for it is a settled point that foreigners are bound to contribute to the repairs and vestments of the church, and to pay all parish duties, and Mr. *Creuse's* cases are expressly in point ; and in the case of *Bate* and *Howland*, decreed in the Court of Exchequer, 1726, a *modus* to pay 4d. an acre for high land, and 3d. an acre for low land, was adjudged a good *modus*.

Mr. Justice Reynolds. A *modus* is a real composition, run into a prescription, made *concurrentibus iis, qui de jure requiruntur*, who might dispose of the rights of the Church, as well as private persons of theirs, and if these contracts now appeared in writing, they would be good, and the memorials being lost, the parties may prescribe, and shall have the same advantage of them as if they appeared ; if these customs were universal, they would undoubtedly be good, and then the question will be, whether the restrictions shall make them void, and if they would be good generally, shall the parson object when the restrictions are for his benefit ? and it cannot now be discovered, whether the parishes were not formerly united, or did not partake of sacramentals ? but if these *moduses* are so uncertain, that the parson cannot know what to demand, I allow they are bad. All the certainty requisite to a *modus* is this, that when the circumstances are the same, there shall be the same *modus*, and it is not uncertain, because the parson is now to have a *modus*, and now to be paid tithes, for that is as certain as the cases of *Non Decimando*, where the parson has sometimes tithe, and sometimes nothing, and this is no loss to the inhabitants, they do not pay more, though the parson has less, and the surplus is not thrown as a load on their estates.

The single authority for the defendants is the case of *Bawdry* and *Bushel*, which was determined on a sudden motion, and no rule given to shew cause, and is founded on reasons that are not law ; and though we have the contemporary reports of *Siderfin* and *Raymond*, they take no notice of that case, and I believe the parties had recourse to another Court that granted a prohibition, because the custom has subsisted in that parish ever since, notwithstanding the prohibition was denied, and that case ought not to be regarded, since it stands single in opposition to so many contrary resolutions, both before and since that time, many of which authorities have been cited by Mr. *Creuse*.

[288] *Lord Chancellor*. I am of the same opinion ; the plaintiffs have proved these *modus*es to be time out of mind, and the defendants have not produced a single instance of the payment of tithe in kind, and as they relate to so many parishes, it would occasion great confusion to set them aside. Every *modus* supposes a composition, which being lost, runs into a prescription. Suppose the composition had been for all occupiers, by the case that has been cited by Mr. Justice *Fortescue*, that would be good, and why should it make the custom unreasonable to restrain it to those that live out of the two parishes ? Does making the composition with part only of the occupiers make it illegal ? They might contract with whom, and on what terms they pleased ; and though *Keeling*, in the case of *Bawdry* versus *Bushel*, says, there was no precedent of such a *modus*, Mr. *Crease* has produced two resolutions before that time, but they not being in print, I suppose he had not seen them, and that case was adjudged on a sudden motion.

There is no uncertainty in these *modus*es, for then indeed, no time or usage could make them good ; they are no more uncertain, than the prescription by the *Cisterians* in *Non Decimando*. Does not the tithe alternately belong to the rector, or vicar, as they are great or small tithe ? These customs therefore, being no ways uncertain, and having held so long, must be established on the original bill, and the defendant's cross bill must be dismissed.

Tuesday, February the 10th [1730].

Case 157.—WHEELER versus SHEER, & al'.

[See *White v. White*, 1778, 1 Bro. C. C. 15 ; *Moggridge v. Thackwell*, 1802, 7 Ves. 79 ; *Mills v. Farmer*, 1815, 19 Ves. 488 ; 1 Mer. 92, 96.]

In Court, Lord Chancellor.

Mr. Verney for the plaintiff. Mr. *Granville Wheeler*, son, heir, and executor of Sir *George Wheeler*, his father. is plaintiff, *Jonathan Sheer*, and *Bridget* his wife, one of the daughters of Sir *George Wheeler*, *Robert*, *Grace*, and *George Hutton*, the children of *Elizabeth Hutton*, another daughter, *Frances Middleton*, another daughter, and her four children, *Ralph*, *Francis*, *Grace*, and *Richard*, *Thomas Sharp*, and *Judith* his wife, another daughter, *Francisca*, another daughter unmarried, *George*, *John*, *Mary*, and *Grace*, the children of *Mary* another daughter, by posthumous *Smyth*, the executors of the said posthumous *Smyth*, the executors of *Grace Musgrave*, another daughter, and the *Attorney General*, are defendants. And the bill is brought for your lordship's determination of several points, arising from the will of Sir *George Wheeler*. Sir *George Wheeler* having two sons, and seven daughters, *Frances*, [289] *Francisca*, and *Judith* unmarried, and *Grace*, *Mary*, *Bridget*, and *Elizabeth* married (to three of which he had given £800 a-piece for their portion, and to the other £1000), by will bearing date the 23d of *May* 1719, devises to the plaintiff several houses in *London*, charged with an annuity to his daughter *Bridget*, to his three unmarried daughters £1000 a-piece, to *Grace* £200 to be laid out in lands or an annuity, to Mr. *Hutton* £200 if he augmented his wife's jointure £20 a year, otherwise the £200 was to be laid out in lands, to be settled on the wife ; and the like legacy, and on the same terms, to posthumous *Smyth*, to his sons-in-law £10 a-piece for mourning, and several legacies to charity, and then the will goes on, ' All the rest and residue of my personal estate, I give to my executors, debts, funerals, and legacies being discharged, in trust, that what remains above £200 to each of them, £100 to be deducted out of the residue, they shall employ to such charitable uses as by codicil I shall appoint, and makes his son *George* and his brother *Charles* executors.' 18th *January* 1721, by codicil, taking notice that since the making his will, *Frances* was married to Mr. *Middleton*, and that he had given her £500 portion, he revokes her legacy of £1000, and devises to Mr. *Middleton* £200 if he settled £20 a year additional jointure on his wife, otherwise the £200 was to be laid out in lands for her use, and directs, that (his daughter *Smyth* being dead since the making his will) the £200 he had devised to her should be divided among her children, and then goes on, ' And whereas I have by my will given the residue to my executors, in trust, &c., now I do hereby direct and appoint that the same shall be applied to such uses and purposes, as by any other codicil or codicils shall be directed and appointed.' The 2d of *March* 1722, he made a second codicil, whereby taking notice, that his daughter *Judith*, since the making his will, was married to Mr. *Sharp*, and that he had given her for her portion an assignment of a mortgage of £1000, he revokes her legacy of £1000, and

likewise taking notice, 'that his son *George* was since dead, he constitutes the plaintiff, 'with his brother *Charles*, the other executor, for the uses, trusts, and purposes in his 'will, and that he should have and partake of such advantages and benefits, by being 'one of his executors, as *George* would have taken, and received as such, if he had lived.' The 23d of *October* 1723, he made a third codicil, in which is no direction as to his personal estate, but only devises lands he had purchased in *Kent* in augmentation of a charity, to which he had bequeathed a legacy by his will. Sir *George Wheeler* soon after died, and *Elizabeth Hutton* is since also dead, Mr. *Charles Wheeler* died before probate, and the plaintiff the surviving executor proved the will.

The first question on this will is with Mr. *Attorney General*, Whether the King shall have the disposal of the surplus of [290] the personal estate to charitable uses. But the first codicil is a plain revocation of the last clause in the will, it takes notice of that clause, and directs that the residue should be applied to such uses and purposes, &c., and by his subsequent codicils he has directed to other charitable uses of the surplus.

Mr. Attorney General. No argument can be drawn in this case from the particular express legacies the testator has given to charitable uses ; if it appears to be his intention, that the residue also of his personal estate should be applied to such uses : If this question stood singly on the will, the testator not having appointed the uses by codicil, the disposition of the residue belongs to the crown. *Attorney General versus Siderfin*, 1 Vern. 224. Mr. *Siderfin* charged a manor with the raising £1000 out of the profits, to be applied to such charitable uses as he had by writing formerly directed, and no such writing being to be found, the King appointed the charity for the benefit of the mathematical boys of *Christ's Hospital* ; so, if a bequest is given to an illegal use, and it shall not be void, for the benefit of the heir, or executor, 2 Vern. 266. *Attorney General versus Guise*. So the testator's general intention shall take effect, tho' he has not specified the particular charity, and the King shall apply it. (1 Vern. 248 ; Nels. Rep. in Canc. 245, Sir Wm. Jones versus *Peacock*.)

The next consideration is, Whether the first codicil is a revocation of this clause of the will. I apprehend a prior will is not revoked by a codicil, but either by express words, or because the codicil is inconsistent with the will, but this codicil is not an express revocation of the will, nor is it inconsistent with it. The testator does not say the uses shall be exclusive of the charitable uses ; they say by this codicil he might have given the surplus to any person ; why so he might notwithstanding the will, and declared any other use ; for the will is not like the reservation of a power by deed.

Lord Chancellor. Where a man devises to such charitable uses as he had appointed, that supposes he had made an appointment, though it could not be found, but here it is plain the testator had made no appointment, but only had it in his thoughts to do so ; by the codicil he confirms his will, and makes the trust of the surplus more extensive, it was to be in trust for a charity, if he directed any.

[291] *Mr. Verney*. The next question is, between the plaintiff and the other defendants, Whether the residue of the personal estate, whereof the trust is not disposed of shall go to the plaintiff, as executor, or according to the statute of distributions, or the custom of *York*.

I will not trouble your lordship with cases when the surplus shall go to the executor, and when to the next of kin ; but this is the most favourable case, for the executor can come before your lordship ; he is an only son, and the only child not advanced by the personal estate, the other younger children were provided for by portions given by the testator in his life-time, or by his will ; for he designed the devises to them as filial portions, and not as legacies ; for by his will he gives his three unmarried daughters £1000 a-piece, but having afterwards given two of them portions on their marriage, he by codicil revokes his bequests to them, and we have expressly proved, that the testator often declared he would never give his daughters above £1000 a-piece, and that he gave the £1000 to *Francisca*, as her full portion, and the £200 to the other daughters, in augmentation of their portions.

Most of the book cases are of a residue not disposed of, but in this case the surplus is expressly devised to the executors, so that the plaintiff is intitled to it by law, and the testator only reserves to himself a power to declare the trust of it, and the testator did not die immediately, without an opportunity to take this power into consideration ; but he afterwards made three codicils, and do not revoke the devise by the first codicil, but only declares the trust should be to such uses and purposes as he should after direct, and he makes no appointment by the other codicils ; and on the death of his

son *George*, when the testator comes to substitute the plaintiff in his room, he gives him all the advantages he designed the other ; and if this point is with us, the other claims of the defendants are at an end.

Mr. Mead. Sir *George Wheeler* cannot be said to die intestate as to any part of his personal estate ; because he has devised the whole residue ; he appoints by his second codicil the plaintiff executor, and that he should have the same advantages thereby as *George*, which shews he designed the executorship as an advantage, which cannot be answered by the trifling legacy of £100 a-piece, nor is that given to them as executors ; therefore since the testator has made no appointment, the trust must result to the executors, and no one can say he has a title to the residue, since by law it belongs to the executors, [292] and the testator himself has taken notice of the legal privileges and advantages of an executor.

In the case of *Milner* versus *Hooker* decreed by your lordship April 1726, Mr. *Milner* gave several legacies to Mr. *Hooker* his executor, and also devised to him all his real estate, and legacies likewise to his next of kin ; the next of kin filed a bill against the executor for an account, and a distribution of the residue, and your lordship was pleased to say, that the testator having given legacies both to his executor and next of kin, the law must take place, and to decree the residue to the executor. Mr. *Wheeler*, in this case, is son of the testator, and has no personal estate devised to him, and the testator has provided for all his next of kin, which is a plain indication he designed the executor should have the residue, subject indeed to any trusts he should appoint, and therefore he having made no appointment, the plaintiff to whom it belongs by law must have it.

Mr. Rider. By law the executor is intitled to the residue, and it is never taken from him by this Court but where it appears to be the intention of the testator he should not have it, which the defendants would gather in this case from the particular legacy, by the words of the testator the plaintiff is to have the same advantages by being executor as his brother *George*, but the £100 was not given to him as executor, and in consideration of his taking upon himself the burthen of, the executorship. But suppose this a particular legacy to him as executor, it is not a manifestation of the intention of the testator to exclude him from the residue. A particular legacy is generally thought indeed to be given by the testator, with a design to exclude the executor, but not where his intention appears stronger to exclude the next of kin, for even where there is equal reason to presume he designed the residue to the one as to the other, the presumption is always in favour of the executor, who has the law with him ; and the trust not being declared, it is as if no trust had been mentioned : But the second codicil shews that this was the intention of the testator, to give him all the legal advantages of an executor, for the legacy of £100 cannot be called *Benefits and Advantages*, and we must consider that the testator was making a provision for all his children, and we have proved that he often declared that his daughters should have but £1000 a-piece, so that to decree them a share of this residue would contradict his intention, and such proofs have been allowed to be read in the House of Lords, and they have decreed upon them, contrary to the case of *Foster and Munt*, 1 Vern. 473, though that was a decree of their own house. (2 Vern. 675, 99, 252, 648.)

[293] *Mr. Solicitor General* for the defendants. Where a legacy is given to an executor, or to two executors, equally to be divided between them, it would be mispending time to shew that the Courts of Equity have always taken this devise since the case of *Foster and Munt*, as an implied intent in the testator to give the executor no more, and have decreed the surplus to be distributed.

But it is said, that in this case legacies are also given to the younger children, who are the next of kin, and so the implication is equal, and the law must take place in favour of the executor : But nothing is given to Mrs. *Sharp*, by the will or codicil, but the testator having given her £1000 on her marriage, revoked her legacy, but the Court has in many cases decreed a distribution of the residue, where the next of kin have had particular legacies ; the next of kin take by the law, by the statute of distributions, not by the intention of the testator, but the executor can take only by the will and intention ; and since he designed to give him so much only, the next of kin come in for the residue, without any regard to the intention of the testator.

But it is further objected, that in this case the residue is expressly devised to the executors in trust, and that since no trust is declared it results to them : This is the first time I ever heard that a man could be a trustee for himself, but the very end of

creating a trust, is to sever the legal estate from the equitable estate ; and it cannot be said that by making them executors he designed them the advantages the law gives them, because he has devised away all the residue, but £200, and there is no room to imagine that the testator designed them any more ; he had some design to give it to charity, if not, it remained undisposed of : So here, by the express words of the will, as well as by implication from the particular legacy, the executors are trustees, and when no trust is appointed, this Court has always declared them to be trustees for the next of kin (Ant. Cas. 3, 12, 26, 32) : If a deed of gift is made on such trusts as the donor shall declare, and he makes no declaration, the trust shall result to the heir at law of the donor ; and the equitable estate shall not go to the donee, who was designed and made use of barely as an instrument.

By the codicil the plaintiff must be considered as a trustee, as well as *George*, for he is made executor for the same uses, intents, and purposes ; so that if *George* was not intitled to the surplus, the plaintiff cannot ; one of the uses he was made executor for was to be a trustee of the surplus, and the [294] £200 was given to them as executors, it is given to them by the name of executors, and they are to deduct it out of the residue.

The plaintiff, they say, is unprovided for by the personal estate, and the daughters advanced ; but he has a real estate of £2000 a-year by descent or settlement, and the daughters have only £1000 a-piece, which is a strong circumstance in their favour ; and the surplus is not above £5000 and the other executor was only a brother to the testator.

They have read proofs, that the testator intended the daughters should have but £1000 a-piece, on the authority of the case of *Littleburry* and *Buckley*, 2 Vern. 675, that a witness may be read in affirmance of the right of the executor, but not in disaffirmance ; whereas he must be read first, before it can be known which way his evidence goes ; but what the next of kin take, does not arise from the intention of the testator, but from the statute, so the defendants are intitled to the residue, whatever was the intention of the testator.

Lord Chancellor. Let this cause stand over 'till *Monday* the 23d day of *February*. (Post, Cas. 165.)

Thursday, February the 12th [1730].

MOTIONS.

Case 158.—HAWKINS *versus* CROKE.

In Court, Lord Chancellor.

The defendant being in contempt to a sequestration, for want of an answer, the plaintiff obtained an order to set down the cause on the sequestration ; the defendant at the day obtains an order for a week's time to answer, and the cause to stand over in the mean time : The defendant puts in an answer, which the Master reported insufficient, and the cause is ordered to be set down again ; the defendant puts in a further answer, and an order is made that if the Master did not report it sufficient in four days, the cause should come on again, the Master reported the answer insufficient, the defendant put in a third answer, and the cause coming to be heard, his Honour adjudged that the cause should be heard on the sequestration, and decreed the bill to be taken *pro confesso*, that it was an indulgence in the Court to adjourn the cause 'till they saw whether the defendant would put in an answer, and that he had abused this indulgence by putting in answers that were insufficient ; and which strictly speaking, [295] were no answers, and that the cause was first set down regularly on the sequestration, and only waited to see if the defendant would make a proper use of the time the Court had given him.

An order was made on the motion of the defendant, that it should be referred to a Master, whether the decree was regular or not, and the plaintiff moved to discharge this order.

The council for the defendant insisted, that this decree was irregular, because they had been served with a subpoena to put in a better answer, and had paid the costs ; and if a defendant will not answer, a plaintiff's bill is taken *pro confesso*, because he has no opportunity to put the matter in issue : but he may join issue on our answer ; and several things in the bill, which by this decree are to be taken *pro confesso*, are

expresly denied in the answer ; and no precedent can be shewn that a bill was ever taken *pro confesso*, after the coming in of an answer. An insufficient answer cannot be said to be no answer, it is a good answer in those points it is not insufficient, or it ought to be taken off the file, and the proper officer would be obliged to certify that an answer was filed ; and shall the Court, contrary to that record, decree the bill to be taken *pro confesso* ? but the answer being in, the plaintiff ought to have taken the usual course of the Court, to oblige the defendant to put in a sufficient answer.

Lord Chancellor. This decree binds the right as well as any other decree, and therefore the order of reference must be discharged, for if there is any error in the decree, it is an error of the judgment, and the defendant must petition to rehear it. (Post, Cas. 198.)

Monday, February the 16th [1730].

Case 159.—MINUEL *versus* SARAZINE.

At the Rolls.

A legacy less than the debt shall not go in part satisfaction. 1 Salk. 155, Cas. 5 ; 2 Vern. 593 ; 2 Salk. 508, Cas. 4 ; Ant. Cas. 7.

The testator was indebted to the plaintiff £421, and bequeathed him a legacy of £400, this being less than the debt shall not go in part satisfaction. Nels. 8vo Rep. in Canc. 38.

[296] *Tuesday, February the 17th [1730].*

Case 160.—RODNEY *versus* HARE & al'.

At the Rolls.

The plaintiff having assigned 150 errors in 5 stated accounts, the Master of the Rolls made an order for him to pick out those he would insist on, and consent to waive the rest, if he should be of opinion they were not errors, if he thought them errors, he would either open the accounts, or give him leave to surcharge or falsify. Where witnesses have been examined, and no replication, the Court at the hearing, or even after a decree, will order a replication to be filed, *nunc pro tunc*. A cause is at issue by the replication, and a rejoinder is never actually filed.

Captain *Rodney* filed a bill, against the Colonel and the Agent of the regiment, for an account of his pay, and the pay of the company ; and to set aside five stated accounts, signed, errors excepted ; and he assigned one hundred and fifty errors in the accounts, and the cause coming to be heard, the *Master of the Rolls* made an order, that the plaintiff should pick out those errors he would insist on, and give the defendants a note of them, and consent to waive the rest, if the Court should be of opinion that they were not errors ; but if the Court, he said, should think them errors, that would be a good cause, either to decree an open account, or to give the plaintiff a liberty to surcharge or falsify.

The defendants having pleaded in bar these five stated accounts, began to read proofs to their plea, and no replication being filed, the *Master of the Rolls* made an order, that the replication should be filed *nunc pro tunc*, and said that such orders had been often made after a decree ; but the defendants insisted that then the cause would not be at issue, for want of their rejoinder, and that though they might rejoin gratis, the plaintiffs could not compel them without a subpoena ; but the *Master of the Rolls* held, that the cause was at issue by the replication, for the issue is offered by the defendants traverse, and a rejoinder is only a fiction of the Court, and is never actually filed.

Case 161.—STEIGNES *versus* STEIGNES.

At the Rolls. Eodem die.

The word moveables, in its full sense, takes in all personal chattles.

Mr. Solicitor General for the plaintiff. Baron *Steignes* made his will in French, and gave his wife, besides all his moveables, plate, jewels, pictures, linen, &c. (except

'his three books of miniature and his whole library'), £6000 South Sea stock'; and the question is, What passes by the *French* word *meubles*, which is translated moveables in the will to which the probate is annexed, and by which we must go; but in the *French* signifies only household goods, suppellectilia. The wife insists that by this word all the personal estate is devised to her; whereas the other words confine the sense of it, and shews the testator only meant it of things corporeal, as plate, jewels, linen, and the *&c.* can never extend it to foreign things, the several species he enumerates are corporeal; and there is no specification of any thing incorporeal; so, stocks and debts do not pass: And in the [297] conclusion of his will, he devises all his other pretences to his wife, or for the benefit of his adopted son; which takes all his debts out of the word moveables; and the intention of the testator is also plain from another clause of his will, whereby if his wife marries he gives her the plate, jewels, and other moveables in the first clause, for life only.

Mr. Attorney General for the defendant. The word *moveables* in this will cannot be confined to household goods, for then there would be no reason for the exception for his library and three books of miniature would not pass by the word moveables, for they are not household goods, nor are they comprehended under the particulars.

Nor is the word confined to be things corporeal, but it is to be extended to stocks, debts, *&c.*, for *bona mobilia* not only comprehends all corporeal things, but right, credits, and all personal chattles. But the plaintiff says, the testator has restrained this general sense of the word, by using it with the words, plate, jewels, pictures, linen, which shews he meant something of that kind, but the *&c.* plainly intimates that the testator did not intend to confine the word to those particulars, but to take in other things, and leaves the word to be understood in its full legal sense.

Master of the Rolls. I am of opinion that the word *moveables* in this will comprehends only corporeal moveables, though if there was nothing to restrain the meaning of it in this clause or in the other parts of the will, the word would take in the whole purely personal estate: The words plate, jewels, pictures, linen, will not confine the generality of the word, though they are only corporeal things, for *&c.* must signify *et ceteræ mobilia*; nor is the sense of it restrained by the exception: But the testator, by saying that his wife should have £6000 South Sea stock, besides all his moveables, shews, that in his understanding of the word, moveables would not comprehend stock; for it would be absurd to say she shall have all my stock, and £6000 South Sea stock besides, and he has given away his debts in another clause, and the word cannot be confined to household goods, for he has particularly mentioned his jewels, which are not household goods. (Swinb. Fol. 172; Went. 430; Jon. 225; Spark *versus* Denn, Swinb. part 7, sect. 10, n. 8.)

[298] Wednesday, February the 18th [1730].

Case 162.—LOCKYER & Ux', Plaintiffs; SIMPSON and BROME, Defendants.

At the Rolls.

A man and woman about to marry surrender their copyholds to the use of them two and the survivor, the man dies before marriage, the woman enters on his lands, and after 30 years quiet enjoyment was decreed to surrender to his heir.

Mr. Attorney General for the plaintiffs. The plaintiffs filed their bill for a legacy of £2000 given to Mrs. Lockyer by the will of Mr. Tolson; and the executors insist by their answer to deduct out of this legacy the value of a diamond necklace and other presents made to Mrs. Lockyer by the testator, to the amount of £420. Mr. Tolson was related to the young lady, and intimate in the family from the time she was two years of age, and often declared that from that time he had given her a legacy in every will he made; and a marriage was concluded between them, and he died on the very day that was fixed for the wedding; no condition was annexed to these presents, but they were an absolute free gift, and worn by the lady in the life-time of Mr. Tolson; and the marriage broke off by the act of God, not by the default of the lady or her parents; and if the executors have a right to these presents, they may bring their action for them, but cannot set them off in this Court by way of discount.

Mr. Solicitor General for the defendants. If these presents do not belong to the plaintiffs, but are to be considered as part of the personal estate of Mr. Tolson, this

Court will not decree the executors to pay the legacy, unless the plaintiffs give up these assets, or allow for them, though the testator used no conditional words, when he made these presents; they were not given to the plaintiff absolutely, but the nature of the gift must be collected from the time and other circumstances: The treaty of marriage was then depending, and every thing prepared, two days were set for the wedding, and these presents were made after the first day, the plaintiff's portion of £5000, which was paid and secured to the testator, has been repaid, and the securities delivered up by his executors, who think it as reasonable that these jewels should be restored likewise, because they were presented in view and contemplation of marriage. The plaintiffs allow, that if the lady had refused to marry, the presents ought to be returned, but if the marriage does not take effect, whether it arise from her default, or from accident, if the party who made the presents is in no default, his representative will be [299] intitled to them, 1 Vern. 432, *Hammond versus Hicks*, a man and woman being about to marry, surrender their respective copyhold estates to the use of them two and the survivor, the man dies before marriage, and the woman enters on his land, and after thirty years quiet enjoyment, she was decreed to surrender to the heir, and account for the profits, as being a trust for the husband and his heirs till the marriage took effect. The difference between this case and ours is in our favour: if the marriage in that case had been solemnized, and the wife had survived her husband, he could not have aliened the lands from her, but if the marriage in this case had taken effect, these presents would immediately have been in the husband's power, and if the wife survived him, they would have been heirs only in case he had not disposed of them.

Mr. Lutwyche. Lord North quoted this case, in the case of *Beaumont versus —*, 2 Mod. 140, a person of quality intending a marriage with a lady, presented her with a jewel, and the marriage not taking effect, he brought an action of *detinue* against her, and she taking it to be a gift offered to wage her law, but the Court were of opinion, that the property was not changed by this gift, being to a special intent, and therefore would not admit her to do it; if the man indeed breaks off the match, it is an injury to the lady, and he is intitled to no relief: But death is an accident this Court has always a regard to.

Mr. Attorney General's reply. The defendants say the particular nature of this gift makes it as much conditional, as if the presents had been given expressly on condition, but they were given to the plaintiff absolutely, and out of kindness, and not barely on the account of the marriage; and if the testator had been asked, whether the lady was to restore them, in case he died before the marriage? he would have thought himself affronted by the question, and how can the Court with certainty declare he intended they should be restored; where two persons come acquainted only on a treaty of marriage, no other reasons can be assigned for the presents, but here the parties were related, and acquainted many years before the treaty, and the legacy he has given her shews he had a kindness for the lady, abstracted from a view of marriage, but the executors say, these presents ought to be given back as well as her portion: A settlement was made in consideration of the portion, but the uses were to the testator and his heirs till the marriage took effect, so his own estate remained in him at the time of his death, and the uses of the settlement never arose, and therefore the money was returned, because there was not *Quid pro quo*. Co. Lit. 204 a, If a man gives lands to a [300] woman *Causa matrimonii prælocuti*, and she refuse to marry him, yet she shall hold the estate, and *a fortiori*, if he dies; and these presents are made in contemplation, but not on condition of a marriage; and to do a thing in view, and contemplation of another, is not the same as to do it on condition; and though the party is disappointed in his views and expectations, that is no cause to refund.

Master of the Rolls. This gentleman was related to, and began an early acquaintance with the lady, even from her age of two years, and he declared that from that time he had always remembered her in his will; this intimacy increased with her years, and when she grew to a proper age, he made his addresses to her with the approbation of her parents, and a marriage was agreed on, her portion paid and secured, and a settlement made; and pending the treaty he made her several presents, without any declaration to defeat them, and two days were set for the wedding; on the first, it was put off, and on the second day he died; by his will he gives her a legacy of £2000 expressly for the kindness he had for her, and that he designed to make her his wife: And the bill is brought for this legacy, and I am of opinion, that if the defendants the

executors had a right to these presents, either in law or equity, they should not be obliged to bring an action, or a bill for the recovery of them, but might deduct the value of them out of the legacy; because it is common justice if a legatee brings a bill, and has possessed himself of any of the assets, that he should take them as a satisfaction *pro tanto*; but I think in this case the executors have no right to these jewels, because no condition being expressed, the law *prima facie*, presumes the gift to be absolute, and is not fond to create a condition to defeat it; the question then is, Whether there are any circumstances that imply a condition. If no motive for these presents could be assigned but the marriage, then indeed it would be more reasonable to suppose this condition: But in this case there are other motives; he was related to her, and had a long and intimate acquaintance with her, of which the marriage was only the effect and consequence, and it would be too great a strain for a Court of justice to fix upon this motive, out of so many others. But suppose this a recent kindness, sprung up from the intention of marriage, a portion was paid, and a settlement made in consideration of it, and the marriage; all this was reduced to writing, but these presents were not brought into the articles as part of the consideration, and therefore ought to be excluded; but I go more upon the nature of this gift, which ought to be taken in an honourable sense, and though the husband by marriage would have become owner of them, yet if he had declared that in case of marriage he designed to take them from her again, they would be [301] no presents at all, his ostentation of a kindness would vanish, and the treaty be a mere bargain. If lands are conveyed *Causa matrimonii prolocuti*, the man cannot aver the cause, but the woman may, but in both cases the condition must be expressed or averred, and if the woman refuses to marry, she shall hold the lands; but here no condition is either expressed or averred, but only supposed or fancied, and they were absolute presents, and she put in possession of them: The question in 2 Mod. was only, Whether time should be allowed to bring compurgators to wage her law, in which the Court would not indulge her, because the Court is always against wagers of law, for fear of perjury, and is desirous to have matters fairly put in issue: Here all the particular circumstances take away any implication of a condition, but if they were all away, I think it becomes a Court of equity to declare presents made by an intended husband, absolute gifts.

Thursday, February the 19th [1730].

Case 163.—ANONYMUS.

At the Chancellor's house, Lord Chancellor.

On the return of an attachment for non-performance of an order against one in the *Fleet*, the next process is a sequestration.

An attachment for non-performance of an order against one in the *Fleet*, is directed to the warden of the *Fleet*, and on his return that he is his prisoner, you may move for a sequestration.

Case 164.—ANONYMUS.

At the Chancellor's house, Master of the Rolls. Eodem die.

You may amend a bill, paying common costs, after a demurrer is put in, but after it is set down to be argued, if you amend, you must pay the costs of the demurrer.

The *Master of the Rolls* said, that the plaintiff may move to amend his bill, on payment of twenty shillings costs, after a demurrer is put in, if it is not set down to be argued; and after it is set down, on payment of the costs of the demurrer, and the register being consulted, agreed to the difference.

Monday, February the 23d [1730].

Case 165.—WHEELER *versus* SHEER & al'.

At the Chancellor's house, Lord Chancellor. [See S. C. with note, Mos. 288.]

Lord Chancellor. This is the strongest case that can be against the executors, for the residue is given them expressly in trust, and no trust is appointed, and they are to deduct £100 a-piece out of the residue. (Ant. Cas. 157.)

[302] *Mr. Verney.* The next question is, since the executors are not intitled to

the surplus, whether the trust of it belongs to the next of kin by the statute of distributions; or whether (*Sir George Wheeler* being an inhabitant of the province of *York*), it is not subject to the custom of that province, as if *Sir George* had died intestate, and so one moiety will go according to the custom, and the heir be excluded from his share, and the other according to statute of distributions. By the 4th & 5th of *W. and M.* ch. 2, the inhabitants of the province of *York* may dispose of their personal estates to their executors, or others, as they shall please; and the widow and children shall not claim by the custom. The Legislature, in making this statute, had it not in their view to distinguish whether a person died intestate in equity, though not in law, but whether he made a will, or died intestate at law; and the custom is only to take place where there is an administration; but *Sir George Wheeler* made a good will in law of his whole estate, so the custom is out of the case.

Dr. Strahan. The 4th & 5th of *W. and M.* only impowers an inhabitant to make a will, notwithstanding the custom, but *Sir George Wheeler* as to this residue died intestate, or the statute of distributions could not operate on it, and therefore so much is out of the statute of *W. and M.* and the custom must operate on the moiety of it, and the residue being in trust for such uses as the testator should appoint, and he having made no appointment, the executors must be trustees for those persons who are intitled by law, and the custom in this place is the law.

Mr. Fazakerly. *Sir George Wheeler* has not made a compleat devise, but as to the trust of the residue has died intestate, and therefore since your lordship has declared the executors are not intitled to it, why should not the trust of it go to the persons who are intitled by the custom, as if no devise had been made of it, as a resulting trust will go to a special heir in borough *English*, or gavelkind.

Lord Chancellor. This is a new case: By law the executor is intitled to the whole personal estate, which is as old as the custom, which is the law of that part of the kingdom, and which the statute takes away only where there is a will; if one then makes [303] a partial will, and no executor, the residue will be subject to the custom; but here are executors, and the residue of the personal estate is devised to them, so this case is within the express words of the statute, then the question is, For whom the executors are to be trustees, not for those who are to take by the custom, by the very letter of the statute; but for those who are intitled by the general law, and the testator devised the residue, to put it out of the custom, so the distribution must be made to the next of kin of *Sir George Wheeler*.

Mr. Solicitor General. Your lordship having declared the surplus must be distributed among the next of kin, the next question is, Whether the younger children advanced in the life-time of their father, must bring their portions into hotchpot, as is required by the statute of distributions? and whether the daughter must bring in her legacy of £1000? but we think nothing ought to be brought into hotchpot, because the portions and the legacy were given the daughters in lieu of their customary shares, for at that time the estate was liable to custom (though *Sir George* had a power to controll it by making a will), and if he had died intestate, these portions would have barred the daughters from claiming by the custom, and then equity will not construe them a double satisfaction of their customary shares, and of what they are intitled to under the statute of distributions. 2 Vern. 274, *Gudgeon versus Ramsden*. An intestate being an inhabitant within the province of *York*, has a son and a daughter, and no wife, and in his life-time gives his daughter £1000 portion in bar of what she might claim by the custom, this shall be no bar of her distributory part, nor shall she bring it into hotchpot; and the intent of the statute by bringing things into hotchpot being to reduce the portions to an equality, if the daughters are to bring in what they received in the life-time of their father, *Francisca* must also bring in her legacy, or this equality will be destroyed, and these constructive intestacies are not within statute of distributions.

Mr. Verney. This point principally concerns the heir at law, and since your lordship is of opinion that the residue must be distributed, the directions of the statute of distributions are to be observed, and the heir must have a share, notwithstanding any lands come to him by descent, or otherwise: And the daughters advanced with portions must bring them into hotchpot, and there is no reason why one part of the statute should govern more than another; it was uncertain whether those portions would go in satisfaction of what the daughters were to take by the custom, or by the statute [304] of distributions, till it was known whether *Sir George* would make a will,

or die intestate ; and it now appears he did not give these portions to the daughters in lieu of their customary shares, because he had it in his power to bar the custom by making a will, which he has done. In the case of *Gudgeon* and *Ramsden*, the father did nothing to prevent the operation of the custom, so the daughter had two rights in her, and it was unreasonable to construe the £1000 a satisfaction for both of them, but here the daughters have but one right.

Dr. Strahan. The £1000 given to *Francisca* by the will of Sir *George*, is not to be brought into hotchpotch, for where there is an intestacy, or a surplus undevised, nothing is to be brought into hotchpotch, but what was given by the father in his life-time as an advancement ; but this £1000 is a legacy or gift, and the statute can only operate on the surplus undevised, which is to be distributed, but cannot destroy the will.

Lord Chancellor. Though the custom does not attach till the death of Sir *George Wheeler*, and he had it in his power to control it, yet till he does so, I shall consider his personal estate as subject to it : This is not a case within the statute of distributions, though I have declared the surplus to be distributed among the next of kin, according to that statute ; but I only consider it as to the persons who are to take, but not so far as to disturb the provisions made by Sir *George Wheeler*, either in his life-time or by his will. (Swinb. part 3, sect. 18, n. 13 ; *Perk.* 109, n. 569.)

Friday, March the 6th [1730].

MOTIONS.

Case 166.—ANONYMUS.

At the Chancellor's house, Lord Chancellor.

If the defendant pleads in bar, he cannot move for the plaintiff to make his election till the plea is argued, for the plea denies he has an election, but says he is not intitled to sue in equity. Ant. Cas. 119.

The defendant put in a plea in bar to the relief sought by the bill, and obtained an order for the plaintiff to make his election, whether he would proceed at law, or in this Court, and on the plaintiff's motion, the *Lord Chancellor* discharged this order ; for the order goes on a supposition, that the plaintiff has an election, and yet the defendant pleads he is intitled to no relief in equity, and therefore the plaintiff is not obliged to make his election till the plea is argued : and Mr. Solicitor General for the plaintiff, quoted the case of *Vaughan* and *Welsh*, where on a plea of the statute of limitations, the like order was discharged.

[305] Case 167.—ANONYMUS.

At the Chancellor's house, Lord Chancellor. Eodem die.

If the plaintiff moves to confirm a report *nisi*, and the defendant shews exceptions for cause, the plaintiff may except too.

If the plaintiff moves to confirm the Master's report *nisi*, and the defendant shows for cause that he has taken exceptions, the plaintiff too may except to the report, notwithstanding his motion.

Case 168.—PYAT *versus* WINFIELD.

At the Chancellor's house, Lord Chancellor. Eodem die.

One co-parcener joins with her husband and sister in a letter of attorney, to sell the timber, which is sold accordingly. Baron dies, the Court denied the wife an injunction, because the letter of attorney was good in equity, for the wife was not imposed on, and was to have half the money, and the other sister had a power by law to cut down all the timber. The Court granted one tenant in common an injunction, to restrain the other from cutting down the timber, and referred it to a Master to see what timber was fit to be cut down and to sell it, and to pay the money to the parties according to their interests.

Two co-parceners, one married, baron and feme join with the other sister in a letter of attorney to a third person to sell the timber on the estate, which he disposes of accord-

ingly ; the baron dies, and the feme brings this bill to restrain the purchaser, and her sister from cutting down the timber, and the *Lord Chancellor* granted an injunction nisi, but allowed the cause shewn by the defendants this day ; for though in law the letter of attorney was determined, it was good in equity, and an injunction ought not to be granted purely to deprive the purchaser of his bargain, when one sister had undoubtedly a power, and the other knew what she did, and do not pretend she was imposed on, and is to have half the money ; and his lordship said, that since the other sister had a power by law to cut down the timber, he did not know how he could restrain her, but the plaintiff ought to make a partition : And though this case was different, he declared himself not satisfied with the case of the Earl of *Chesterfield* and Mr. *Viner*, which was quoted by the council for the plaintiff. The Earl of *Chesterfield* was intitled to one fourth, and Mr. *Viner* to three fourths of an estate ; Mr. *Viner* was for cutting down some timber off the estate, the Earl was against it, and filed a bill against Mr. *Viner*, and Lord *Cowper* granted an injunction, and referred it to a Master, to see what timber was fit to be cut down, and to make a sale thereof, and the money was to be paid to the parties according to their interests, for both having a title by law, and one being desirous to have the timber felled, and the other opposing it, it became necessary for a Court of equity to interpose.

Case 169.—ANONYMUS.

At the Chancellor's house, Lord Chancellor. Eodem die.

You may move for a Serjeant at Arms in all cases on the return of a *cepi corpus*.

By an order made by the Earl of *Macclesfield*, the plaintiff may move of course for a Serjeant at Arms in all cases on the return of a *cepi corpus*, though it was warmly insisted upon that such a motion was proper only where the fines and amerciaments belonged to the Sheriff, as in [306] *Middlesex, &c.*, for then it would be to no purpose to amerce him for not bringing in the body, but that in other cases, you might have the party brought in by *habeas corpus*, or the bail bond assigned to you.

Monday, March the 9th [1730].

PLEAS AND DEMURRERS.

Case 170.—TREFUSIS *versus* Sir HIND COTTON, Lady COTTON, & al'.

At the Chancellor's house, Lord Chancellor.

Mr. Attorney General for the defendants. On a bill brought by the now defendant Lady *Cotton*, she was decreed the benefit of her marriage settlement (Ant. Cas. 113), unless the defendant *Trefusis* within six months after he came of age, should shew cause to the contrary : Mr. *Trefusis* came of age, and he and his sister file their bill to discover whether the defendant Lady *Cotton* did not agree to waive the benefit of her marriage articles, on Mr. *Trefusis* settling her father's personal estate, in trust, for her sole and separate use, and to be relieved against the said settlement, and to have an account and distribution of their father's personal estate : The defendants put in a full answer to the discovery, and denied all fraud and imposition, and pleaded the marriage settlement, and the decree, to the relief sought by Mr. *Trefusis*.

A decree cannot be varied or altered by a new bill, and this is an absolute decree *ab initio*, if the infant when he comes of age cannot shew good cause to the contrary : An infant indeed, after he comes of age, may bring an original bill to set aside a decree, for fraud and collusion between the plaintiff and his guardian, but there is no such suggestion in this bill, and we have denied them by our answer. In the case of Sir *John Napier* and Lady *Effingham Howard* (Ant. Cas. 39), it was adjudged, that an infant when he came of age might amend his answer, but could not file a new bill, or amend the old : And Mr. *Trefusis* may have any relief he is intitled to, under the reservation to shew cause ; and a decree, whether it is inrolled or not, may be pleaded to an original bill ; if it is not inrolled, the party who thinks himself aggrieved by it, may be relieved by a rehearing, if it is inrolled by a bill of review, or sure this decree may be pleaded as a *lis pendens*, and these decrees against infants never are inrolled,

so if a decree could not be pleaded 'till inrollment, infants on their coming of age might always bring new bills.

[307] *Mr. Solicitor General for the plaintiffs.* We do not suggest or suppose there was any fraud, or collusion in the former cause, but we say that our guardian did not make a proper defence, for want of being acquainted with several particulars, especially with an agreement of Lady Cotton with Mr. *Trefusis* to waive the benefit of her marriage settlement; the defendants say, a decree cannot be impeached by a new bill, I agree that by the rules of the Court an absolute decree cannot, whether it is inrolled or not, but this is a decree *nisi*; and 'till the day for shewing cause is past, it is in suspense, whether it will be absolute or not, and till that time it is not a complete decree, and if our cause should be allowed, the decree could never be made absolute, and then this plea would be allowed, on a supposition which proves not true; and it is more allowable to set aside decrees against infants by bill than any other decrees *nisi*, because other defendants are tied down to shew cause on the pleadings, but an infant, if his defence is imperfect, though there is no fraud or collusion in the case, may amend his answer, when he comes of age, if an infant is plaintiff he cannot amend his bill, but may file a bill against his prochein amy, if he has been guilty of any fraud or collusion: But if he is defendant, he is made a party *invitus*, and he may amend his answer, and file a bill of discovery to that end against the plaintiffs in the former cause, and great part of this bill is for a discovery, and the plaintiffs further pray a distribution of their father's personal estate; and the sister, one of the plaintiffs, was not a party to the other cause, so this is not a bill to vary the former decree, but to enable us to shew cause against it, and for further relief, and is in nature of a cross bill, in which case the plaintiff cannot plead the dependency of the original suit, and it is proper that Mr. *Trefusis* should amend his former answer, and that both causes should come on together.

Mr. Wills. The defendants have pleaded this decree as a final judgment, whereas a decree *nisi* can be pleaded but as *lis pendens*, and only in bar of the same bill; but the defendant may bring a cross bill both for a discovery and relief, because he may have a more adequate remedy, by setting forth his case as plaintiff, than by way of defence. Sir John Napier was both plaintiff and defendant; but Mr. *Trefusis* brought no cross bill.

Lord Chancellor. It is agreed by both sides, that an absolute decree cannot be called in question by bill, for that would make causes endless [308] and decrees contradictory; but it must be final, unless it is reversed on a rehearing, or by a bill of review, or an appeal: A bill was filed against the infant to have the benefit of a marriage settlement, and a decree was made for the plaintiff, and the infant had a half year given after he came of age to shew cause against this decree, but this was an absolute decree, the Court gave their judgment, and nothing can hinder it being absolute, but the defendant's shewing cause; but he cannot come in and controvert this decree by another bill (and I think the case is stronger against an infant, because he may amend his answer) but he may controvert this decree two ways, if there was any fraud or collusion between the plaintiffs and his guardian by an original bill, or if matter that then appeared was not insisted on, or if he has discovered new matter since, he may amend his defence, and have a bill of discovery, which was the reason I enlarged the time for his shewing cause till the defendants had put in their answers, and he may have the same remedy by amending his answer, as he proposes by the bill: So this plea must be allowed, with this express declaration, that the defendant may insist on all these things in the other cause, and I will give him leave to put in a new answer.

Friday, March the 13th [1730].

MOTIONS.

Case 171.—VILLERS & ux' versus Lady OSBORN.

At the Chancellor's house, Lord Chancellor.

The spiritual Court may order the effects to be brought into Court, whilst a will is in contest, and grant an administration *pendente lite*. Ant. Cas. 126.

Dr. Henchman for the plaintiffs. Mrs. Villers and Lady Anne Montague, are sisters children, and Lady Osborn is sister to the late Mr. Walsingham deceased, who by will devised a real estate of £1500 a-year to Lady Osborn for life, and made her

executrix, and left a very considerable personal estate, to the amount of £15,000, and this bill is brought to set aside the will for the insanity of the testator, that a receiver may be appointed of the rents and profits of the real estate, and for an injunction to stay waste, and to compel Lady *Osborn* and Mr. *Percival* the administrator, *pendente lite*, to bring into Court all the personal estate come to their hands respectively, and to restrain them from getting in any more, or that if the will should be established, the residue of the personal estate might be distributed among the plaintiff Mrs. *Villers*, and the other next of kin to the testator, and I am humbly to move your lordship for an injunction.

[309] The plaintiffs put in a caveat against the probate of the will, and the spiritual Court made an order on Lady *Osborn* to bring into Court £400 part of the assets she had received: For tho' the Delegates, in the case of *Powis* and *Andrews*, were of another opinion, yet in that very cause the House of Lords declared, that as the spiritual Courts had the jurisdiction to prove wills of personal estates, they had inherently a power to secure the effects whilst the will was in dispute.

Lord Chancellor. I was one of the Delegates in the case of *Powis* and *Andrews*, and our chief reason why we thought the spiritual Court could not call in the effects, was, because they might grant an administration *pendente lite*.

Dr. Henchman. The sentence in favour of the will was given *ex parte*, and we appealed instantly, and yet the Court was pleased to grant a probate to Lady *Osborn*, and to order her the £400 out of Court; notwithstanding an appeal from a final sentence suspends the sentence below, and ties up the Judges hands; upon this we obtained a common inhibition and citation for Lady *Osborn* to appear before the Delegates, and she not appearing at the return of it, we could only prosecute her for the contempt, and we could have no relief since from the Delegates, because there has been no court day: If she had appeared, the Court would have immediately ordered her to bring in the probate and the money; the defendant has no authority to collect in the effects for our appeal suspends the sentence, and it is unreasonable she should have the assets to defray the expence of this suit more than we: It is still in suspense, whether Mr. *Walsingham* made a will or not, neither side can yet claim the personal estate, and therefore it ought to be secured, and not delivered to either side, and the cause is now as much undetermined, as when the £400 was first ordered to be brought in, and therefore there is the same reason it should be brought into this Court, and the administration *pendente lite* determined on the granting the probate, and did not revive on the appeal, but the Court of Delegates will grant a new administration; and it will be for the benefit of all parties to appoint a receiver and to stay waste, for it is sworn that no care is taken of the real estate, but that it is let to run to ruin, we are heirs at law of the reversion of the third part, though the will should stand; and as she is tenant for life, she is answerable for any waste committed by strangers.

[310] *Mr. Solicitor General* for the defendants. It is a question, Whether the spiritual Court have a power to call in the effects or not; if they have, then the orders to pay in the £400 and to pay it out again, were good and legal; if they have not, then it was right in the Court to return the money to Lady *Osborn*, which was called in without authority; the bill is brought to impeach the will, or that Lady *Osborn* the executrix, may be declared a trustee of the residue of the personal estate for the next of kin. The will as to the personal estate cannot be litigated in this Court, as was settled by the House of Lords, the 11th of March 1727, in the case of *Kerrick* and *Bransby*; and she cannot be considered as a trustee for the next of kin, because she is the only surviving sister of the testator, and has no particular legacy left her (Ant. Cas. 80); but they say they are proper to pray an injunction to secure the effects, because we may make an ill use of the probate, but they forget that here is an administration *pendente lite*, and if the sentence is suspended by the appeal, the *lis* is still *pendens*; but suppose the administration determined by granting the probate, and not revived by the appeal, yet the presumption is in favour of Lady *Osborn*, and they have an absolute inhibition on her, precedent to the citation to appear, and which operates on the service of it, though she does not appear; and an injunction out of this Court cannot be of more avail, so this is not like the case of *Powis* and *Andrews*, here the proper Court has issued a proper process, there was a vast estate in the hands of a person worth nothing, and though the probate was called in, it was made use of in the mean time to receive several large sums; and suppose even a sentence should be given against the will, Lady *Osborn* will be intitled to one third of the personal estate, which

is of about £5000 value, and she has received but £400, and the plaintiffs have no title to call the money out of the hands of the administrator, because he gave security in the spiritual Court.

Mr. Mead. In the case of *Powis and Andrews*, the bill charged that the executor got in several effects, after the probate was called in, that he was only an executor in trust, and was worth nothing, and yet had set up a very rich equipage; the defendant demurred, which was a confession of the facts, and the plaintiff had liberty to move for the injunction, at the same time the demurrer came on to be argued: 'The true secret of this cause is, That Lady *Osborn* is above fourscore years of age, and takes the whole surplus of the personal estate as executrix, and therefore if the plaintiffs could delay the probate during her life-time, no right would vest in her, but Administration [311] *Cum Testamento annexo*, must be granted to the next of kin of Mr. *Walsingham*.

Lord Chancellor. There is no foundation for a receiver, or an injunction to stay waste, for the affidavits only say that the estate is untenanted and neglected, not that any waste is committed, or against the administrator *pendente lite*, for the authority is determined by the appeal, so that he can receive no more, and he has given security to answer for what he has received: If I should restrain the executrix from getting in the effects, and she should die intestate, the administrator, *De bonis non, &c.*, would have the residue; but the spiritual Court have granted an inhibition, and cannot grant an administration 'till the Court sits, so let an injunction go 'till answer, and further order, to restrain her from getting in any more of the assets, but not to bring in the £400, because that was paid out to her by order of a proper judge.

[312] DE TERM. PASCH. 1730.

Tuesday, April the 9th [1730].

MOTIONS.

Case 172.—BIRD *versus* OWEN.

At the Chancellor's house, Lord Chancellor.

A defendant by order may examine the *prochein amy*, but not one of the plaintiffs.

The defendant, on a petition to the *Master of the Rolls*, obtained an order to examine one of the plaintiffs, and the *prochein amy*, saving just exceptions; and a motion was made to discharge this order.

Lord Chancellor. The order must be discharged as to the plaintiff, but not as to the *prochein amy*, for there is the same reason why a defendant may examine a *prochein amy* as a co-defendant; because otherwise the plaintiff by making a material witness defendant or *prochein amy*, might rob the other defendants of the benefit of his testimony, and if he is examined to any point he is concerned in interest, he may demur; and though he is interested in the costs, this is no reason why he should not be examined for the defendant, but why he should not be examined for the plaintiff.

Case 173.—ANONYMUS.

At the Chancellor's house, Lord Chancellor. Eodem die.

By the standing rule of the Court, if the contemnor, being examined on interrogatories, denies the contempt, the prosecutor may take out a commission to examine witnesses to [313] prove it; and the contemnor can name only one commissioner, and may cross-examine the prosecutor's witnesses, but cannot examine any witnesses for him; but on proper affidavits the Court will give him leave to examine witnesses to some special points, as the *Lord Chancellor* did in this case, and declared that he thought it a very hard rule, and that since the prosecutor might examine one in contempt on interrogatories, he ought to be content with his oath.

Wednesday, April the 15th [1730].

MOTIONS.

Case 174.—Sir JOHN HIND COTTON and Lady COTTON *versus* TREFUSIS.

In Court, Lord Chancellor.

Ant. Cas. 113.

The defendant now shewed for cause, why the decree should not be made absolute, that he had put in a new answer; and the *Lord Chancellor* allowed the cause, and said, the plaintiffs must proceed upon the answer according to the rules of the Court, as in other cases.

Wednesday, April the 22d [1730].

Case 175.—CHESTER *versus* CHESTER.

[S. C. 3 P. Wms. 56. Commented on, *Morgan v. Surman*, 1808, 1 Taunt. 292.]

In Court, Lord Chancellor.

Mr. Wills for the plaintiff. Sir John Chester by a settlement in 1687, made on his marriage by Sir Anthony his father, being tenant for life, remainder to trustees to preserve contingent remainders, remainder to his first, and every other son in tail male, remainder to himself in fee of certain lands of the yearly value of £1100, on the marriage of his son William in 1716; Sir John and his said son joined in a common recovery of the said lands, in trust, as to part of the value of £400 a-year, to the use of William for life, then to Penelope his wife for life, for her jointure, and as to the remainder, to the use of William for life, remainder of the whole after the death of William and Penelope, to trustees for five hundred years, to raise portions for younger children, remainder to trustees to preserve the contingent remainders, remainder to the first, and every other son of the marriage in tail male, remainder to trustees for six hundred years, to raise portions for daughters, remainder [314] to the heirs male of the body of William, remainder to Sir John and his heirs.

Sir John, on the marriage of the defendant his son John, settled lands of the yearly value of £1600 to the use of John for life, remainder of part to his wife for life, for her jointure, remainder of the residue to John for life, remainder of the whole to trustees to preserve the contingent remainders, remainder to the first, and every other son of the marriage in tail male, remainder to Sir John in fee.

Sir John Chester being thus seized of the reversions of these lands, and of other lands in possession, made his will dated the 25th of January 1725, and devised to his son William and his heirs, some few parcel of lands in possession, and his goods in his house at Lickleston; and several legacies to his other children, and to his son John, the furniture of his house at Chigley for life, and after his death to his son; and all his personal estate to his wife Frances, his son John, and his son-in-law Mr. Toller, whom he made executors, and then he devised to his wife, and his said son-in-law, their executors, administrators, and assigns, 'All his messuages, lands, tenements, and hereditaments in Lickleston, Marston, and Milbrook, and elsewhere, not by him formerly settled or thereby otherwise disposed of, for the term of a hundred years, in trust, to apply the yearly rents and profits, to aid his personal estate in payment of his debts and legacies, and when they should be all paid, then he gave and devised the said messuages, lands, tenements, and hereditaments, to his son John Chester, and his heirs for ever.'

Sir John Chester, soon after the making this will died, and William his son, then Sir William Chester, is since also dead without issue male, leaving six infant daughters, who as heirs at law to Sir John Chester their grandfather, filed a bill by their *prochein amy* against Sir John Chester their uncle, the executors of Sir John Chester their grandfather, and the trustees of the terms of five hundred and six hundred years limited by the marriage settlement of Sir William their father: to be decreed the reversions of the lands in settlement, as heirs at law of Sir John Chester their grandfather, and the only question is, Whether these reversions belong to the plaintiffs as heirs at law of Sir John Chester their grandfather; or to the defendant Sir John

Chester, by the will of his father Sir John ? and though this is a question at law, the plaintiffs could not try it by ejectments, because the intermediate terms for five hundred and six hundred years are still subsisting.

[315] And it is plain from the words, and the intention of the testator, that the reversions of the lands in settlement do not pass to the defendant Sir John *Chester* by this will.

It is an established rule, that heirs are not to be disinherited but by express words, and that if the words are doubtful, they are to be expounded in their favour. The defendant relies on the words, *And elsewhere*, none of the lands in the settlement are mentioned in the will, except the capital messuage and some few parcels that lie in *Lickleston*, for all the rest of the lands lie out of the three places particularly mentioned, but the testator goes on, *Not by me formerly settled*, which words explain his intention ; he does not say, the estates not by him formerly settled, but all his messuages, &c., by him formerly settled, and therefore cannot pass, and these words can be put in to no other purpose but to exclude them ; the defendant would extend the words only to the estates settled, but then these words must be rejected as superfluous, for the word *Elsewhere* would pass these reversions, though these words had been left out, and they are different from the words, *Not by him formerly disposed of*, for the reversions in the testator were not disposed of, but they were formerly settled, and the words are of the same sense as if the testator had said, All his lands not comprized in any settlement, and the following words, *Or thereby otherwise disposed of*, shews that this was his meaning.

And the testator's intention appears further from the other parts of his will, the lands that lie in *Lickleston*, *Marston*, and *Milbrook*, are not above £400 a-year, and the lands settled in 1716, which are principally in question, are worth about £1100 a-year, and if the testator had designed to pass the reversion of these lands which are so much more valuable, would not he have particularly mentioned them ?

His personal estate was near sufficient to pay his debts and legacies, and these remote reversions were not proper for that purpose, and Sir William *Chester* might have barred the reversion of the lands settled on him.

The daughters (if these reversions do not pass) have not above £4000 to be equally divided among them for their portions.

Sir John devised several small parcels of land in fee to Sir William *Chester* of a very inconsiderable value, but with regard to the mansion-house, as the little piece of ground on which the water-house stands, that serves the capital seat with water, and cony-hills which adjoin to the park and mansion-house, and therefore it is reasonable to suppose that the testator [316] designed the reversions in fee should descend to the same heirs to whom he had devised these parcels.

Mr. Verney. The words *Or elsewhere* will not always take in, even what the testator is seized of in possession, if it is of a considerable value, 2 Ventr. 351 ; 1 Vern. 3, *Wynne* and *Littleton*, whereas the defendant would have lands of £1100 a-year pass by the words, *Or elsewhere*, though Sir John *Chester* has particularly devised lands of £400 a-year.

This case is very different from the case of *Sir Litton Strode* versus *Lady Russel*, 2 Vern. 621, there the words were, *All my other lands, &c., out of settlement*, and the reversions were out of settlement, and the words were general, *All my other lands* without any exception ; here the first words are general, and the following are by way of exception, and it is as if the testator had said, the settled lands shall go as they are limited, and I do not design to disturb the limitations, and these reversions were not estates left in Sir John *Chester*, but actually limited to him by the settlements, though in such a manner as he might dispose of them. In the case of *Hyley* and *Hyley*, 3 Mod. 228 (which is very near the same with this), it was adjudged, that the reversion did not pass ; and when a man excepts all his lands that are settled, shall any one say, he did not mean his whole estate in settlement, but only such a part of it as he could not dispose of.

In construction of wills, the testator's view is to be considered, which in this case was to create an immediate fund for the payment of his debts and legacies, and therefore he could not design to pass these remote reversions, and if they do not pass to his wife and son-in-law for the term of one hundred years, they do not pass to his son the defendant Sir John *Chester*.

Mr. Serjeant Eyre. The words that follow, *Or elsewhere*, must amount to an excep-

tion, or they are of no signification, for otherwise as much would pass by the words, *Or elsewhere*.

The trust of the term is to apply the yearly rents and profits, but what profits can be raised yearly out of such distant reversions? and those words cannot amount to a power to sell, because the debts are to be paid out of the annual profits. 1 Chan. Cas. 240, *Cary against Appleton*.

In the case of *Sir Litton Strode* and *Lady Russel*, the words do not come in by way of exception, and there all the limitations [317] determined at the death of the testator, in this case there are many intermediate estates, and in that case the testator had expressly devised to his wife, part of the lands in settlement, which shewed, that it was his intention to pass whatever he had a power over.

Mr. Peere Williams. A reversion in fee after an estate tail is not assets at law, or a proper fund for payment of debts; sure these lands were settled at the time *Sir John Chester* made his will, and are excepted by it, if he had expressly devised *the lands by him before settled*, these reversions would have passed, and will they pass by the words, *Not before by him settled*?

Mr. Attorney General for the defendant, Sir John Chester. All the estate of *Sir John Chester* was in settlement, but the lands particularly devised; *Sir William Chester* had been married twelve years, and had several daughters, but no issue male; and it was natural for the grandfather to prevent the estate from descending to the daughters, and to leave it to his son *Sir John*, who was to continue his name: And as we have proved that this was his intention, so he has used the most general words to that purpose; a reversion will pass by the word hereditament, and by all his hereditaments in such particular places, *Or elsewhere*, all the reversions the testator was seized of, will pass; and it is a rule in construction of wills, that no words that can have a meaning put on them, shall be rejected; but to what end could the words, *Or elsewhere* be made use of, but to pass these reversions? when the testator had no other lands, but these reversions, that lay out of *Lickleston, Marston, and Milbrook*, and he could not have made use of stronger or plainer words. The decree in the case of *Wynne and Littleton* went upon this reason, that the testator had only lands held in mortgage in the other counties, which would not have passed, though they had lain even in the particular places, because the testator had only his real estate in view.

The words, *Not by him formerly settled*, the plaintiffs say, exclude all his lands in settlement, but in the case of *Sir Litton Strode* and *Lady Russel*, though the words were stronger to enforce the objection, it was decreed otherwise, and that is an authority in point for us; there the words were, *All my other lands, &c.*, out of settlement, but these words, they say, are not by way of exception, the words neither in that case, or ours, are express words of exception, but they qualify and restrain the sense of the others; there it might be said the reversions were in settlement, for the word settlement might mean the deed whereby the estate passed; here the [318] words are, *Not by him formerly settled*: These reversions were not formerly settled, but were part of the old estate of *Sir John Chester*, remaining in him.

Lord Chancellor. You need not go on, for I shall not determine a case of this consequence without help, but let the cause stand over 'till the second day of causes in next Trinity term, at which time I shall desire the assistance of the Lord Chief Justice *Raymond*, Mr. Justice *Reynolds*, and Mr. Justice *Price* (Post, Cas. 180).

Tuesday, April the 21st [1730].

Case 176.—LEE versus ROOK.

At the Rolls.

If one borrow money for another on a mortgage of his estate, he may file a bill against him to pay off the mortgage money, and so may every surety against his principal, and shall not be put to his *indebitatus assumpsit*. And the covenant in the mortgage to pay the money will bind him, for it is properly his debt and his covenant, and the mortgagor is only a nominal person.

The defendant, whilst he was under age, borrowed several sums of money of Mr. Lee, and Mr. Lee and his wife joined in a fine, and mortgage of their estate to raise the money: The defendant after he came of age, promised to pay Mr. Lee what money he

had received from him, Mr. *Lee* died, and the plaintiff his wife, as his executrix, brought a bill against the defendant *Rook*, to redeem and pay off the mortgage money. And at the hearing of this cause, two questions were made, Whether this was a proper bill? And whether the defendant, since the statute of frauds and perjuries, could be bound by this contract concerning lands, which was never put into writing?

Master of the Rolls. The defendant, after he came of age, having promised to pay the money, this is to be considered as the case of a person of full age, and if I borrow money on a mortgage of my estate for another, I may come into equity (as every surety may against his principal) to have my estate disencumbered by him, and the covenant in the mortgage deed to pay the money, will bind the defendant, for the money being borrowed for him, it is his debt, and the testator of the plaintiff was only a nominal person, but since it does not appear what money the defendant received, the plaintiff by consent is to bring an *indebitatus assumpsit*, and the defendant is not to take advantage of the statute of limitations; and is to pay £120 to the plaintiff, admitted by his answer to have been received, and the bill is to be retained 'till after the trial.

[319] *Friday, April the 24th [1730].*

MOTIONS.

Case 177.—STAINES *versus* MADDOX.

In Court, Lord Chancellor.

The defendant who was decreed to pay the costs, being run away, and the *prochein amy* poor, the solicitor was paid his bill of costs, out of money lodged in Court for the benefit of the plaintiffs, during their infancy.

By the decree in this cause, the money recovered was brought into Court, and put out for the benefit of the infants, the plaintiffs, and the defendant was to pay costs, and he being run away, the solicitor for the plaintiffs moved the Court to have his bill of costs paid out of this money which was lodged in Court, and insisted that a solicitor was always considered to have a lien on the money recovered, because it was by his means, and at his expence. The *prochein amy*, who was father to the plaintiffs, and very poor, and stood liable to the solicitor, joined in the motion, and the infants the plaintiffs did not oppose it; and the *Lord Chancellor* granted the motion, but with some reluctance.

Saturday, April the 25th.

APPEALS AND REHEARINGS.

Case 178.—HORNSBY *versus* HORNSBY.

In Court, Lord Chancellor.

Sel. Cas. in Canc. 73, S. C.

One devises £300 to his 3 daughters at 21, or marriage, and if any died before, to go to the survivor, one died in the life-time of the testator, her legacy shall go to the surviving daughters. 2 Vern. 653, 116, 199; Swinb. in fol. 171. If a legacy is devised to A., to be paid at 21, and if he die before, to go over to B.; if A. dies an infant, B. shall take presently, and not wait till A. would be 21, for a devise over is to be considered as an original legacy.

1 Anders. 33, Cas. 82; Ant. Cas. 25; Swinb. part 1, sect. 7, 3; 1 Leon. 278; Perk. sect. 576, 567; 2 Vern. 92; Dyer, 59 b; 2 Vern. 138; Moor, 774, Cas. 1069; Yelv. 73; 1 Brownl. 85; Fulbeck's Parall. 1 part, fol. 42 b; part 4, sect. 17; Swinb. n. 9.

Mr. Attorney General for the plaintiff. Mr. *Hornsby* made his will, and devised to his executors, their heirs, executors, administrators, and assigns, all his real and personal estate, in trust, to sell with speed, and to pay his debts and legacies; 'and gave to his son *Joseph* £600, to be paid with all convenient speed, and to his son *George* £500, to be paid in convenient time after his decease, and in case either of his said sons, *Joseph* or *George*, should happen to die before they received his whole legacy, or any part of the

'said legacy, or the remainder so unpaid, was to be paid to the survivor, and if both died, their legacies were to go to his two younger sons': *George* died in the life-time of the testator; and the only question in this cause is, Whether his legacy is lapsed, or survives to his brother *Joseph*? And this legacy must survive, 2 Vern. 207. Sir *John Borlace* devises to *N. Miller* £1500 to be paid him at twenty-one, to *B. Miller* £1500 when he shall attain the like age; to *E. Miller* £1500 to be paid at eighteen years of age, or marriage; the like to *M. Miller* (1 Vern. 425); and in case one or more of the aforesaid children should happen to die before his, her, or their respective [320] legacy, or legacies, shall become due to them as aforesaid, his, her, or their legacy, or legacies shall be equally divided amongst the survivors of them; and in case three of them shall happen to die before their respective ages, or days of marriage, their aforesaid legacies shall be and remain to the survivor of them. *M. Miller* died in the life-time of the testator, and it was decreed her £1500 should survive. 2 Vern. 378. £50 is given to *Darrel Trelawny* at twenty-one or marriage, and £50 to *Elizabeth Trelawny* at twenty-one or marriage, and if any legatee died before their legacy was payable, it was to go to the brothers and sisters of such legatee. *Darrel* died in the life-time of the testator, and it was adjudged no lapsed legacy, and that it should go to his sister. 2 Vern. 611, one devised £300 a-piece to his three daughters, at twenty-one or marriage, and if any died before, to go to the survivor; one died in the life-time of the testator, her legacy shall go to the surviving daughters: And the foundation of all these decrees is, that the devise over is to be considered as an original legacy, and for this reason your lordship decreed, where a legacy was given to A., to be paid at twenty-one, and if he died before, to go over, and A. died before twenty-one, that he to whom the legacy was devised over, should be paid it immediately, and not wait till A. would arrive at twenty-one, and so is the case of *Papworth* and *Moor*, 2 Vern. 283, so it is the same thing whether *George* die before, or after the testator.

Mr. Solicitor General for the defendant. This legacy is plainly lapsed as to *George*, but the question is, Whether it is a good legacy as to *Joseph*; he says, it is an original devise to him: No, it is first given to *George*, and given over upon a contingency to him, and though the will is made in the life-time of the testator, it cannot take place till after his death, and therefore when he provides for a contingency, he must mean for a contingency to happen after his death, and since this contingency could never arise, *Joseph* could have no title; and this is plain from the words of the will, *And in case either should happen to die before they received, &c.*, that is, if the legacies once vested, but were not paid, but the legacy never vested in *George*, and these words distinguish this from the cases that have been mentioned; there the words are, If one dies before the legacy becomes due or payable, so if the legatee died in the life-time of the testator, he came within the words, He died before the legacy was due or payable; but here the legacy is to be paid in convenient time after the testator's death, no part could be received till after his death, but if it vested, and part was received, the rest was to go over.

[321] *Lord Chancellor.* These are considered as immediate devises, which was the reason why the Court first allowed a devise over of a personalty. Here is a devise to two persons to be paid in convenient time after the testator's death, and if either die before the whole, or part is received, the whole, or the remainder is to survive to the other, and one of them dies in the life-time of the testator, his legacy shall go over to the other: This case does not differ from those that have been cited, and the defendant has not produced an authority to the contrary: So if lands are devised to A. for life, or in remainder to B. in fee, if A. dies in the life-time of the devisor, B. shall take immediately, though it is plain the testator did not design him an estate in possession; and though the legacy is lapsed as to the first taker, yet the next man shall have it immediately; so the decree by default for the plaintiff must be made absolute.

Friday and Saturday, May the 1st and 2d [1730].

Case 179.—*Mrs. DIANA HOSIER, Plaintiff; Mr. HART, and FRANCES DIANA, his wife, the daughter of the plaintiff, Mr. HAWES, the next of kin of the late Admiral HOSIER, deceased, and Mr. BAKER, his heir at law, Defendants.*

In Court, Lord Chancellor. Master of the Rolls:

Mr. Solicitor General for the defendant Baker. The bill is brought to perpetuate the testimony of witnesses of the marriage of the plaintiff with the late Admiral *Hosier*,

C. v.—14

and the legitimacy of her daughter, the defendant, Mrs. *Hart*. And the defendant *Baker* has preferred this petition to your lordship, that the depositions of Mr. *Philips* taken in this cause may be suppressed, and that the plaintiff, the defendant *Hart*, and Mr. *Reynolds*, the examining clerk, may be committed.

The plaintiff, and the defendant Mrs. *Hart*, as wife and daughter of the late Admiral *Hosier*, brought an ejectment for the recovery of his real estate, and had a verdict chiefly on the evidence of Mr. *Philips*, who swore that he baptized Mrs. *Hart*, and that being afterwards in the *West Indies* a chaplain to a man of war, and relating the marriage, and birth of the [322] daughter among the sea officers, and it coming to the ears of the Admiral, he was at first greatly offended with him, but at last owned to him they were his wife and daughter, and damned all church security; this evidence he gave upon the trial, and his depositions taken in this cause were obtained by corruption, and we hope your lordship will suppress these depositions for that reason, and for the irregularity in taking them.

Mrs. *Hosier* entered into two bonds to the said *Philips*, each of the penalty of £1000, one for the payment of £500 and the other for the payment of £50 a-year to him for life, as a reward for what he was to swear at the said trial; but before the trial, the plaintiff being apprehensive that if upon his examination these bonds came to light (which she had heard Mr. *Hawes* had come to a knowledge of from Mr. *Broom*, the parish clerk), the Court would not allow his evidence, she took up these two bonds, and she and Mr. *Hart* gave another of £1000 to *Mary Thompson*, in trust, for Mr. *Philips*, and which she indorsed in these words, *I assign this bond to Mr. Philips whose right it is; and Mary Thompson signed this indorsement, and Philips before and after the trial often said, the bond was given him as a reward, and refused to go down to the assizes, unless the plaintiff gave him ten guineas; and some time after the trial he swore, if the plaintiff would not give him an hundred guineas, the cause should yet go against her; and often said, it was a pity Mr. Hosier's relations should be wronged by such a woman, and that he would not do again what he had done for her to gain the Admiral's whole estate, and that he no more believed she was married to the Admiral, than the dog that was passing across the room while he spoke; and the plaintiff allowed him a guinea a week till his death.*

After the trial, the bond being put in suit, the parties came to a new agreement, and the plaintiff gave a note of £50 to Mr. *Philips*, which has been since paid, and a bond of £1000 to *Mary Thompson* defeasanced, not to be put in suit till three months after the plaintiff had obtained administration of the personal estate of the late Admiral: Then the plaintiff brings this bill to perpetuate the testimony of her witnesses, and particularly of Mr. *Philips*, who being very ill the day he was to be examined, after he had been sworn by the Master, he refused to let the examiner take his depositions, unless the plaintiff would advance him ten guineas, so his examination was deferred till the next day, when she brought the money, and whilst the clerk was taking his evidence, he knocked, and the plaintiff and *Mary Thompson* came up, and the plaintiff in discourse with Mr. *Philips* said, Good God! Cousin, how can you forget yourself so? You have strangely lost your memory, and *Mary Thompson* coming first down, and being asked what Mrs. [323] *Hosier* did above, she said she was refreshing Mr. *Philips's* memory, and when the plaintiff came down, she said to *Mary Thompson*, *Molly*, Mr. *Philips's* memory is quite gone, he knew the Admiral above twenty years ago, and now he swears he knew him but five years before his death, and the plaintiff after went up again by herself, and when she came down, she said, she would not for a great deal have been out of the house; and the examiner when he came down, told the plaintiff, upon her asking him how he had performed, that he had at last answered to his satisfaction; and Mr. *Philips* afterwards declared, that he was very sorry for what he had done, that his evidence was false, that he had injured the Admiral's relations, that he had not baptized the child, or ever seen the Admiral, and desired that what he said might not be made publick till after his death.

These bonds are admitted by the affidavits for the plaintiff to have been given to Mr. *Philips*, but not to induce him to give his testimony, but to borrow money on them, to enable Mrs. *Hosier* to go on with her law-suit; but did ever any one enter into a bond to another to pay him £50 a year for his life, as a fund to borrow money on? and he never borrowed but £30 on these securities, of Mr. *Rogers*, and that was for himself, but the defeasance of the last bond plainly proves, it was given as a reward to him to give such evidence as would procure her the administration; because he was not before

to have the benefit of the bond, but it could not be designed as a security for borrowing money, because the payment depended on a fact which might never happen, and this appears from his own letters; and being asked if the bonds were given to raise money on, he denied it, and said they were given for a purpose not fit to be mentioned, but which they very well knew, and that the last bond was given in consideration of his delivering up the others, and giving his evidence, and he has disposed of this bond by his will, as part of his estate. As to the irregularity, Mr. *Philips* ought to have attended the examiner alone, or the examiner him, and the plaintiff ought not to have been in the room during the examination; and as this is a bill purely to perpetuate testimony, it is proper for us to apply to your lordship in this manner to suppress these depositions, and all these facts we have made out by our affidavits.

The affidavits of the plaintiff, and of those that were sworn for her, were to this purpose.

Mrs. *Hosier* swore that she was acquainted with Mr. *Philips* several years, and that they went to school together at *Shrewsbury*, and that knowing how she was straitened for money, he proposed, and did raise her several small sums by [324] assignment of the bonds; and others swore, that *Philips* had endeavoured to borrow money of them on these bonds, for the plaintiffs use, as he told them, and she denied the bonds were given him as a reward or on any other occasion, only to raise £100 for himself, in case he should be arrested going to the trial, and that being told the subpoena was a sufficient security, he promised to deliver them up; that *Mary Thompson* told her, she or Mr. *Hart* should never see Mr. *Philips* to serve him with a subpoena, unless they gave him the bond of £1000, that she would endeavour to persuade her aunt to advance the money, and that she might be prevailed upon to leave her that bond; and that she believed *Mary Thompson* kept him out of the way for this purpose, and that Mr. *Philips* was so sensible of it, that he promised after the trial to deliver up this bond; that this objection to the bond was made at the trial and over-ruled, and Mr. *Philips* was examined, and swore, that the Vice-Admiral owned the plaintiff and Mrs. *Hart* for his wife and daughter, that they never heard *Philips* make any such declarations, but that he always said he had sworn the truth and wished the plaintiff and Mrs. *Hart* might long enjoy the estate; that she gave the note for £50 because *Mary Thompson* said she had pledged the bond for that sum, and that she gave the last bond for fear her bail should surrender her up, and that *Mary Thompson* has often promised to deliver up the bond, or to raise her money on it; that she brought this bill to perpetuate the testimony of Mr. *Philips*, because he designed to go teach school in *Ireland*, and that she maintained him, to keep him in *London* 'till he was examined, but denied that there was any contract for that purpose or any allowance, that she lent him ten guineas to pay for his lodging, but denied that he refused to be examined 'till she did, but put off his examination 'till the next day, that he might have clean linen: She denied that she had any such discourse with *Philips*, or *Mary Thompson*, relating to the cause, or with the examiner, or that he made her such answer, that they went up to give Mr. *Philips* wine because he was faint (but it was sworn on the other side that the wine was in the room, and given him before the examination), that the plaintiff had been often heard to say, that *Mary Thompson* had twice cheated her, and that she had given instructions for a bill to be filed against her to deliver up the bond, that *Philips* said he knew Admiral *Hosier* twenty years, that he always spoke in the plaintiff's favour, and declared in his last illness, that he was glad he had done her justice, and that she had a great many enemies; and that the plaintiff pressing him for the bond, he bid her be easy, and said, By the living God you shall have it: That the Admiral owned that the plaintiff was his wife, and Mrs. *Hart* his daughter.

[325] Mr. *Reynolds*, the examining clerk (whose affidavit was also read), being examined *viva voce*, declared, that Mr. *Philips* was very willing to be examined, though he was very sick and weak in bed, that growing faint, he desired somebody might be called up to give him wine, that upon his knocking, the plaintiff came up, and gave him some, and then went out, and that she did not prompt him, or complain that he had lost his memory, and that he did not examine him while any body was present; that one of the interrogatories being of the plaintiff's family, Mr. *Philips* said, he had forgot where her father lived in *Wales*, and desired the plaintiff might be called up, and when she came, she informed him, that Mr. *Philips* at first swore he knew the Admiral but five years, but that when he read his depositions over to him, he said he mistook, he knew him seventeen years, that he signed the depositions, and said they

were true, that *Mary Thompson* met him as he came down, and asked him if Mr. *Philips* had done Mrs. *Hosier* justice, and he told her he hoped he had.

Mr. Attorney General for the defendants, Hart and his wife. It will be of the utmost ill consequence to us to suppress the depositions of so material a witness after his death, for our evidence of what he swore on the trial, must be very uncertain. If a witness concerned in interest is examined, his depositions are not of course to be suppressed, but it is an objection at the hearing of the cause, against their being read, as it would take off his evidence at a trial, and so as to what relates to his credit, and it is the practice of the Court to exhibit articles to the credit of a witness, but it will depend on the evidence, when the cause is heard, whether the depositions shall be suppressed or not, and this is a bill for relief, as well as to perpetuate testimony, and what they have sworn, they may give in evidence on a new trial, and may encounter the evidence of Mr. *Philips* by these witnesses, as they did at the former trial. So then the question will turn on the irregularity of the examination, the witness was sick in bed, and during a long examination grew faint, and desires some wine, the examiner knocks, and the plaintiff and another come up, and give him wine, and then go down again, and the examiner goes on; this is not a sufficient foundation to suppress the depositions, if a witness is examined at the office, nobody is suffered to be present, but in the course of a long examination if the witness is tired, they let him go out of the office, and it is often impossible to do otherwise, for an examination sometimes holds two or three days, and then the witness may see whom he pleases, and if a witness in the course of his examination wants relief, it is no fault in the examiner to call for it, and though it happened that the plaintiff was one [326] of the persons who came up, that is no reason to set aside the depositions, if she said nothing to prompt him, and the examination stopped while she was present; afterwards the witness could not recollect the name of a place, and the plaintiff informs him, sure this is not a good cause to suppress the whole deposition when it has no influence on the material part of it, and it would be hard that Mr. *Hart* and his wife, who are most concerned in interest should lose the benefit of all the depositions, when the witness might have gone out on pretended business, and asked that or any other question.

Mr. Verney for the defendant, Baker. Our objections are not only to the credit of Mr. *Philips*, but to his competency, and, if what is sworn against him, was proved at a trial against a witness, the Court would not suffer him to be examined; and though here his examination is first taken, our affidavits are not only sufficient to discredit his depositions, when they come to be read at the hearing, but to hinder them from being read, and to have them suppressed.

Master of the Rolls. These depositions ought to be suppressed for irregularity. A witness under examination at the office may go abroad, from the necessity of the thing, and though this is a great inconvenience, it is impossible to remedy it without depriving the witnesses of their liberty, and confining them 'till their examination is over, but here the witness is not dismissed, but the plaintiff is suffered to instruct him, which is a gross irregularity, and owned by the examiner himself: If a witness is uncertain, or at a loss, as to any question, the examiner ought to take it down that he is so, and not suffer him to inquire of the party concerned, and it is of no consequence whether the question the witness asked the plaintiff was a material question or not; for if it should once be allowed that an examiner might suffer a witness to inform himself in an immaterial point, it would raise endless disputes what was so; but there must be a general rule in all cases; for as the justice of the Court depends on these paper depositions, great strictness ought to be observed in the taking them: So if he was examined in the office, the examiner ought not to let him go abroad for information, or break off in the middle of an interrogatory, but keep him 'till he has finished his examination to that interrogatory, and therefore long interrogatories are in themselves an irregularity. What the examiner has sworn, gives great weight to what is sworn against him: *Mary Thompson* says that when the plaintiff came down, she complained that Mr. *Philips* had lost his memory, and that he had sworn he knew the Admiral [327] only five years, and the examiner owns he first swore so, and then he is no witness to the marriage, which was several years before; and this shakes the credit of the examiner, and confirms their affidavits; and this examination was not only irregular, but procured by the practice of the plaintiff, and is a very foul examination, the examiner knew the plaintiff had been once at her lodgings, and entertained by her, and she was in the house at the time of the examination; and truly the deposi-

tions of such a man as Mr. *Philips* appears to be from these affidavits, is not worth preserving, and makes way for the belief of what they have sworn, and is confirmed by the defeasance, for when the plaintiff had got administration committed to her, she had carried her point ; so here is a foul practice and irregularity in obtaining this evidence, and as Mr. *Philips* was examined at the trial, by producing the record, they may swear to the evidence he gave.

I refer to his lordship what punishment the examiner shall suffer, who I think ought not to be trusted for the future in the office.

Lord Chancellor. I agree with his Honour the *Master of the Rolls*, this is a bill to perpetuate the testimony of the plaintiff's witnesses of her marriage, Mr. *Philips* is her witness only, and the question is, Whether his depositions ought to be suppressed ? At a trial at law, as Mr. *Verney* observes, if a witness is proved to be corrupted, he is not suffered to give evidence ; here indeed he is first examined, and the question is, Whether the depositions of an incompetent or corrupt witness shall stand on the records of this Court, when the parties are perhaps dead who could prove the corruption, and which were taken in a foul and irregular manner ; the clerk knew the plaintiff, and she was in the house when he came to examine, some have sworn that the wine and table stood in the room when the examiner went up ; the examiner knocked, upon the witness growing faint, and Mrs. *Thompson* came up, and *Philips* asked her for Mrs. *Hosier*, and Mrs. *Thompson* called her to him, she swears the examiner bid her, and that she heard Mrs. *Hosier* say to Mr. *Philips*, Sure your memory is very bad, when you say you knew the Admiral only five years, and others swear, Mrs. *Thompson* told them Mrs. *Hosier* was above refreshing his memory, and this is confirmed by the examiner ; the witness pauses a second time, and then Mrs. *Hosier* is called up again : Can there be a greater misdemeanor than to let the party come up to instruct the evidence ? therefore these depositions must be set aside, the examining clerk committed, and discharged for unfair and irregular practice, and the plaintiff must pay the costs of this application, and of all the affidavits.

[328] *Wednesday, May the 6th [1730].*

Case 180.—ANONYMUS.

In Court, Lord Chancellor.

The creditors of a feme covert file a bill after her death, to be paid out of a trust estate for her sole and separate use. The Court decreed, that all the creditors should be paid *pari passu*, and a mortgage and bond creditor were not to be preferred, because a feme covert by law could not make a mortgage, or enter into a bond.

But that her executor, who was a creditor, might retain his debt, though the estate stood out in trust, but not the trustee. Ant. Cas. 78. See the next following case. Ant. Cas. 61 ; 2 Chan. Cas. 54.

Mr. *Guyon* settled £800 in trust, for the sole and separate use of his wife, and to be at her disposal, by deed or will, and he was to be indemnify'd from her debts ; the wife made a will and died, her creditors file a bill against the husband, executor, and trustee, for payment of their debts ; and the *Lord Chancellor* decreed, that the husband should be indemnified out of the assets, and all parties paid their costs ; in the first place, that the creditors should be paid *pari passu*, and that her trustee, who was a creditor, a mortgagee, and a creditor by bond, should have no preference, because a feme covert by law could not make a mortgage, or enter into a bond ; but it was void, and she might plead *Non est factum*, but the executor, who was a creditor, had liberty to retain his debt, and the expences of the funeral, and probate of the will, though the assets were in the hands of a trustee.

Wednesday, May the 13th [1730].

Case 181.—HALL *versus* KENDALL

At the Rolls.

Mr. *Wright*, by articles previous to his marriage with *Mary*, one of the defendants, covenanted to lay out £800 in iron works, and that the profit and produce of the trade,

in case his wife survived him, should go to her for her life, and after her decease to their children, in such proportion as Mr. *Wright* should appoint, and for want of such appointment, share and share alike.

Mr. *Wright* made his will, and his wife and two others executors, and taking upon him to dispose of his whole real and personal estate, he directed all his stock in the iron works, and all his personal estate to be sold for the payment of his debts ; and devised all his real estate to his executors, and their heirs, in trust, to pay to his wife £40 a year for life in lieu of the provision made for her by the marriage articles, and to pay his debts. The executors contract with the plaintiff for sale of part of the lands, and agree he shall discount out of the purchase money £400 the testator owed him by simple contract, and afterwards contract with him for the purchase of the rest of the lands, and agree he shall retain out of the purchase money £200 which Mr. *Wright* owed by bond to the plaintiff's brother, whose representative the plaintiff is, the plaintiff [329] files his bill for a specific execution of these articles, and the wife insists, that she is a creditor by specialty, and ought to be preferred to the demands of the plaintiff, and that if the Court should establish these articles, they would decree the executors to commit a devastavit, the assets being deficient to satisfy all the creditors ; and the great question is, Whether the money raised by sale of the estate is to be considered as legal, or as equitable assets, in the hands of the executors ?

Master of the Rolls. In the case of *Degg and Degg*, where an estate was devised to executors and their heirs, in trust, to sell for payment of debts, I decreed that the money raised by the sale was not legal assets, and the decree was affirmed on appeal by the Earl of *Macclesfield* : But if an authority is given to executors to sell for payment of debts, or if the estate is devised to them and their heirs, to sell to pay debts, the money arising by the sale is assets at law ; but where the estate is devised to them in trust, calling them executors, It is only considered as describing the persons who are to sell, and I always strongly incline to an equality among creditors (Cro. El. 524 (54)).

Mr. Attorney General for the plaintiff. The executors, by the articles, expressly agree, that we shall retain what is due to us out of the purchase money, this retainer was part of the terms of our purchase, and the reason why we gave so much for the estate, and the executors cannot take advantage of one part of the agreement, unless they will perform the whole ; and *Mary* cannot defeat these articles, which she herself entered into. Here is a general and special trust reposed in the executors, which they may be compelled to perform in this Court.

In the case of *Degg and Degg*, the lands were devised to persons (who were afterwards made executors) and their heirs, in trust, for payment of debts, the creditors by specialty had received part satisfaction of their debts out of the personal estate ; and they insisted to be paid the residue, preferable to the other creditors, out of the money raised by sale of the real estate, and this brought on the question, Whether the money was assets or not ? and your Honour decreed they should receive nothing out of this money, till the other creditors had received as much in proportion as they had out of the personal estate, and the reason of this decree was, that by the statute of fraudulent devises, a devise of lands is void against a bond creditor, except the devise is for payment of debts, so this devise stood as at common law, and the descent being broke by it, the bond creditors had no lien on the lands, [330] but could only come into this Court to have the trust performed.

Mr. Lutwyche for the defendant Mary. A devise of lands to executors to sell, implies a trust, so I do not see how such a devise differs from an express devise in trust, &c., and executors being in all cases trustees by their office, it is the same thing whether the trust to sell, is expressed or implied ; and a creditor, by taking a superior security, depends upon his having gained a preference to the other creditors. Here the estate is expressly devised to them by the name of executors ; in the case of *Degg and Degg*, the estate was devised to them by their particular names, in trust, and in the following part of the will they were made executors, and the Court therefore would not join together their office of executor and trustee ; and the statute of fraudulent devises will make no alteration in this case, for all devises, before the statute, broke the descent, and left nothing in the heir.

Master of the Rolls. An executor or administrator is not a trustee by his office, for then he would be accountable only in a Court of equity, and not at law : This case is stronger than the case of *Degg and Degg*, this is a trust for a particular purpose, to pay £40 a year to the wife, and she may make her election, to take by the articles or

the will, and she chuses to stand by the articles, whereby she has a specifick lien on the stock for so much as it amounts to (for it was in the contemplation of the parties that the £800 should be invested in the iron works), and let the Master take an account of the real and personal estate, and if there is not enough to pay all the debts, she must be paid the residue in equal proportion with the other creditors, and in computing what her proportion will amount to, an account must be taken of what is due to her for principal and interest, and the plaintiff cannot retain, but after the account is taken, he may consider whether he will go on with the articles without retaining; for I adjudged the money raised by the sale of the lands not to be assets at law, and I am sure there are a hundred such decrees; for I think the testator designed this a trust in the executors, to be performed under the direction of this Court, and not a legal interest, such as the law gives them. Ant. Cas. 61; Cas. 78; Cas. 115. And a creditor by specialty must be paid in proportion to what his principal and interest amount to. Nels. Fol. Rep. in Canc. 88, 195, 478; 2 Vern. 763, 61, 435, 106, 133, 405, 248; 1 Chan. Cas. 32, 248; 1 Vern. 101, 63, 482; 2 Chan. Cas. 54; 1 Lev. 224; Wentw. Off. of Ex. 46, 50, 73, 74; 1 Vern. 69; Stat. 21 H. 8, ch. 5; Dyer, 234; Swinb. part 6, sect. 7, n. 7; Dyer, 152, 264.)

[331] DE TERM. S. TRIN. 1730, IN CUR. CANCELLARIÆ.

Tuesday, May the 26th [1730].

MOTIONS.

Case 182.—ANONYMUS.

At the Chancellor's house, Lord Chancellor.

The order of taxation impowers the Master to examine the solicitor on personal interrogatories, only what money he has received, but may move on proper affidavits for the Master to examine him to his disbursements.

The usual order was made, that Mr. *Haywood*, a solicitor's bill, should be rated by a Master, and he be examined on interrogatories what money he had received; and it was now moved, that he should be examined on interrogatories what sums he had paid to counsel, and other persons, on affidavit, of his having charged several items which the party himself had disbursed; and the *Lord Chancellor* seemed very unwilling to break in upon the usual course of the Court, but made an order, that the Master, in the course of the taxation, might if he thought proper, examine him on oath to any items contained in the affidavits, but not to any other.

But afterwards on a motion to the *Master of the Rolls*, a general liberty was given to the Master to examine him on oath; and his Honour said, he thought it very reasonable, he should be obliged to clear up every thing in that manner.

[332] *Thursday, May the 28th [1730].*

Case 183.—*Ex parte* FERRARS.

At the Chancellor's house, Lord Chancellor.

A lunatick having recovered his understanding, petitioned for a *supersedeas* of the commission, but the Court only suspended it for some months, to see if he was perfectly recovered, because he had often relapsed, and was found by the inquisition, a lunatick with lucid intervals. Ant. Cas. 49; 1 Vern. 155.

Earl *Ferrars* petitioned the Court, that the inquisition might be quashed, the commission of lunacy superseded, and that he might have his liberty, being restored to his senses; and he appeared personally in Court, with his sister Lady *Betty Shirley* the committee of his person, and Dr. *Monroe* his physician, who made an affidavit, that the Earl was restored to his senses for four or five months last past; and being examined likewise in Court, he declared, he believed there was no danger of a relapse,

because he was greatly afraid of running into any excesses, which might bring on a return of his disorder, which physicians always looked upon as a very good symptom ; but this petition was opposed by Mr. *Lawrence Shirley*, brother to the Earl, and the committee of his estate, because the inquisition found him a lunatick with lucid intervals ; and the surgeon and apothecary, who formerly attended him, made affidavit, that after a salivation by Doctor *Hale*, he had enjoyed his senses for a longer time, and yet relapsed ; upon which the Doctor gave him over, as incurable, and that since that time, whilst he was under the care of Doctor *Lewis*, he enjoyed a sanity of mind for several months after a violent fever, and yet his distemper returned, and therefore his counsel humbly submitted to his lordship, whether it was not more adviseable only to suspend the commission till after the fall of the leaf, to see whether his recovery was perfect or not ; and mentioned the case of Mr. *Vincent*, a *Yorkshire* gentleman, where his lordship had made the like order. And the Lord Chancellor made an order, that the Earl should have his full liberty, but that the *cassetur* of the inquisition, and the *supersedeas* of the commission should be suspended 'till the first day of petitions before *Michaelmas* term.

[333] *Monday, June the 1st [1730].*

Case 184.—CHAMBERS, an infant, under the age of twenty-one years, by his prochein amy, *Plaintiff* ; JOHN CHAMBERS his father, and ELIZABETH his wife, and his younger brothers and sisters, and the Earl of EXETER, *Defendants*.

In Court, Lord Chancellor.

Mr. Solicitor General for the plaintiff. *William Chambers*, on the marriage of his son *John*, the defendant, with *Elizabeth Greenwood*, by articles bearing date the 18th of *July* 1718, covenanted to add £3000 to the portion of *Elizabeth*, which was £3000, and that the £6000 should be paid into the hands of trustees, to be invested in a purchase of lands, to the use of *John* for life, remainder to *Elizabeth* for life, remainder to trustees to preserve contingent remainders, remainder to the first, and every other son of the marriage in tail male, remainder to *John* in fee, and two termes were to be limited to trustees, one to raise £2000 for the portions of younger children, payable at twenty-one, or marriage, or £1000 for the portion of a younger child, the other for raising £3000 for the portions of daughters, in case there was no issue male of the marriage, and the money was to be put out on Government, or other securities, at the discretion of the trustees, 'till a proper purchase could be found, and the interest of the money was to go as the profits of the lands when purchased, and the father further covenanted, on or before the marriage, to settle his messuage and lands in *Derby*, to the use of himself for life without impeachment of waste, remainder as to part, to *Elizabeth* his wife for life, remainder of the whole, to the use of his son *John*, and the heirs male of his body, remainder to himself in fee, the marriage took effect. In 1720, the money which stood out in South Sea annuities, was subscribed by the trustees into the South Sea Company ; and by the loss of that year was reduced to about £3000, which have never been laid out in a purchase. *William Chambers* having made no settlement, the lands in *Derby*, on his death, descended on the defendant *John*, who conveyed them to trustees and their heirs, to the use of himself and the heirs male of his body, remainder to the heirs of *William* in fee, [334] and has since barred the intail by a common recovery, and the eldest son of *John* filed this bill against the trustees, his father, mother, and brothers and sisters, to have the money laid out in a purchase of lands, to be settled, pursuant to the articles, and the younger children to abate in proportion to the loss, and the lands in *Derby* conveyed in strict settlement. This loss must not fall on the trustees, for not only the act of Parliament indemnifies them, but the articles also authorize them to place out the money as they pleased ; and therefore the justice of this case is, that the younger children should abate in proportion with the elder son, and as by the articles they were to have £2000, which is one third of the whole money, and if there was no son, the daughters were to have £3000, which is the half of the money ; so they ought to have the same proportion of what is left, whereas if the younger children are to have the whole £2000, they will have twice as much as the plaintiff, and the Court will not put this construction on the articles, so contrary to the intention of the parties, and therefore as we were at first intitled to two thirds, and they to one, the loss ought to be borne in that proportion.

The next question is, How the estate in *Derby* is to be settled? *John* contends, that by the articles he is to be tenant in tail, and that he settled the lands in that manner, and has since barred the intail by a common recovery: If this is the meaning of the articles, it is in vain to pray a settlement, which he may destroy as soon as it is created; but this is a reason why the Court should not direct so vain a settlement, but a strict settlement to be made, as hath been done in many cases, as in the case of *West and Erisey*: By articles of marriage, lands were covenanted to be settled on *Richard Erisey* for life, without impeachment of waste, remainder to the heirs male of the marriage, remainder to the heirs male of *Richard Erisey* by any other wife, remainder to the heirs female of the marriage, &c., with a power to *Richard* to make leases; and a settlement was made in the words of the articles: The marriage took effect, and *Richard Erisey* suffered common recoveries of the lands, and sold great part of them, and devised the remainder, and died without issue male, and the issue female of the marriage filed a bill to have the lands settled in strict settlement, according to the intent of the articles, and to have a satisfaction out of the assets of *Richard Erisey* for the lands he sold: The bill was dismissed by the Court of Exchequer, December the 12th 1720, but this decree was reversed by the House of Lords, the 12th of February 1727, and a decree was made according to the prayer of the bill, though the settlement was made before marriage.

[335] *Mr. Attorney General* for the defendants. The council for the plaintiff have produced an instance, where the loss has been decreed to fall on one who has a charge on the inheritance; the charge is certain, the value of the lands to be purchased is uncertain, and the charge remains the same, whether the lands to be purchased are of more or less value; and the money being to be laid out in lands, is to be considered as a real estate, and if the lands had been purchased and fallen in value, yet this certain pecuniary charge must have been raised: The money at the time of the articles was invested in South Sea annuities, which might fall in value, yet the parties have not provided for an abatement, if such a case happened. Suppose the stock had rose according to the expectation of the parties, the younger children would have been no gainers by the rise, but the plaintiff would have had all the benefit: so by parity of reason, he ought to bear the loss, and if the money had been laid out in lands, mines, escheats, and other casual profits would have been his.

The general rule relating to marriage articles is, that where lands are covenanted to be settled in tail male, a strict settlement shall be made, if the intention of the parties does not appear to the contrary, because otherwise they shall be supposed to have meant such a settlement; but in this case the parties have declared their intention to the contrary. *William Chambers* knew what a strict settlement was, and has covenanted that the lands to be purchased shall be settled in that manner, but when he further covenants to settle his own lands, he has used a different form of words, which plainly shew his intention to be different, and he has limited different uses of the same lands: He is made expressly tenant for life, and *John* tenant in tail, and this construction of the words is according to law, and the covenant is to settle on *John* and the heirs male of his body generally, and not said by his intended wife, and so it is not to be considered as part of the marriage contract, but as a further advancement of his son.

Lord Chancellor. If the younger children happen to die before the age of twenty-one years, or marriage, these contingent portions will never become due. Suppose the money had been invested in a purchase, the younger children would have had no advantage of any accidental profits, but been only intitled to the sum charged, and in case of a loss, would have had no remedy against the heir; but here the money is not yet laid out in a purchase, and a deficiency happens, by placing it out in a lawful way, [336] allowed by act of Parliament, which includes the consent of every one; and the trustees had also the authority of the parties to dispose of it at their pleasure; if any gain had been made it would have gone to all the children in proportion, as hath been often adjudged in this Court: And now a loss has happened, if the same proportion of what remains be given to the younger children, they have all that was designed them: The parties to the articles never designed that they should have two thirds of the money, but one third only, and designed to provide for all the children; and therefore the defendants must abate in proportion to the loss.

As to the other question, Where a provision is made for children by marriage articles, the Court will take care that an effectual settlement is made on them, but these lands were not designed as a provision for the children, but only the lands to be

settled in strict settlement; and therefore there is no reason to alter the nature and quality of the estate, which is expressly an estate in tail, and the covenant is said to be only in consideration of the marriage, and not of the children. (2 Vern. 670, 551, 702.)

Tuesday, June the 2d [1730].

Case 185.—HINTON *versus* SCOT, & al'.

At the Rolls.

The husband in poor circumstances, and his wife wholly unprovided for, settles her orphanage part in trust, for her sole and separate use, his creditors prior to this assignment, shall not set it aside, or have the interest of the money during his life, for this is a reasonable settlement, and such as the Court would have obliged the husband to make, if he had sued for her orphanage part here.

2 Vern. 270, 302, 17, 61, 64, 68, 67, 190, 493, 501, 626, 659, 760, 707, 671, 401, 752; 1 Vern. 7, 18, 396, 161, 408; 1 Chan. Cas. 41, 271, 189, 225, 307, 181; 4 Inst. 85, 86, 87; Supplem. to Wentw. 310; 2 Chan. Cas. 73; Co. Lit. 351.

Mr. *Reynoldson* the defendant, married the defendant Mrs. *Reynoldson*, the daughter of Mr. *Scot*, a freeman of London: Mr. *Scot* died, and the husband (who had a considerable portion with his wife on the marriage, and had never made any provision for her) assigned over her orphanage part to trustees, for her sole and separate use during life, and after her decease for her children: The creditors of the husband file this bill against the executors of Mr. *Scot* the husband, wife, children, and trustees, to have this money paid to them as fraudulently assigned.

Master of the Rolls. I shall suppose the plaintiffs to be creditors prior to the assignment, though they have not clearly proved it. The husband by law is intitled to the estate of his wife, but if he wants the aid of this Court to recover it, he must make a provision for his wife, before the Court will decree it to be paid to him; and he could not recover this chose in action without a *subpœna*; and at law, if he sues for a chose in action in right of his wife, he must join her in the action; and if he dies before he reduces it into possession, the action survives to her, and the Court imposes terms on the husband, on [337] that principle, that he who would have equity, must do equity: So there only remains to be considered, whether the plaintiffs are not intitled to the interest during the life of the husband. The husband has no title to it, because he has assigned it for the separate use of the wife, then if I decree it to the plaintiffs, I must break through a settlement I think a very reasonable one, for where the husband is indigent, and the wife in a starving condition, the Court has often obliged him to settle the portion on the wife, for her own separate use; so the bill must be dismissed

Wednesday, June the 3d [1730].

Case 186.—CHESTER *versus* CHESTER.

[S. C. 3 P. Wms. 56; Mosely, 313. Commented on, *Morgan v. Surman*, 1808, 1 Taunt. 292.]

In Court, Lord Chancellor; Lord Chief Justice Raymond; Lord Chief Baron Reynolds; Mr. Justice Price.

Mr. *Wills* for the plaintiffs, stated the pleadings as a case, and then went on to this effect.

It is plain from the words of the clause in question, and from the intention of the testator, appearing out of other parts of the will, that these reversions do not pass. (Ant. Cas. 175.)

Two rules are to be observed in the construction of wills, and both of them are in our favour: One, that an heir is not to be disinherited but by plain words, the other, that not only the particular clause is to be considered, but every part of the will together, and if the words are doubtful, they must be explained by the intention.

These reversions do not pass by the word *Elsewhere*, the lands particularly mentioned are not above £300 a-year, and the reversion principally in question is £1100 a-year, and it cannot be imagined that the testator would particularly describe lands of £300 a-year, and leave those of such a great value to pass by so general a word,

which is rather a word of course, like an *&c.* (6 Co. 39 a), and can serve only to pass some little quantity that belongs to the lands particularly set out, though it should lie out of the three places, as was adjudged in *Sir Thomas Littleton's* case, reported in 2 Ventr. 351, and in 1 Vern. 3, and 2 Chan. Cas. 51, by the name of *Wynne versus Littleton*. *Wynne* being seized of divers lands in fee, in the several counties of *G. M. D.* within the dominion of *Wales*; and having likewise divers other lands in other counties within the dominion of *Wales*, made over to him in mortgage, which were of more value than the other lands; he devises all his lands in the counties of *G. M. D.* and all his lands elsewhere, within the dominion of *Wales*, to *Sir John Wynne* and his heirs. [338] It was adjudged, that the mortgaged lands did not pass by this devise, for he could not be thought to mean to comprehend lands of so much value under the word *Elsewhere*, which is like an *&c.*, and comes in *currente calamo*: so if he had stopped at the word *Elsewhere*, it could not be supposed he designed to pass these reversions.

But the words, *Not formerly settled*, which follow, explain his meaning, and shew he designed these reversions should not pass, for then he would have used the words, *Not disposed of*, which he mentions after, and to say that he only meant that the estates limited by the settlements should not pass, is to say, that he put in the words for no purpose, for those estates could not pass if the words were left out, and I can find no difference between the words, *Lands not formerly settled*, and the words, *Not formerly comprized in any settlement*: So that this clause considered by itself, will not support the construction the defendant puts upon it.

But our construction is strongly confirmed by the other clauses of the will. The devise is, first, to trustees for a hundred years, in aid of his personal estate, to pay his debts, and then to *Sir John* and his heirs; but these reversions are not proper for payment of debts, and no lands come to *Sir John*, but those which first vested in the trustees. It is absurd to think these reversions pass to the trustees as a fund for the payment of his debts, the fund is very sufficient without them; and if it was not, these reversions would be useless, for the money is to be raised out of the annual rents and profits, and *Sir William* might have barred the reversion of the lands settled on him, because he had an intermediate estate tail in him (though he could not bar his eldest son), and if his lady had a son, the reversion would be of no value, the daughters too had only £400 provided for them by the settlement, and the testator, on the marriage of the defendant, had settled lands of £1600 a year on him.

His intention further appears from that clause of the will, by which he devises some small portion of lands, as *Bury Piece* and *Cony Hills*, to *Sir William Chester* in fee, which come to the plaintiffs by descent; and no reason can be given, why he should devise these lands to *Sir William*, but that they might go with the mansion house, *Cony Hills* lying contiguous to it, and the park; and a water-house being built on *Bury Piece*, to supply the house (which lay very dry) with water; and if his intention was to unite these estates, it is plain he did not design to devise the reversions from his daughters.

[339] As to the words, the case of *Hyley and Hyley*, 3 Mod. 228, is a strong authority for us (*Nov. 13, Stockwood versus Swan*). *Hyley* had issue *William* his eldest son, who had issue, *Peter*, *Charles*, and *John*, he devised £1000 to his eldest son, and several parcel of lands to others; then he gave to *Peter*, lands in tail male, to *John*, a mansion-house in tail male, and in like manner, another house to *Charles*; And all the rest, and remaining part of his estate, he devised to his three grandsons, equally to be divided amongst them, that only excepted, which he had given to *Peter*, *Charles*, and *John*, and to the heirs of their bodies, whom he made executors; then he devised, if either of his said executors died without issue, the part of him so dying, to the survivor and survivors, equally to be divided. *John* died without issue, and the question was, Whether the reversion of his house should be divided amongst his surviving brothers or descend to the heir, and it was adjudged, that the exception in the will did comprehend the reversion in fee, and that it did not pass, but that without such an exception it had passed. In that case the words are very strong; *All the rest, and remaining part of his estate*; and several estates being carved out of the lands, the reversion might be said, an estate *Not before given*.

The case of *Willows and Lydcot*, 3 Mod. 229; *Carthew*, 50; 2 Ventr. 250, is very different from ours. *William Shelton* seized in fee of the messuage in question, and of divers other messuages in the parish of *St. Martin's*, and other parishes, made his will, and thereby devised his houses in the other parishes to divers charitable uses,

and then devised to *Harris* and *Mary* his wife, the messuage in question, for their lives, and in the following clause, the better to enable his wife to pay his legacies, he devised all his messuages, lands, tenements, and hereditaments whatsoever within the kingdom of *England*, *not above disposed of*, to have and to hold, to her and her assigns for ever, and made her executrix, and judgment was given in B. R. that the reversion did not pass, but was unanimously reversed in the Exchequer Chamber, because there were words in the devise to the testator's wife, that would carry the reversion of this house, as an hereditament not disposed of, there the words were, *Not above disposed of*; tho' the house was settled, it was not disposed of, here the words are, *Not before settled*.

And tho' the case of *Sir Litton Strode* versus *Lady Russel*, 2 Vern. 621, seems to be against us, yet, when the reasons of that case are considered, it makes greatly for us. *Sir William Litton*, by virtue of several settlements, being tenant in tail after possibility of issue extinct of some lands, remainder in fee to trustees, in trust, for him and his heirs, and as to some other lands, being tenant for life, remainder to his first, and every other son in tail male, remainder to trustees in fee, [340] in trust, for the right heirs of *B.*, whose heir he was, and as to the other lands, being tenant in tail, remainder to the right heirs of his father; the value of which lands was about £3000 a-year, and being also seized of lands of his own purchase, both freehold and copyhold, of about £600 a-year, and possessed of a great personal estate, made his will, and after a devise of part to his wife for life, and other legacies, devised to his nephew all his other lands, tenements, and hereditaments, *out of settlement*, provided he took upon him the surname of *Litton*, and subject to raise £4000 in case the testator left a daughter: It was adjudged, that by the words, *Out of settlement*, the whole family estate was well devised; there all the estates tail ended in *Sir William Litton* the testator, but here there are several estates tail, intermediate to these reversions, after the death of *Sir John Chester*; and it appeared plainly that he intended *Sir Litton Strode* should have the whole estate: The devise to him is, on condition he took upon him the name of *Litton*; so it could not be supposed, that he designed the greatest part of the estate should go from him, and if he had a daughter, he charges the estate with £4000 for her, who would have been his heir. And this charge plainly shewed he did not design she should have the estate. There no lands of less value were before particularly named, and he devised in the former part of his will, to his wife, part of the settled lands by name; which shewed he thought he had a power to devise them; and it is said in that case, if the reversions descended, some of them would go to the testator's sister of the half blood, whom he could not be supposed so much to favour as his nephew of the whole blood, whom he designed to keep up his name. In our case it plainly appears by other parts of the will, that he intended these reversions should descend, and there are no words to shew his intention that they should pass.

Mr. Verney. The plaintiffs are the six daughters and heirs at law of the eldest son of the testator, and have but £700 a-piece out of an estate near £4000 a year, and it is proper to consider the circumstances of the family, for the question is not, Whether these reversions can possibly pass by the words, but whether, after a view of all circumstances, we can suppose that the testator intended to give them away from the eldest branch of the family.

The devise is not of *all his lands*, which would have been strong words against us, but in three particular parishes, and he would not have used these words, if he had designed to pass all his lands, and part only of the settled lands lie in these three places.

[341] Then the devise of these reversions must be by the word, *Elsewhere*, but that word, though it is not always rejected, yet it often is, and if we can shew the testator meant something else by it, the reversions shall not pass. *Mr. Vernon* says, the reason of the decree, in *Winne* and *Litleton's* case was, because lands of greater value could not pass by the word *Elsewhere*, and in the case of *Green* versus *Armstead*, Hob. 65, the use of the word is shewn, and that it is often put in, for fear the particular description should not be satisfactory and full.

It is plain from the next words *Not by him formerly settled*, that he did not design to disturb the uses of the settlements, part of the settled lands lay in *Lickleston*, one of the places particularly named, and these words shew a recollection in the testator, and a design that they should not pass, for unless by these words he designed to exclude the lands, they can have no meaning put on them, the estates that were settled he could not pass, so unless they exclude the reversions, they are vain and nugatory. The word

Settlement has two senses ; strict settlement, over which the party has no power, and a settlement in fee or tail, over which he has ; and the word settled, in this case, must be taken in that sense that will favour the heir, so these reversions may be said to be settled, though the testator had a power over them, and if he had been asked the question, he would have said the whole inheritance was settled, for these reversions were not left in him, but the whole estate was granted to trustees. In the case of *Sir Lillon Strode versus Lady Russel*, the testator had no son, and he was making an heir in his room, so the devisee being *hæres factus*, was intitled to all the privileges and advantages of an heir at law ; and since his intention plainly appeared to give him all he could, it was reasonable to decree him the reversions, if they could possibly pass by the words. In the case of *Willows and Lydcot*, the devise was not of all his lands in three particular places, and elsewhere, but of all his lands, &c., so there was no reason to except one estate more than another. The case of *Hyley and Hyley*, is an authority in point for us, and the words of that devise were stronger against the heir than of this. The words, *All the rest and remaining part of my estate*, would certainly comprehend the reversion, *That only excepted which he had given to Peter, Charles, and John, and the heirs of their bodies*, why he had not given them the reversions in fee.

Here the testator devises the furniture of his house at *Chigley*, to the defendant for life, and after his decease to his son, but the furniture of his house at *Lickleston*, and the water-house, to his son *William*, and his heirs, to make the house commodious to them, which plainly shews he had a respect to the settlements he had made, and that he designed these should [342] go, as the reversions stood limited. I own the general words of the will may carry the reversions, but the question is, whether the intention of the testator does not appear to the contrary.

Mr. Serjeant Eyre. *Lickleston* park, which was in settlement, lies in one of the three places mentioned, and the words, *Not formerly settled*, were put in, to distinguish the lands settled from those that were not settled, and the greatest part of the lands in settlement are not mentioned by the testator, because he did not design to pass them, and these reversions may be said to be settled, because they go according to the settlements, and are influenced by them, and liable to be defeated by the tenants in tail. By a devise of all my lands, leases and mortgages will not pass, and if the Court makes this distinction, where the testator has made none, how much more will it take notice of what the testator himself has taken care to distinguish. In the case of *Hyley and Hyley*, the reversion did not pass : The words, *Not formerly settled*, are as much an exception, as the words, *That only excepted*, for no certain words are necessary to make an exception, and no sense can be made of these words, but by way of exception.

Mr. Peere Williams. An exception is to exclude what would otherwise be comprehended, but if the words, *not formerly settled*, were left out, the estates settled would not pass, therefore the words must be put in, to exclude the reversions. By the words, *Formerly settled*, the reversions would pass, and it is nonsense to say, *not formerly settled*, and *formerly settled* have the same meaning ; and the counsel for the defendant can quote no case, where, by a devise of *all my lands not by me formerly settled*, if an estate tail stood out in a third person, the reversion passed : The testator is not supposed to be at the trouble to devise what is of no value, and what can be so soon destroyed by the tenant in tail. By this devise, he gives the lands, the things he had not settled ; he does not say the estates, or so much of them as he had not settled. The word *Elsewhere* might be put in by the scrivener, but the subsequent words must be inserted by the express direction of the testator, and doubtful words are to have the most kind construction put on them in favour of the heir, for which reason, *I give all to my mother*, was adjudged a devise only of the personal estate. 1 Lev. 130.

Mr. Attorney General for the defendant. In 1716, *Sir William Chester* was married, and in 1725, *Sir John Chester* made his will, and though *Sir William* had several [343] children, he had no son, but his brother the defendant had, and we have proved the father had a great regard for him, that there had been a misunderstanding between him and his son *William*, and that he designed to leave the defendant all that was in his power.

I shall first consider the meaning of the word *Elsewhere*, and there is no weight in their objections on this head. Though the testator had lands in possession in the three places he has mentioned, and part of the settled lands lay in one of them, yet he had no lands in possession elsewhere. The word *Elsewhere* is the largest and most comprehensive the testator could make use of, and signifies as much as if he had said,

All my lands whatsoever and wheresoever, and though he first says, *All his lands in Lickleston, Marston, and Milbrook, and elsewhere*, as he ends with general words, the devise is as full as if the particular places were not mentioned ; if, *and elsewhere* were out, so much of the reversion would pass as lie in the three parishes, by the words *All my messuages, lands, tenements, and hereditaments*, and by the words *And elsewhere*, all his reversions whatsoever are devised. The foundation of the decree in *Sir Thomas Littleton's* case was, that the lands out of A., B., and C., would not pass by the word *Elsewhere*, because they were mortgages, which would not have passed though they had lain even in A., B., and C., for a mortgage is an estate of a different nature, but *Sir John* had no other lands to answer this word *Elsewhere* but these reversions, and therefore they must pass by it.

The next words to be considered are *Not formerly settled*, which it is said, exclude all lands comprized in any deed of settlement made by *Sir John Chester*, these reversions were not properly settled, the same lands may be considered as settled, and as not settled. If one conveys to A. for life, remainder to B. in tail, remainder to himself in fee, the estates for life and in tail may be said to be settled ; but the remainder in fee is an estate not settled, for it is not a new estate created by the settlement, but part of the ancient estate left in him.

These words are idle and nugatory, if they are not put in to exclude what was in his power ; for what was settled out of his power, would not pass if they had been left out.

This is no objection in the explanation of a will, they shew the testator's intention, not to break in upon any former settlement he had made, and are like those clauses in a will, where the testator confirms a jointure, or a former settlement ; which shew his intention to do justice, and that everything should remain as it was settled : So it is usual, in a will, to devise expressly the personal estate for payment of debts ; and [344] yet such a clause is idle, for the estate is answerable, though it was left out : And this objection was made in the case of *Sir Litton Strode* and *Lady Russel*, and had the same answer given to it.

That case is an authority in point for us, and if there is any difference between the two cases, it is in our favour. There the words were, *Out of settlement*, here, *Not formerly settled* ; in that case, they say, the words are part of the devising clause, but here they come in by way of exception, but there are not express words of exception in either case, but of qualification and restriction : there settlement might be said to mean the deed, which in common speech is called the settlement ; so the words might be said to be the same, as lands not comprized in any deed of settlement ; here the words must be applied to the estates settled, and though the reversions in that case might be said to be comprized in the deed, they cannot in this case be said to be estates settled, it is said that the words are general in that case, but that in this, there are first, particular words, and then come sweeping words ; but in that case, all the words might have been satisfied with the lands in possession, but in ours, *Elsewhere* has nothing to answer it but the reversions, and though there the testator had no son, but here *Sir William Chester* had several children, and his wife was a breeding woman, yet there was a possibility that *Sir William Litton* might have a son, and *Sir William Chester* had no son, though he had been married nine years, so it was natural for the father to take care that these reversions should go to the heir male. Here *Sir John Chester* disposes of the reversions, not to an heir he was instituting, but to his second son, who was his heir male, and was to support the name and honour of the family.

In the case of *Hyley and Hyley*, the testator devised *All the rest and remaining part of his estate*, which comprehends his whole interest, and the exception extends only to part of his interest, to the estates given to *Peter, Charles, and John*, and to the heirs of their bodies ; so the judgment in that case seems to be very particular : And in the next case, of *Willows and Lydcol*, the same Judges were of the same opinion, but their judgment was reversed in the Exchequer Chamber, by eight Judges. And in *Alleyn*, 28, *Wheeler* versus *Waldron*, A. having a manor and other lands in *Somersetshire*, devised the manor to B. for six years, and part of the other lands to C. in fee, and the *Rest of his lands in Somersetshire*, or elsewhere, he gave to his brother, it was adjudged, that the reversion of the manor passed as well as the lands not before devised. As in *Willows* and *Lydcol's* case, the words, *Not above disposed of*, are tantamount to *Not by me formerly settled* ; so the same words are afterwards made use of in this will, and the [345] plaintiffs must admit that they are vain, for the general words would not have defeated any devise in the former part of the will, though those words had been omitted

Their next argument is drawn from the purpose for which these lands were given, to apply the annual rents and profits, in aid of his personal estate for payment of his debts : The testator designed this as a general comprehensive clause, and the lands in possession, as an immediate fund, the others as they dropped in ; and though such reversions are not assets to charge the heir on a false plea, they are assets, *cum acciderunt*, but the payment of his debts was not the only motive of the devise. He had two inducements to pay his debts, and to pass them with that charge to the defendant and his heirs, who was to keep up the honour and name of his family ; and the one was as prevailing upon him as the other, so both his designs ought to be taken into consideration, and the nature of the trust will not alter the legal estate, that passes by the words. In the case of *Willows and Lydcot*, the devise is introduced with these words, The better to enable my wife to pay my legacies, and the verdict found, that the lands, without the reversion, were sufficient for that purpose, yet it was adjudged that this would not alter the construction of the devise, but that the words should be taken in their full sense.

The testator had it not in his view to devise *Bury Close*, as an easement and convenience to the estate, for he has not devised it in the same manner the lands are settled, but to Sir *William* and his heirs, so that he might have disposed of it as he pleased.

The daughters complain they have but £4000 among them : The mother's portion was but £3000, which, in marriage settlements, is the usual provision for daughters, and they have an estate in fee of £200 a year by descent, which was the reason perhaps why the testator did not increase their portions ; but whether they are large or small, the words must be considered according to their legal construction ; and since they have taken notice of the circumstances of the family, we must remind them, that by the settlement made on the defendant, he has no power to make a jointure on a second wife, or to provide for the children of the marriage ; so that if these reversions do not pass by the will, if Sir *John* should die without issue by his first wife, though he left a son by a second wife, to whom the honour would descend, both the estates would go to the daughters, which we can hardly suppose the testator intended.

There is no difference whether the reversion depends on an estate tail in the testator, or in a third person ; in the case [346] of Sir *William Litton*, if he had a son, the estate tail would have been in him, and if he had afterwards died, that would not have altered the construction of the devise.

Mr. Solicitor General. If the testator had rested at *All my messuages, lands, tenements, and hereditaments*, those words would have carried the reversions, but *In Lickleston, Marston, and Milbrook*, were added, they say, to restrain them, *And elsewhere* can extend only to any little parcel of lands, that lie out of those places, the testator could not have used more comprehensive words ; *And elsewhere* will take in all his lands out of those three places, and they cannot shew an authority, where the Court has restrained the sense of that word. In *Sir William Littleton's* case, the other lands were mortgages, and redeemable too at the time of the devise ; and the testator had other lands that lay out of the three counties to satisfy the words ; so that by the devise of all his lands, the testator could not be supposed to design to pass these mortgages, which indeed were the lands of the mortgagor, and only the personal estate of the mortgagee ; and the lands were charged with an annuity of £80 a-year, which was not a proper charge on a mortgage, which might be redeemed the next day, and he had expressly devised the residue of his personal estate, so the mortgages were decreed to belong to the residuary legatee. That case therefore is no authority, to restrain the sense of the word *Elsewhere* : But to shew that the Court either rejected, or restrained the sense of it, they have quoted the case of *Green and Armsteed*, though the words were general, they restrained them indeed from taking in what the testator had before devised, but can they produce any case where the Court were of opinion, that what the party had not before disposed of, would not pass by those words. So, according to the rule they have laid down, the heirs at law are disinherited by express words, and by a different construction, another rule relating to wills would be broke, that no word is to be rejected, that can have a reasonable meaning put on it.

Not formerly settled, the testator could not use plainer words to express his intention to dispose of everything in his power ; but they say, every thing comprized in the settlement is settled. Where an estate for life, or in tail of lands is limited, they are settled lands, but the reversion in fee is not settled : So since the words, *All my messuages, &c.*, take in these reversions, in considering how these words are qualified, it is necessary

to see if these reversions were formerly settled, and in common understanding they were not; for when people speak of settlements, they do not mean what they have settled on themselves, but what they have settled out of their power, on [347] their wife, or children, or others: And this further appears by the words that follow, *Or hereby otherwise disposed of, settled and disposed of*, are synonymous terms, and shew his intention not to disturb former dispositions, but to give to his son, by this general devise, what he had not before disposed of by settlement or will: They say, in our sense, the words are nugatory, in theirs restrictive, but wills are not to be considered in that strict manner; many words are inserted, not out of necessity, but caution, they shew his care to confirm whatever he had before settled, though there should be any defect in the conveyance, and to give away whatever he could, consistent with his former settlements or dispositions by that will: But in the case of *Sir Litton Strode versus Lady Russel*, the same objection was made to the words, *Out of settlement*, and over-ruled; and they have endeavoured to distinguish that case from ours, because the decree was affirmed in the House of Lords. In that case Lord Trevor said, the words, *Out of settlement*, were the same as *Not before settled*, and when Sir William Litton made his will, he had a prospect of a son, for he made a provision for her, in case he should have a daughter; but they say, the charge on the estate for her, shewed he designed the reversions for his nephew: In that case, lands of £600 a year passed without question, which would have answered the charge, tho' the reversions were not devised; but the daughters in this case have £4000 provided for them by the settlement, which shews the parties to it, at that time, did not design they should have the estate, and the same disposition might continue in Sir John Chester, when he made his will, and induce him to devise the reversions. In the case of *Cook versus Garrard*, 1 Lev. 212; 1 Saund. 180; 2 Kebl. 206, 207, 224, *Keep seized of Spain's Hall*, settles part thereof on his daughter for life, and after he devises the house to his wife for a year after his death, and then devises, *All his lands not settled or devised to Thomas Keep, habendum to him and his heirs*. It was adjudged, that although the devise is of the lands not settled or devised, and not of the estate not settled or devised, that the reversion would pass, although the land itself was settled and devised before, and that the words were to be understood of the residue of the estate. There the objection might be made, Shall the words, *Not devised or settled*, and *Devised or settled*, which are direct contrary, mean the same thing, but the same lands are both settled and unsettled,

It is objected, that these reversions shall not pass, because they are an improper fund for the payment of debts. 1 Leon. 180; Cro. El. 524 (54); Moor, 341, Cas. 463, *Townsend and Wale* is an authority to the contrary. A man seized of lands [348] in possession, and of other lands in reversion, upon an estate for life, devises, that his executors should have all his lands free and customary in D. for ten years, to perform his will, and the will of his father, with the profits thereof, and that after the ten years, his executors, or any of them, should sell them for the payment of his debts, he dies, the ten years expire, the tenant for life dies, and the executors sell the lands, and it was objected, that the reversion of the estate for life passed not, because he had other lands there to satisfy the words, and it was not his intent to pass it, because there were not any profits to be taken thereby, but the Court resolved to the contrary. And it is in our case especially a proper fund, where the reversions are devised over. (34 H. 6, 6; 2 Anders. 59; Owen, 155; Moor 341, Cas. 463; Cro. El. 159 (49).)

Their argument fails, as to the water-house and *Cony-hills*, unless they can make out, that Sir John Chester designed to unite them to the lands he had settled on Sir William Chester, but if he had, he would have followed the limitations in the settlement, and not left them in the power of Sir William to dispose of. And if he had the same intention as to the goods, he would have devised them in the nature of heir looms, but by this devise they absolutely vested in Sir William.

Mr. Lutwyche. It is an odd objection, that *Elsewhere* is too general a word, especially in a will, where it is not usual to name the particular places that lands lie in, as in a conveyance, which first describes the particular places, and then makes use of general words beside; and many estates, of much greater value than these in question, have passed by such a word in wills; they have talked, that it takes in a few stragling parcels only, but they have not told us what they are, and if there was any colour for it, they should have set out such a case by their bill, and if the reversions in the places that are named pass, why should not those that lie out of them pass too? He named the three places particularly, because all his lands in possession lay in them, which at that time were of most

value, because the reversions might never fall in, which he therefore leaves to pass by the general words, so that though the reversion that is now fallen in, is £1100 a year, yet it was to come into possession after an estate tail, which answers their objection to the different value of the lands, and all the other objections they have made were raised in the case of *Sir Litton Strode and Lady Russel*, and answered by the Judges. Mr. Vernon said there, as Mr. Williams does here, it is odd that the words *Settled*, and *Not settled*, should have the same meaning; and Mr. Justice Tracy answered, that in some sense the same lands may be said to be in and out of settlement, they may be named in the settlement, they may be settled to some purposes, and yet the reversion may remain in the person who made the settlement, [349] for it is the same estate, and if it descended to the heirs of the mother before the settlement, it would have remained to them after, so in this sense they are out of settlement. It was objected too in that case, what could the testator mean by putting in the words, *Out of Settlement*, but to shew that he would not have the lands that were settled pass, Mr. Justice Tracy said, he mentioned the words *Out of settlement*, to explain his meaning to give away all he could dispose of, and to shew an honest intention, not to devise what he had settled, and what he had not a power over.

Though the testator created the term of one hundred years for the payment of his debts, it was also in his view to give the lands to the defendant subject to his debts, and the words *Yearly rents and profits*, are of little use, for he in reversion might compel the trustees to mortgage the term, to pay the debts off at once.

As to his intention, we may argue, as the testator has expressly devised some lands to *Sir William* and his heirs, so if he had designed him these reversions, he would have devised them also to him; so, here these reversions pass to the defendant by the words of the will, and it does not appear to be the intention of the testator to defeat him of them.

Mr. Fazakerly. The words are comprehensive enough to take in these reversions, All my messuages, &c., in *Lickleston, &c.*, and elsewhere, and they must shew how the following words restrain them, *Not formerly settled*, do not confine them, for these reversions were hereditaments not formerly settled, and though part of a man's interest in lands is settled, it does not follow from thence, that what is not settled shall not pass. 2 Vern. 461, A. seized in fee, devises *Blackacre* to B. for life, and to C. all his lands not before devised to be sold. By this devise, the Judges of the common Pleas certified, that the reversion of *Blackacre* was well devised, and the same sense here must be put on *Not settled*, as was in that case on *Not devised*. 2 Vern. 560, A. devised a farm to B. for life, and after some legacies, devises *all his other personal estate, lands, tenements, and hereditaments, not before devised* to C., the reversion of the farm passed by the general devise to C.: These words they say, must operate by way of exception; they are put in by way of caution: when a man makes a will he does not look into deeds as a purchaser does; suppose then in a deed of settlement there was a power of revocation, an express devise by will of what was settled, would be a revocation: So these words might be inserted to shew that he did not design to disturb former settlements, and for fear of undoing any thing he had done before by not looking into the settlements. *Elsewhere* must be retained. [350] it is a plain intelligible word, and extends to all places; and why should it be rejected, they have not shewn how it can operate, which is in effect to reject it, but we have shewed the meaning of it, and the devise of *Bury Close* is an argument against the plaintiffs, that *Sir John Chester* designed nothing should pass to *Sir William* as heir, for that would have descended on him, if he had not disposed of it by his will.

Mr. Justice Price. I shall examine the import and signification of the words of this will.

The devise of *All his messuages, lands, &c.*, plainly carry all the lands the testator had in possession and reversion; for in a will, a devise of lands is a devise of the estates the testator has in them; so by these words reversions pass, but then the question is, To what reversions the clause extends? In *Lickleston, &c.*, and elsewhere. Wills being often made in time of sickness, people are forced to use general words: And *Elsewhere* is a necessary word in wills, and signifies every where; so all the lands pass he had not settled, then the question is, What lands were settled? most part of the lands were in strict settlement, and the reversions in himself, and it is no repugnancy to say, the same lands are settled and are not settled; the particular estates are settled, but not the reversions, and the testator's intention is plain to raise his son *John*, though *William*

had children, he had not sons, but *John* had, and if *Sir William* should have a boy, he was provided for by the settlement, he trusts *John* with the bulk of the estate, charged with annuities to his sisters, and therefore we are to take the words in the largest sense they will bear. When a man devises an estate in possession and reversion, for the payment of his debts by the annual profits, those words might be understood, By the rents of the lands in possession. The words *All the rest and residue, &c., not before devised. not before settled*, have always been adjudged to take in the reversions, and the case of *Wheeler and Waldron*, in *Alleyne* 28, is a leading case, where the word *Elsewhere* carried the lands the testator had every where. I am guided by the intention of the testator to think these reversions pass to the defendant *Sir John*.

Lord Chief Baron Reynolds. I am of the same opinion. The case is this, *Sir John* the grand-father being seized in fee of several lands in 1716, on the marriage of his son *William*, he settles the lands principally in question, in strict settlement, the reversion to himself in fee. In 1718, on the marriage of his other son the defendant, he settles other lands on him in strict settlement, the reversion also to himself in fee. In 1725 he makes his will [351] and after devising some lands not comprized in the settlement, he devises in the words in question. The plaintiffs are heirs at law of *Sir William*, and old *Sir John Chester*, and consequently what is not disposed of by this will, descends to them; they say they are intitled to the reversions on both settlements, because the words of the will does not extend to them. It is a reasonable maxim, that an heir should not be disinherited but by plain words, for all comes to him as representative of his ancestor; and then, if the words of the will are ambiguous, it is justice he should have it, because there is nothing to divest it out of him. The question then is, Whether these words are ambiguous? the plaintiffs say, they extend only to the lands out of settlement, and that it appears to be the intention of the testator not to devise these reversions from two considerations.

First, Because these lands being given as a fund for payment of debts, these reversions, which are distant and defeasible interests, cannot be within the intention of the testator; but it is most reasonable to suppose that he designed all the lands in his power for a fund, and they might fall in as one has, and be applicable to those purposes, and since they might be serviceable to his intention, there is no reason to exclude them.

Secondly, They say it appears to be his intention not to give these reversions to the defendant, from the devise of the two convenient pieces of land to *William* and his heirs, but no inference can be drawn from thence; he has not devised them in the same channel the lands are settled, but has put it in the power of *William* to defeat his own sons of them.

But they say, the very words have a restraint put on them, for the lands formerly settled are not to pass. I beg leave to consider the word settlement, where the owner of the fee carves several estates out of the inheritance, and reserves the reversion to himself: The lands in law are no further settled than the particular estates; and the reversion is looked on as part of his old dominion, and has all the same incidents, whether they are lands *ex parte materna*, or of the nature of gavelkind, or borough *English*, and in point of law there is no alteration. These reversions then are hereditaments not settled, and so answer the very words, because they are part of his ancient inheritance, and remained in him, and the cases cited are in point. That in *Alleyne* is the foundation of them all, and the doctrine of that case is carried further in *Cook and Garrard*. *Hyley and Hyley* is an interruption to these authorities, and in *Lydcot and Willows* the same judgment was given by the same Judges, but reversed in the Exchequer Chamber, and the reversal allowed for law in the case of *Hopewell and Ackland*, 1 Salk. 239. So we may venture to say, that case is not [352] law, being contradicted by later authorities; so reversions will pass. But the plaintiffs say, if they do pass, it can only be of the lands that lie in the three places particularly named. *Elsewhere* is a very general word, and very proper to be made use of in wills, because the testator has not time to look over his writings, and is of a most extensive signification, and proper to carry the different interests of the testator, though it cannot indeed defeat or destroy what the testator evidently intended to devise before, as was adjudged in the case of *Green and Armsteed*. But it is asked, why then did the testator mention these particular places? It is hard to say why he did, but it was not to be expected that he should mention all the several places his lands lay in; and it is not material what was his reason, because there is nothing to limit the extent of the other word. And Mr. *Lutwyche's* is a good conjecture. And the case of *Sir Litton Strode and Lady Russel*, which was

greatly debated in the Court of Chancery, and the decree affirmed in the House of Lords, is an additional weight to the other cases, for though particular interests in these lands were settled, the reversions were never settled, and so are lands *not formerly settled*, and there is no reasonable difference between that case and ours; though the expressions are different, and though the law would have implied as much as these words, they are explanatory of his intention, not to innovate or break in upon former settlements and devises; and this objection was made in the case of *Sir Litton Strode* and *Lady Russel*, and over-ruled. And I should be of this opinion, if I was not confirmed by the authority of that case.

Lord Chief Justice Raymond. I agree in opinion with Mr. Justice Price, and my *Lord Chief Baron*, that the reversions of the lands in *Lickleston*, *Marston*, and *Milbrook*, and out of them, pass; because the words are very full to carry all his lands in possession and reversion; and an imagination only to the contrary cannot defeat the sense of them. The words *All his messuages, lands, &c.*, will certainly pass all his reversions; then the question must be, Whether the testator afterwards confines them to those three places? *Elsewhere* is a general intelligible word, and it is very usual in wills to enumerate some few places where the lands are situate, and then to make use of general words by way of precaution, because the testator often has not time to look over his writings, as when he makes a settlement, and therefore since it is a comprehensive word, and of a known plain sense, why should not it have its full operation? *Sir William Littleton's* case is only that the mortgages did not pass, but the lands the testator had an absolute property in, and is not an authority for the plaintiff, and they have cited no other, and why should *Elsewhere* extend only to little parcels of land, [353] for it is not taken in its full sense, it cannot carry even little things lying out of the particular places, though they are ever so contiguous and commodious; and there is no reason why £1100 a year should not pass by *And Elsewhere*, if the words will legally pass them.

Not formerly settled, it is said, exclude these reversions, because all the lands in the settlements were formerly settled: These reversions were not properly settled, it is the old use, and in common parlance those lands only are said to be settled that are not in the power of him who made the settlement; and this meaning was put on the words in the case of *Sir Litton Strode* and *Lady Russel*. In the case of *Wheeler* and *Waldron*, the rest of my lands was adjudged the same as the rest of my estate in my lands, and this is further explained in the case of *Cook* and *Garrard*, where the reversion passed, though the lands were settled and devised, because that was an interest remained in the testator undisposed of, and this was the foundation of the decree in the case of *Sir Litton Strode* and *Lady Russel*.

As to the objection that the term was given for payment of debts, it may be said, that the testator not only designed to pay his debts, but to give the estate to his son *John* and his heirs, and the reversions might fall into possession.

Though the testator gave two small parcels of land to his son *William* and his heirs which lay commodious to the capital messuage, yet he has not united the estates, but devised them so that they might go in a different manner.

These words are very plain, and the intention of the testator must appear very strong to the contrary, to induce a Court to go against the authority of the cases of *Cook* and *Garrard*, and *Sir Litton Strode* and *Lady Russel*.

Lord Chancellor. I am of the same opinion with my Lords, the Judges, and every objection has been so fully stated and answered, that if it was not for the sake of custom, I should not say any thing. I think these reversions plainly pass by the words of the will. *All my lands* will pass all the interest the testator has in freehold lands, whether in possession or reversion; and where a particular estate is devised by will, *All the rest of my lands* will carry the reversion. In *Lickleston*, *Marston* and *Milbrook*, [354] and *Elsewhere*, that is in all places, and in making their wills men have not time to look over their deeds, but make use of general words to supply that defect. It was adjudged in *Sir William Littleton's* case, that the word *Elsewhere* would not comprehend the land in mortgage, but it would freehold lands, if the testator had any. Then the question is, If these general words are restrained by the following, *Not by me formerly settled*; for it is objected, that these reversions were formerly settled by the deeds of 1716 and 1718. But the meaning of the words is, *Not out of my power*; and in a legal sense they were not settled, because the reversions in the testator were his old estate: If the lands came by the mother, they would descend to the heir *a parte materna*, and are subject to the debts of the ancestor. And all my lands signify, all my estate in the lands;

so not the lands contained in the settlements, but the estates not in his power are excluded, according to the authority of the case of *Cook and Garrard*. The words, *Not hereby otherwise disposed of*, are as nugatory as *not before settled*, but they shew the testator's intention that every thing should remain fixed, and settled as it stood before the making his will, and is like those clauses in wills which confirm jointures and former settlements, though they add no weight or authority to them. And the testator designed this devise a beneficial interest for his son, as well as for payment of his debts. The case of *Sir Litton Strode and Lady Russel* is the same with this. There is no difference between *Out of settlement*, and *not before settled*; and there is no getting over so solemn and settled a decree.

Thursday, June the 4th [1730].

MOTIONS.

Case 187.—Mr. NUGENT, commonly called Lord DELVIN, *versus* DANIEL ARTHUR SMYTH. CREAGH *versus* NUGENT and SMYTH.

At the Rolls.

Lord Delvin entered into a bond for the payment of £400 to *Daniel Arthur Smyth*, a banker at *Paris*, which *Smyth* assigned in part satisfaction of a debt to *Creagh*, who resides in *Holland*: *Creagh* put the bond in suit in the name of *Smyth*, Lord *Delvin* pleads *Non est factum*, and the plaintiff obtains a verdict. Lord *Delvin* files a bill against *Smyth*, suggesting that *Smyth* was more indebted to him on account, than the money due on the bond. *Smyth* takes out a *dedimus*, and the plaintiff of course obtains no injunction. [355] Sometime after, the plaintiff procures an order to amend his bill, and amends the defendant's copy, but not the record, and lies by for a twelvemonth, upon which *Creagh* brings a bill, charging a collusion between Lord *Delvin* and *Smyth*, who was only his trustee, and that Lord *Delvin* did not make him a party, though he had notice of the assignment to him. That Lord *Delvin* had been lately at *Paris*, and desired *Smyth* not to put in his answer. Lord *Delvin* by his answer denies collusion, says he does not remember he spoke to *Smyth* not to answer, and admits he had notice of the assignment; and *Creagh* now moved to dissolve the injunction in the cause of Lord *Delvin* and *Smyth*.

Master of the Rolls. Where a bill is brought against the *cestuy que trust* and the trustee, and the trustee will not answer, I have often known the injunction dissolved on the motion of the *cestuy que trust*: But this is an extraordinary case to dissolve the injunction on the motion of *cestuy que trust*, who is not a party in the cause. Mr. *Nugent* enters into a bond to *Daniel Arthur Smyth*, a foreigner, out of the reach of the Court, who assigns it for a valuable consideration to *Creagh*, another foreigner, of which Mr. *Nugent* had notice: An action is brought on the bond, the obligor pleads *Non est factum*, and the plaintiff obtains a verdict, and then Mr. *Nugent* brings a bill against *Smyth*, who was only a nominal person in point of interest, but as he had notice of the assignment, he ought to have made *Creagh* a party. Mr. *Nugent* obtained an order to serve the attorney at law with a subpoena, and the *cestuy que trust* enters an appearance for Mr. *Smyth*, and on taking out a *dedimus*, the plaintiff of course obtains an injunction; afterwards he procures an order to amend his bill, and he should have proceeded in his cause with expedition, but has done nothing in it since *July* last past, upon which, *Creagh* having no other means to dissolve this injunction, kept up by the default of his trustee, brought his bill. Mr. *Nugent* says, that *Creagh* should have taken care to have got in the answer of Mr. *Smyth*, his trustee; But there was no understanding between them, and he could not force him, and he is in collusion with Mr. *Nugent*: And whereas *Creagh* charges him with having spoke to *Smyth* not to answer, he denies it faintly, he does not remember he did, and the delays in this cause are justly imputed to the plaintiff, because he stopped the proceedings; for when he found *Smyth* did not answer, he should have applied to him, and desired him, and if he made any application to him when he was abroad, he should have set it forth in his answer: And affidavits have been read on the part of Mr. *Creagh*, that Mr. *Nugent* made overtures of satisfaction, and would have paid him by instalments.

[356] The difficulty in this case arises from Mr. *Smyth* and Mr. *Creagh* being

foreigners, and therefore if Mr. *Nugent* should pay the money, and afterwards be relieved on the hearing the cause, we could not enforce a repayment; but if foreigners sue here, it is for the interest and honour of the nation, they should have justice done to them: And this objection is answered by the offer the council for Mr. *Creagh* have made, that Mr. *Creagh* shall give security to appear to the original bill, if Mr. *Nugent* will make him a party, and to abide the order of the Court at the hearing, and therefore let the injunction be dissolved on those terms.

If a bill is brought for a sum under ten pounds, the defendant may either demur to the bill, or move to have it dismissed, as below the dignity of the Court. (Ant. Cas. 31.)]

Monday, June the 8th [1730].

Case 188.—ROBERT LODER, *Plaintiff*; SEYMOUR LODER and MARY his wife, JOHN LODER and JANE his wife, JOHN JORDAN and ANNE his wife, JOHN CARNE and ELIZABETH his wife, the daughters of CHARLES LODER deceased, THOMAS WHITLEY and RALPH his son, the heir at law of JOHN LODER, and MARY LODER relict and executrix of FRANCIS LODER, the son of CHARLES LODER, *Defendants*.

At the Rolls.

John Loder made his will *inter al'*, in these words, 'I give and devise all my manor and rectory of *Hinton*, &c., to my son *Charles Loder*, for ninety-nine years, if he shall so long live, remainder to trustees to preserve the contingent remainders, remainder to the first, and every other son of the body of *Charles* in tail male, remainder to my son *Francis* for ninety-nine years, if he shall so long live, remainder to trustees to preserve the contingent remainders, remainder to the first, and every other son of *Francis* in tail male, remainder to my kinsman *Robert Loder* and his heirs for ever, upon trust, that the said *Robert Loder*, his heirs and assigns, shall pay to all and every, the daughter and daughters of my son *Charles* and *Francis*, and also of my son *Thomas*, as an addition to their portions, the sum of £5000 [357] equally to be divided between them, in case there shall be more than one: Provided also, that it shall and may be lawful for my son *Charles* and *Francis*, as they severally and respectively come into possession, to charge and make chargeable, by lease, mortgage, or otherwise, the said premisses, for the answering or paying such sums of money to and for the portions of their respective younger sons and daughters, and to be paid at such time and times as they shall by any deed or will severally direct and appoint, so as the sums to be appointed by *Francis* do not exceed £2000, and by *Charles* £3000, and with answering such sums for their maintenance, until their portions shall become payable, as they the said *Charles* and *Francis* shall direct; and for want of such appointment, then I will that the lands shall stand chargeable with the payment of £2000 to the younger children of *Francis*, and of £3000 to the younger children of *Charles*, with interest, till they become payable, and such portions are to be paid to the sons at twenty-one, and to the daughters at twenty-one, or marriage, and if any die before their portions shall become payable, then their portions shall go to the survivor, and if all die, they shall sink into the estate; and in the last clause of his will, he devises to his son *Charles* all the rest and residue of his real and personal estate whatsoever undisposed of, whether in law or equity, to him, his heirs, executors, and administrators, for ever, in trust, for the payment of his debts and legacies, and the surplus, if any, to his own proper use and benefit.'

John Loder died, and his sons *Francis Loder* and *Charles Loder* are since dead without issue male, and *Charles* made no appointments for the portions of his younger children, and left the four defendants his daughters and heirs at law, and had two sons living at the death of *John Loder*; *Francis*, who was then the youngest, and lived to attain his age of twenty-one years, but before his death, which happened in the life-time of his father, by the death of his brother, became his eldest son, intermarried with the defendant *Mary*, whom he made his executrix, and *Thomas Loder*, the son of the testator died, leaving *Anne* and *Elizabeth*, his daughters, who both died in the life-time of *Charles Loder*, *Elizabeth* unmarried, and *Anne* married to the defendant *Thomas Whitley*, who took out administration to her.

Robert Loder, to whom the estate descended for want of issue male of *Charles* and *Francis*, filed a bill, to have the rights [358] of the several defendants settled, that

he might pay the money charged on the estate with safety, and to have the deeds and writings delivered up to him; and at the hearing of the cause, *June* the 2d, there were three questions made.

The first was, Whether the defendant *Thomas Whitley*, as representative of his wife *Anne*, the daughter of *Thomas Loder*, who died before the estate came to the plaintiff, was intitled to a share of the £5000, and the *Master of the Rolls* adjudged that she was not, and that the £5000 was to be divided only among the daughters who were alive at the time the remainder to the plaintiff came into possession.

The second was, Whether *Mary*, the wife and executrix of *Francis Loder*, who was a younger son of *Charles Loder* at the death of the testator, and attained his age of twenty-one years, though afterwards he was an eldest son, and died in the life-time of his father, was intitled to a fifth part of the £3000, and his Honour decreed that he was not, because he was the eldest son before any appointment was made, and his father could not afterwards have made an appointment in his favour, and the portions given by the will did not vest till after the death of the father, for he might make the appointments at any time during his life. (2 Vern. 528, 661.)

The third question was, Whether the residue of the estate, after the trust for raising the portions was performed, belonged to the defendant *Ralph Whitley*, as heir at law of the testator; and it being late, the consideration of this was deferred till *Thursday, June* the 4th, when it appearing, that *Charles Loder* was made residuary legatee of the real estate undisposed of, it was adjudged, that the heir at law of the testator had no right, and that the cause should be adjourned to this day, when it should be argued, whether this was a beneficial devise to the plaintiff, or whether the residue of the trust should belong to the defendants, the four daughters and heirs of *Charles Loder*, the residuary legatee.

Mr. Attorney General for the plaintiff. To determine this question, it is necessary to consider the whole will, the testator was making a disposition of all his estate among his sons and daughters, on the marriage of his son *Thomas* he had settled an estate on him; to his son *John* he devises a rent-charge and several legacies, and provides for his daughter and her heirs, and devises the lands in question to his sons *Charles* and *Francis*, in strict settlement, and on failure of issue male of their respective bodies. to the plaintiff and his heirs [359] upon trust, &c., there can be no doubt but the whole legal estate is disposed of to him, so the only question is on the trust. The defendants say, that the devise being in trust to pay £5000 is only a disposition of the trust *pro tanto*, and that the residue of it belongs to the residuary legatee; but as we are upon the disposition of a trust, we are to guide ourselves by the intention of the testator. The devise is to *Charles*, for ninety-nine years, if he should so long live, remainder to his first, and every other son in tail male, and the remainder to the plaintiff is to take place only if *Charles* died without sons, in which case his daughters, if he left any, would be his heirs, and the £5000 is to be raised out of the estate for the daughters of *Charles*, *Francis*, and *Thomas*; but can we suppose that the testator intended the remainder of the trust should go to the daughters of *Charles*, in whose favour he had made a particular charge on the estate? And his intention of kindness to the plaintiff appears from a devise of other lands to him and his heirs absolutely, after the death of *Francis* and *Charles Loder*. Where lands have been devised in trust to raise portions out of the rents and profits, or by a sale of the estate, the residue has often been decreed a resulting trust, but here the devise is in trust, to pay, &c., and so comes up to those cases where lands are devised to pay such a sum, which has always been adjudged to be a devise in fee, because the estate is given on condition the devisee pay such a sum of money out of his pocket, without any regard to the value of the estate, and the testator takes notice of the plaintiff as his kinsman. which is a material circumstance; for in the case of *Hobart versus Com. Suffolk*, 2 Vern. 644, Lord *Cowper* declared that the devise could not be intended a bounty, because Lord *George* was not his relation. as it might have been, if the devise had been to *Colchester* only (2 Vern. 252). And the case of *North and Crompton*, 1 Chan. Cas. 196, is a strong authority for us; *Catherine Crompton* made her will in these words, 'I ordain and constitute *Henry North* my executor, and I give all my estate, real and personal, to dispose of for the payment of all my just debts, and for the performing of all such legacies as I have herein, or by the codicil annexed, bequeathed unto my executor above named'; then she devised £200 to the defendant, her uncle and heir at law. The *Lord Keeper* and four Judges agreed, there was no implied trust of the surplus of the real estate for the heir; for

if the testatrix had intended him the surplus, she would not have given him £200, and by that construction the devisee would have no benefit by the will. So here the testator having made particular provisions for *Charles, Francis*, their sons, and daughters, that is an evidence he designed they should have no more.

[360] *Mr. Lutwyche*. A trust must be implied from the intention of the testator, but the whole frame of the will shews, that this was intended a beneficial devise to the plaintiff: The testator provides in the first place for his sons, and their issue male, and then for their daughters, and the estate is to go on and continue in his own name, subject only to the particular charge. If the devise had been in trust to sell, that would have shewed the testator did not design to continue the estate in his own name. In the case of *Wyche and Packington*, the testator devised a rent-charge of £200 a-year out of all his lordships in the county of *Pembroke, &c.*, for thirteen years to his wife, whom he made executrix, nevertheless in trust and confidence, to enable her to pay his debts and legacies, and he devised to her all his said lands for life, as an augmentation of her jointure. The Barons of the Court of Exchequer were divided, and the Chancellor of the Exchequer was of opinion that the trust of the rent-charge, after the payments of debts and legacies, resulted to the heir at law; and the decree was affirmed in the House of Lords. This case looks more like a trust than ours; the wife had a provision made for her by the will, besides the rent-charge, and it is not likely in our case that the testator intended the plaintiff should have nothing for his trouble.

Mr. Solicitor General for the defendants, the daughters, and heirs of Charles Loder, the residuary legatee. It is proper to consider the intention of the testator, as far as it is agreeable to the rules of law. It is very plain that this will was drawn by a person who understood the law, he makes use of legal words, and of terms proper to conveyances, through the whole will, so the testator must be supposed to understand the difference between a devise in equity, and in law, where the devise is to vest in the party for his own use, and where in trust only: The first devise to *Charles* is plainly a beneficial devise, the remainder to trustees, &c., is in trust only, remainder to the first and every other son, &c., are all beneficial devises, and the devise to the plaintiff is expressly in trust. If lands are devised to a man and his heirs, in trust, to pay a sum of money, the devisee is to be considered as a trustee, unless he can shew the testator intended the contrary, and therefore it is incumbent on the plaintiff to make it appear, that the testator designed he should not be a trustee of the surplus, and all the cases of undisposed parts of trusts, whether created by deed or will, in fee or for years, are applicable to this case, which has nothing new in it: What a use was at law, a trust is now, and if an estate at law was limited to trustees, for particular uses only, the remaining [361] use resulted to the feoffor: If a term is carved out of the inheritance, to raise portions, as soon as they are raised, though the legal estate remains in the trustees, Courts of equity always decree that the terms shall attend the inheritance; for so much of the trust as the owner has not disposed of remains in him; so here, so much of the trust as is not devised away shall fall into the residuary devise. 2 Chan. Cas. 115, 223, and *Wyche and Packington* is a case greatly in our favour, where part only of the trust being disposed of, the residue was decreed to the heir; though the term created out of the inheritance might be supposed to be for the benefit of the wife, whom he had made executrix, as well as to pay debts and legacies. The case of *Hobart* and the *Earl of Suffolk*, Serjeant *Maynard* devised to the Countess of *Suffolk*, the Lord *George*, and the defendant *Colchester* and their heirs, to the use of them and their heirs, all his several manors and lands upon trust, to convey part, after the death of his wife, to *Hobart* for ninety-nine years, if he should so long live, remainder as to part, to his wife for life, remainder to the first son for life, and other part to his daughter the Countess of *Suffolk*, and her issue male for life, with a cross remainder, on failure of issue male of either of them: And the will said nothing as to the remainder in fee. The Court decreed what of the trust was not disposed of to the heir; but it is said that this devise is in trust to pay, but the devise in that case was in trust to convey, but there is no difference whether the trust is to raise a particular sum only, or to limit particular estates only, the word paying in the cases that have been cited, was put in, to denote the quantity of the estate, not whether it was in trust or not, but that is not in dispute in this case, for the plaintiff has, without doubt, the legal estate in fee. *North* and *Crompton* is very distinguishable from this case; by the first clause he is made executor, and the last devise to him is of the real and personal estate, for the payment of her debts

and legacies ; by which it appeared to be her intention to make them a common fund, and the whole is to be considered as assets. So this is the same as a devise of the personal estate to him for payment of debts and legacies, in which case he is intitled by law to the surplus, and in equity too, if he is not excluded by the intention of the testator, and there the heir at law had a legacy of £200, though that alone would not have been a sufficient cause for the decree, as appears by the case of *Randal and Booky*, 2 Vern. 425, but the rule that the heir is to be excluded, where he has something given him, will not hold in this case ; for though the daughters have a particular provision, they claim only as standing in the room of their father, who was intitled by the residuary devise, which is a provision for himself, and it is a chance that the daughters are his heirs ; but the residuary clause is a full explanation of his intention : He devises to *Charles Loder* all his estate, real and personal, either [362] in law or equity, which remained undisposed of, in trust, for payment of debts and legacies, and the overplus for his own use, he knew that an estate, after a particular charge was paid off, would result to the heir, or sink into the residuum, therefore he gives it in one case to raise particular sums only ; but in this clause he expressly devises the surplus for his own use : This is the description of what he devises, and the surplus of this trust is an estate undisposed of.

Master of the Rolls. I think this is a devise to the plaintiff *Robert Loder* his kinsman, and his heirs, only in trust, to pay the particular sums charged on the estate, and to decree otherwise would be to make a new will for the testator, and go contrary to a multitude of cases, and in point of construction this case is to be considered as if there was no residuary devise.

Where an estate is conveyed on particular trusts if the rest is to be taken as a gift to the party, there will be an end of resulting trusts ; and this case is the stronger against the plaintiff, because the testator, when he had disposed of part of the estate by the residuary clause, shews that he knew the overplus would result to his heir, whom he designed to disinherit, and therefore he makes a total disposition of it ; and I do not think he designed to make a compleat disposition of his estate till the last devise, for by that he supposes he had not given away all, but that part of his real and personal estate remained not disposed of, it is said that this devise is in trust to pay, not in trust to sell ; but I do not think that a devise in trust to sell makes more for the heir than this devise, for in that case it might be said, that the testator designed to change the nature of the estate, and have no regard for the heir, but turn it into personal estate : This devise is to the plaintiff, his heirs and assigns in trust to pay, that is, whoever is in possession of the estate shall pay this sum, and nothing shall be personally demanded of them, but the estate only shall pay, and is a direction to the *cestuy que trust* to follow the lands, in whosoever hands they come.

In the case of *North and Crompton*, the real and personal estate were united, the executor was a person favoured, one for whom it appeared the testatrix had a kindness, and the personal estate was not given him in trust, but for his own benefit, therefore it would have been a strange construction, to have decreed it a trust for the real estate, or to suppose that she designed him an interest in one, and that he should be only a trustee of the other, when both were blended together.

It has been said, that the calling him kinsman is an implication of kindness. This is not the case of raising a use, [363] where calling him kinsman would be material, if no consideration was expressed, but of a devise, which in its own nature purports a bounty, and therefore by that rule all resulting trusts would be destroyed ; but when the testator gives the estate to the party for particular purposes, that excludes any supposition that he designed it him as a bounty ; and he called him kinsman, not to shew he designed him a benefit, but that he was one in whom he could repose a confidence, as a relation and friend : This is a rational motive to cloath him with such a trust, and it is dangerous to lay hold of such appellatives, in order to go contrary to the whole course of precedents, as the case of *London versus Garway*, 2 Vern. 571, A. by will devises his lands to trustees upon trust, to sell, and to dispose of the money as he by writing should appoint, and for want of such appointment, then the trustees were to stand seized in trust, for the benefit of his four nephews, and if any of the appointees died before sale, and payment of the money, their share was to go to his nephews. A., by writing, appoints his trustees to pay several sums to several persons, but not near the value of the lands : The surplus was decreed to the heir, as an interest resulting and not disposed of. In the case of *Wych and Packington*, carving the term

out of the inheritance, looked like turning so much into personal estate, yet the surplus was decreed to the heir. *Com. Bristol versus Hungerford*, 2 Vern. 645. A. devises his real estate to his executors, to be sold for payment of debts, the surplus, if any, to be deemed personal estate, and to go to his executors, to whom he gives £20 a-piece, the surplus was decreed to the heir, and the decree was affirmed in Parliament, 2 Ventr. 359. If one seized in fee, makes a lease, or devises an estate for years, for payment of debts, if the profits of the lands surmount the debts, all that remains shall go to the heir, though not so expressed, and albeit the case of an executor.

The devise of the other lands to the plaintiff absolutely, is an argument against him, for if the testator designed him this estate too, why did he load one with a trust, and give him the other absolutely? And therefore the bill must be dismissed. Swinb. part 4, sect. 4, n. 6. (2 Vern. 247, decreed no trust as appeared by a manuscript report quoted by Mr. Robins, 138, 430, 252, 264; 1 Chan. Cas. 98, 310; 1 Vern. 21; Moor, 7, Cas. 24, 123, Case 269; 2 Ventr. 56; 3 Lev. 259; 2 Leon. 41, 226; 3 Leon. 165, 130; Dyer, 127; Cro. Jac. 74; 1 Rol. Ab. 844.)

[364] *Saturday, June the 13th* [1730].

APPEALS AND REHEARINGS.

Case 189.—GARRET *versus* EVERS.

In Court, Lord Chancellor.

The mortgagee devises a mortgage, of which he had got a decree of foreclosure *nisi*, by the name of his other freehold estate in A., this mortgage being devised as real estate, shall not go in satisfaction of a less debt, but if assets are deficient, shall be considered as personal estate, for payment of debts.

Mr. Garret being indebted to the plaintiff his brother £640, devises to him a mortgage of £693 (of which he had got a decree of foreclosure, but died before the account was taken, or the mortgagor absolutely foreclosed), in these words. 'And to my brother and his heirs, my other freehold estate in *Feverham*.'

Lord Chancellor. The lands in mortgage being devised as real estate, shall be considered as such between the devisor and devisee, and therefore though this legacy is greater than the debt, it shall not go in satisfaction of it; but if assets fall short, it is still to be considered as personal estate, for the payment of debts.

Monday, June the 15th [1730].

Case 190.—LANSDOWN *versus* LANSDOWN.

In Court, Lord Chancellor.

There were four brothers, the second dies, and the eldest brother enters upon his lands, the youngest brother claims a title, upon which they apply to *Hughes* a school-master, their neighbour in the country (who often acted as an attorney), for his opinion, who, upon consulting a book called *The Clerks Remembrancer*, gave it in favour of the youngest brother, because lands could not ascend; upon which the eldest brother agreed to divide the estate with the youngest, and declared he would rather do so, than go to law, though he had the right: Upon which Mr. *Hughes* prepared deeds of lease and release of the moiety, which were executed by the eldest brother, and bonds of the penalty of £300, which was computed to be the value of the moiety, conditioned for quiet enjoyment of their respective shares; the youngest brother died, and the moiety descended on the defendant, the infant, his son and heir: And the *Lord Chancellor* decreed, that the bond, and deeds of lease and release, should be delivered up to the plaintiff, the eldest brother, being obtained by mistake [365] and misrepresentation, and that the defendant the infant, when he came of age, should convey *nisi*, &c., and his lordship said, That maxim of law, *Ignorantia juris non excusat*, was in regard to the public, that ignorance cannot be pleaded in excuse of crimes, but did not hold in civil cases.

Thursday, June the 18th [1730].

MOTIONS.

Case 191.—ANONYMUS.

At the Rolls.

An attachment against a prisoner in the *Fleet* is directed to the warden, but an *Excommunicato capiendo* cannot, notwithstanding the words in the 5 of *Eliz.*, *The Sheriff or other Officer.*

A Motion was made, to direct an *Excommunicato capiendo* against a prisoner in the *Fleet*, to the warden.

Master of the Rolls. An attachment, in such a case, is directed to the warden of the *Fleet*, but that is not an original writ, and is always returnable into this Court; but I cannot grant this motion, because an *Excommunicato capiendo* is a viscontiel writ; and the words of the 5 *Eliz.* *That the Sheriff, or other Officer,* will not warrant such an order, but are made use of for other reasons; the writ has no *Non omittas* in it, so the Sheriff, in case of a liberty, can only return *Mandavi Ballivo*; besides the writ runs into counties palatine, and then it is directed to the Chamberlain, or Chancellor, and by law, if the Sheriff is excommunicated, it is directed to the Coroner.

Saturday, June the 20th [1730].

Case 191.—CARTER *versus* CARTER.

At the Rolls.

£2500 was provided by settlement for the issue of the marriage, in such proportion as the husband should appoint, he died, leaving a daughter, and made no appointment, the £2500 was decreed to her.

John Carter devised £8000 to his nephew *George Carter*, to be invested in a purchase of lands, in trust, to the use of *George* for life, remainder to trustees to preserve the contingent remainders, remainder to his first, and every other son in tail male, remainder to trustees, their executors, administrators, and assigns, for fifteen years, without impeachment of waste, with several remainders over, and a power to *George* to make a jointure, and the trust of the term is declared to be, in case there should be no issue male, 'for the raising portions for the daughter and daughters of the said *George*, to be paid at such times, and in such manner and proportion, and with and under such provisos and limitations as the said *George*, by any writing or writings, under his hand and seal, attested by two witnesses, should appoint.'

[366] A bill is brought by those in remainder against *George*, to have this money laid out in lands: *George* by his answer says, 'That he does appoint, and intends by a writing in due form to appoint, that all the rents and profits should be collected and applied for raising a portion for his daughter *Elizabeth*, in case he should have no other daughter, but if he should have more, the rents and profits were to be divided equally between them, payable at eighteen years of age, or marriage.'

George made an appointment of the whole profits for the jointure of his wife, and died without issue male, leaving *Elizabeth* his only daughter, having never made any appointment of the portion.

And on this bill, which was brought to have the money laid out in a purchase of lands, and the jointure established, two questions were made as to the portion of *Elizabeth*: Whether it would arise if the father made no appointment? and, Secondly, if an appointment was necessary, Whether the answer of *George* was a sufficient appointment.

Mr. Rider for the defendant the daughter. By the intention of the testator, the profits of the whole term were to go to her, if *George* had but one daughter: If a long term is carved out of the inheritance to raise portions, it cannot be supposed that the testator intended all the profits should be applied, but this is a very short term, and

only sufficient for that purpose. If the words had gone no further than, *For the raising portions for the daughter and daughters of the said George*, the whole term would have been in trust for the daughter, and the words following do not alter the sense of the foregoing, for they give the father no power to appoint the sum, but only the time, manner, and proportion in which it shall be paid. In the case of *Davy and Hooper*, 2 Vern. 665, £2500 was provided by settlement for the issue of the marriage, in such proportion as the husband should appoint; he dies leaving a daughter, and makes no appointment; the £2500 was decreed to the daughter, to be raised out of the term, and the judgment was affirmed in the House of Lords; and the trust of this term is to be executed in favour of a daughter, and the portion cannot be raised without the assistance of this Court.

As to the second question, nothing of substance that is required in the appointment is omitted in the answer, and the circumstances are prescribed only to ascertain the fact, and to guard more effectually against fraud and imposition; but here the father does appoint upon oath and on record, which is stronger than by any matter in pais, or by deed, so that there [367] can be no doubt whether he intended to appoint. If a bill is brought to carry a parol contract into execution, and the defendant admits the contract, that admission shall bind him, and the Court will decree a performance, because then there can be no doubt of the reality of the contract, the end of the statute is answered, there is no danger of perjury in the evidence; and then why should not the Court allow this answer to be a good appointment, and dispense with the circumstances which were tacked to it, only to manifest that it was really executed, as it does in many cases, in favour of a wife, a child, or a creditor.

Mr. Attorney General contra. The Court in the construction of a term in trust, never makes any distinction whether it be long or short: There is no direction in the will to apply the whole profits: In the case of *Davy and Hooper*, a particular sum being mentioned, nothing was left for the husband, but to appoint the time and manner of payment of it; but here the father has a power to proportion, which is to be understood, not only in relation to the number of daughters, but likewise to the profits of the whole term, in case he had but one daughter, and he might appoint her a portion less than the profits, and she could not insist that she was intitled to the whole.

As to the second question, I admit that this Court does sometimes make good a defective execution of a power in favour of daughters; but never a non-execution: The power is, *By any writing or writings under his hand and seal, attested by two witnesses.* And by an answer to a bill in this Court, he says, he does appoint, and intends to appoint, &c., which shews he did not think his answer a sufficient appointment. This is not an appointment by him in writing; the answer is not writ or signed by himself, and is no more than a parol declaration; though it is more solemn and binding than a deed, as to the Court, and parties to the cause. And this is not like the case of a parol contract, where if the defendant does not plead the statute, but admits the contract, he shall be bound to perform it; for there the agreement is on a valuable consideration, which binds the conscience of the party, and seeing the contract is admitted, the end of the statute is answered, for there is no fear of perjury in examining to it; here the appointment is defective in all its circumstances, which were prescribed, not only for the sake of the party to whom the power was given, but also for the sake of the remainder-men, and though this Court will make good a defective appointment in favour of a daughter who has no provision, it never will if she is provided for; because then she cannot be considered as a creditor of [368] the parent: In this case the father has devised to the daughter lands of the value of £20,000, and so it is like the case where a copyhold is devised to a wife or child, if they are provided for, equity will not supply the want of a surrender.

Mr. Mead. This power is given by a stranger to the father of the defendant, and is not a power reserved by the owner over his own estate, which is to be construed liberally. If the father had appointed a smaller sum than the profits, the trustees could have raised no more, and no case can be mentioned where the construction of the defendant has been put, even on terms created by settlements on marriage for raising portions, though the daughters in such a case are purchasers. If a power is given by deed, and it is executed by will, it is not a good execution; here the power must be meant to be executed by deed; and the answer is not an execution of it; and the case of the parol contract is no way applicable to this, yet I remember in one instance, where the mortgagor confessed by his answer a parol agreement, that the interest should

be raised from £5 to £6 *per cent.*, that Mr. Justice Tracy would not decree it contrary to the statute of frauds and perjuries, and in a late case your Honour would not supply the want of a surrender of a copyhold, devised to the wife, because she had £60 a-year given her by the same will.

Master of the Rolls. This term of fifteen years is not created for the raising any particular sum, or for the raising portions not exceeding such a sum, but in a very unusual manner for the raising portions.

It has been objected, that no distinction ought to be made, whether the term is long or short; yes, I think they may have different considerations, as they manifest different intentions in the testator, in one case, it is not reasonable to suppose he designed the whole profits should be applied, as it may be in the other, where they will only be sufficient to form a competent portion.

This term is not to commence 'till after the death of the wife; for the father having a power given him to limit a jointure, and he having executed that power, lets loose this estate for life, precedent to the estates to his first and every other son, and this term being subsequent to those limitations, must be postponed to the jointure.

[369] I am of opinion that this whole term is allotted for the raising the portions, and that it was the intention of the testator to appropriate the whole profits, and it is no objection to say, he might as well have devised a term to the daughters for fifteen years, because then he could not have left the father this power to adjust the proportion, the profits should be paid to them in, in case he had more daughters than one. The term is upon trust for raising portions, &c., if no more had been said, there could be no doubt but that the whole profits belonged to the daughter, the term being but fifteen years, and proper for that purpose. But he goes on, *To be paid*, &c. Proportion cannot relate to the profits, in case there should be but one daughter, but must have a reference to the portions, if there were more than one; and it was put in, not with an intention to empower the father to lessen her portion, if he had but one daughter; but if he had several to proportion it among them, as he should think they deserved: The term is in trust for raising portions, which gives a present interest, and the civil law and ours allows a distinction when the time is annexed to the legacy, and when to the payment only. Suppose he had said, the portions shall be raised by the profits, to be paid, &c., this could be only directory as to the time of payment, and the proportion, in case he had several daughters; and if the estate had been purchased, as the term was without impeachment of waste, the daughters might cut down the timber, and this was in the view of the testator, he was making a provision for his nephew and his children, and if he had sons, he gave them an absolute power over the estate, and to bar all the remainders.

The second question is, if an appointment is necessary to the raising and charging this portion; if the answer is a good appointment, it must be admitted that this is not such an appointment as the will directs, though a writing may be under hand and seal, and not a deed for want of delivery: But the question is, Whether the defendant, being a daughter, is not intitled to have this defective execution made good by this Court? But it is said, here is no execution, and equity will not supply the want of it, either in favour of a child or a creditor, but I think there is a defective execution, and that the circumstances were not added in favour of the remainder-man, for the power does not charge his estate more or less, but only ascertains the time and proportions in which what is before charged is to be paid. The answer says, he does appoint, so is a present appointment, and the words, *And intends*, &c., do not derogate from that actual appointment, or shew that he thought it would not avail, but only that he would [370] afterwards execute it in the precise form. If such a power was given to raise portions, a parol appointment would not be good in equity, even before the statute of frauds and perjuries, but the question is, Whether this answer is not such a manifestation of the execution of his power, as this Court will make it good, as well as decree a parol contract admitted by the answer; for the statute was made to prevent perjury in the evidence; but there is no occasion to examine where the contract is admitted, and I think this case is the same, for he could have done nothing that would have made his intention to appoint more manifest than this answer. Where a younger child comes into equity to have the want of a surrender of a copyhold supplied, he must be wholly unprovided for, or have but a very slight provision, though there have been great variety of opinions upon this point, and where all the children have been well provided for, the Court has supplied the want of a surrender against the heir, because the father was the best judge in what manner to provide for his children; and I believe

Lord Cowper was the first who refused it, because the younger child was greatly provided for, and the heir had little or nothing; but I have never known this distinction made, or that the Court would enter into the consideration of it, where a younger child has applied to have a defective execution of a power made good. So I am of opinion, that the whole profits of the term belong to the daughter, after the death of the mother. (Ant. Cas. 29; 2 Vern. 163, 265, 69, 564, 609, 310; 1 Vern. 37, 40, 219; 1 Chan. Cas. 103, 159, 263, 264; 3 Chan. Cas. 55; Nels. Fol. Rep. in Canc. 28, 273.)

Wednesday, June the 24th [1730].

Case 193.—THORNICRAFT *versus* HARWOOD.

At the Chancellor's house, Lord Chancellor.

Mr. Attorney General for the plaintiff. Sir John Thornicraft, the father of the plaintiff, being about eighty years of age, and his son at a small allowance of £40 a-year, in 1717 became acquainted with the defendant *Minshul*, who pretended in friendship to him, to grant him an annuity of £400 a-year during the life of his father, for which the plaintiff covenanted to transfer to *Minshul*, or order, £10,000 South Sea stock, six months after the death of his father, and *Minshul* entered into a bond of £10,000 to the plaintiff, for the payment of the annuity. Afterwards *D'Costa*, in concert with *Minshul*, advanced £4000 on the covenant, whereby *Minshul* insinuated to the plaintiff, he should be better able to supply his necessities, and pay him the annuity; the money was paid to the plaintiff in notes, and a draft on the bank, but none of it came to the plaintiff's hands, and the plaintiff, according to his agreement, covenanted to transfer ten thousand pounds in South Sea stock to *D'Costa*, six months after the death of his father, and afterwards, on his desire to [371] have the security altered, and advancing £500 more, the plaintiff entered into a bond of £18,000 to *D'Costa*, for the payment of £9000 after the death of his father, but the plaintiff received but £50 of this money. Sir John, the father, soon after died, and *D'Costa* went beyond the seas, and a commission of bankrupt being taken out against him, *Harwood* the assignee brought an action on the bond; and this bill is for relief, on payment of what was really advanced by *D'Costa*, with interest, and for a perpetual injunction; and your lordship was pleased to grant us an injunction, upon our giving judgment, subject to the order of the Court; and the question is, Whether we are to pay the £4000 advanced, by *D'Costa*, or only £430, which is all the money came to our hands? This bond was obtained by a gross fraud, and without any consideration: *Minshul* gave no security but the bond for the annuity, though he agreed to give the plaintiff real security, and he never received but £430, and so this is within the reason and authority of the cases of extravagant bargains with young heirs, where the Court have always set aside unreasonable securities, taken for annuities during the life of the father, as against conscience. *Berry versus Pit*, 2 Vern. 14. The plaintiff's father being tenant for life of a great estate, which by his death was to come to the plaintiff in tail, in 1675 he borrowed £2000 of the defendant, and confessed two judgments of £5000 each, with defeasances, that if the plaintiff outlived his father, and within a month after his death paid the defendant £5000, and if the plaintiff should marry in the life-time of his father, and should from his marriage, during his father's life, pay the defendant interest for his £5000, the defendant should vacate the judgments; and that it was the intent of the parties, if the plaintiff did not outlive his father, that the money should not be repaid. The plaintiff's father died in 1679, and the bill was to be relieved against the said judgments, upon payment of the money lent, with interest; and Lord *Nottingham* did not think fit to relieve the plaintiff against the bargain itself, without paying the £5000 and interest, from a month after the plaintiff's father's death; but this decree was reversed by the Lord Chancellor *Jefferies*, who decreed the defendant to refund all the money, except the £2000 lent, and interest.

Mr. Solicitor General. The question is, What relief we shall have against this bond? The assignee insists to be paid double the sum advanced, because of the contingency that the plaintiff would survive his father; but in the case of *Berry* and *Pit*

this was determined not to be a sufficient reason, and that the clause, that the money should not be repaid, if the father survived, was put in only to colour the bargain. for if the heir dies in the life-time of his father, he is worth nothing, and [372] of course unable to pay. We have been notoriously over-reached by *Minshul*, and if *D'Costa* was concerned in the fraud, we ought to be relieved, though none of the money came back to him; it was unconscionable and fraudulent in him to demand £9000, and gives a colour to believe he was privy to the whole fraud; and though he was not concerned in the fraud, the plaintiff ought not to be charged with more than came to his hands, 2 Vern. 77. (1 Vern. 467.) The plaintiff, with other young heirs, being drawn in by *Stystead*, with the concurrence of *Sir William Smyth*, to buy goods at an extravagant price, and to accept of assignments of bad securities, and jointly to enter into securities for the payment of the money agreed on, the bill was to be relieved against those securities, and the Court declared, that the plaintiff should be liable only to so much of the goods as came to his own hands, and should not be answerable for his companions; here we were not jointly bound with *Minshul*, but were defrauded by him, and he is in prison, and worth nothing.

N.B. Lord *Nottingham* in one day made eleven decrees against *Stystead*, and after the first decree, the second cause being opened, and so every one in their order, and the council informing his lordship, that every cause was of the same nature, he ordered the register to draw up the same decree in each cause *mutatis mutandis*.

Mr. Versey for the defendant. These bonds have been adjudged good at law, because of the hazard, and are of the nature of bottomry bonds, on one contingency the obligee is to have nothing, on the other double the money he advanced, and this Court will never presume a fraud, especially when *D'Costa* really advanced the £4000 to the plaintiff, as is proved by an account found among the papers of *D'Costa*, made up and signed by the plaintiff.

Lord Chancellor. I think all bonds in general entered into in expectation of the father's death, ought to be discountenanced, and are not like a fair adventure on bottomry; so that the plaintiff must certainly be relieved; but the question is, in what manner? There is no doubt but *D'Costa* paid the £4000 to the plaintiff, but whether there appears sufficient proof that he was concerned in the cheat, that it should not remain with him, he was not originally in the contrivance, but *Minshul* was wholly concerned in it, and little credit is to be given to his testimony, where it is not supported by other circumstances. The sum of his evidence is, that in 1717, *Biron* brought him acquainted with the plaintiff, and he agreed with him, in order to supply his necessities, to pay him an annuity of £400 a [373] year during his father's life, and the plaintiff was to covenant to transfer to him or his assignee, £10,000 South Sea stock after the death of his father; that he, *Helbert*, and *D'Costa*, did afterwards concert to cheat the plaintiff; *D'Costa* was to advance £4000, and the plaintiff was covenanted to transfer £10,000 South Sea stock to him (but he afterwards swears that *D'Costa* advanced the money on the bond, and not on the transfer of the security), and that the plaintiff was not to keep this money to his own use, but he warily avoids saying for whose use, nor he does not swear that *D'Costa* was to have any of it, and therefore he is not to be affected with the transaction. And he might pay part of it to *Minshul*, as agent to the plaintiff, who acquainted him that he wanted money, and would therefore transfer the security to *D'Costa*, who was ready to advance it, and *Minshul* was to retain the money to supply the plaintiff's occasions, but this is all talk between him and the plaintiff only; and he does not say that *D'Costa* knew of it, and *Minshul* was to have £2000 to pay *Helbert* several sums out of it, which he agreed for, before he would introduce him to *D'Costa*, which he does not pretend *D'Costa* knew of; therefore on the plaintiff's payment of £4000 and interest, the defendant *Harwood* is to acknowledge satisfaction on the judgment, and neither side is to have costs.

The plaintiff insisted he ought to have costs, because, though the assignee was a stranger to this transaction, he demanded the £9000, and the defendant claimed costs, because the plaintiff was relieved from a penalty. (1 Vern. 167, 271, 141: 2 Vern. 27; 2 Chan. Cas. 120, 136.)

Signing and sealing is a good publication of a will.

Case 194.—BIRCH *versus* BAKER. [1730.]*At the Rolls.*

An ademption of a legacy is not to be presumed. Swinb. part 3, sect. 5, n. 2. I give A. £500, viz. £400 due on bond, and £100 in money, the testator after receives part of the money, and takes a bond for the residue, this no ademption of the legacy.

Mr. Solicitor General for the plaintiff. 'Mr. Lockington devised a moiety of two thirds of the residue of his South Sea stock, India, Bank, and Orphan stock, leases, East India, and South Sea bonds, mortgages, and other his personal estate, to his sister Mrs. Colchester, who, before the said moiety was paid to her, made her will, and as for such share and proportion of her brother Lockington's personal estate, she devised all her said share to trustees, to pay £200 out of it to her grandson Birch, and the residue of the money arising by the sale of it, was to be put out at interest, for the benefit of her grand-daughter,' till she came to the age of twenty-one years: After the making the will, the executor of Mr. Lockington, at the desire of Mrs. Colchester, and the legatees of the other moiety came [374] to an account, and their respective shares were divided, and paid to each of them, and Mrs. Lockington's moiety consisted of several East India and South Sea bonds, and Orphan and Bank stock, part of which she afterwards sold in her life-time for £719, and the question is, Whether that is an ademption of so much of the legacy; or whether we shall not have a satisfaction out of her assets *pro tanto*.

I shall lay it down as a rule, that an ademption is not to be presumed, but must be either expressed, or necessarily implied, something must be done to shew the intention of the testator altered or otherwise, though the thing is changed, there is no ademption. Your Honour at a former hearing determined, that the receiving the legacy did not take it away, for that did not shew an alteration of her intention, but it was necessary to ascertain the share, and prevent survivorship; so the present consideration is, whether her sale of part of it afterwards as a divided moiety, is an ademption of so much. This is not like the devise of a horse, or other specifick thing, which if the testator sells afterwards, the legacy is gone; for at the time Mrs. Colchester made her will, she was intitled to nothing in specie, and she devised no specifick thing, and the species afterwards allotted to her were not the things she had before devised, so that her disposing of any of them afterwards, was not an alienation of any specifick thing she had devised, but she designed by her will that her moiety should be turned into money, and £200 of it to be paid to her grand-son, and the residue to be put out at interest for the benefit of the grand-daughter; so that she does not devise the share itself, but the money arising by it; and then, since ademptions are not to be presumed, what is there in this case that shews an alteration of her intention? not the turning it into money, for that was what she designed by her will; so that this was only pursuing that intention, and preparing things for her trustees, 2 Vern. 681. I give my uncle Orm £500, viz. £400 due on bond, and £100 in money, the testator after receives part of the £400, and takes a bond for the other part: This was adjudged by Lord Harcourt no ademption of the legacy, because nothing appeared to shew an alteration of intention. It cannot be imagined when Mrs. Colchester made her will, she considered herself as intitled to a sixth part of every species, and then her will cannot be understood as a devise of a sixth part of every species; but she disposes of her sixth part, be it what it will, and orders it to be converted into money; if her receipt is no ademption, why should her sale of it? which is not inconsistent with her will, but carrying on the intention of it.

[375] *Mr. Attorney General for the defendant.* This devise of Mrs. Colchester is the same as if she had devised the particular sorts, and she only expresses herself otherwise for shortness; her said share is given to the trustees, and the turning of it into money is part of the trust; and not of the bequest; and that direction shews, she did not apprehend she was intitled to money, and, if after making her will, she had not called it in, her trustees would have been intitled to a share of each species, which shews the will amounts to a devise of the particular kinds, and not of so much money: I allow an ademption is not to be presumed, but must be shewn by some fact, that takes away the thing, and differs from a revocation, which takes away the bequest, as a later will, or codicil, and the direction to the trustees to sell, does not alter the case, because this

was a sale by herself in her life-time. If the testator devises a bond debt, he designs the legatee the money, yet if he afterwards call it in, the legacy is lost. In the case of *Orm and Smyth*, the legacy of £500 remained, though one of the funds was altered, and the *viz.* made the difference, for the £500 was absolutely given. The executor of Mr. *Lockington*, if the ready money was sufficient, could not turn these species into money, for the payment of the debts ; but the residuary legatees were intitled to the specifick shares. Lady *Dover* devised the residue of her personal estate, which consisted of leasehold houses, to a *Roman* Catholick, and your lordship decreed it to be distributed among her next of kin, because the testatrix having left money sufficient to pay her debts, the devise was intitled to the very species, and the executor could not sell them, and she was disabled by the statute to take the leases. Therefore this devise is the same as if she had devised the particulars by name, and the testatrix having afterwards disposed of part of them : As to so much of them the legacy is gone, and it is become part of her own estate. Suppose she had given them away, could the legatee have had satisfaction for them out of her assets ?

Master of the Rolls. An ademption is an implied revocation, a declaration of the intention being altered, and must operate as a revocation ; the civil law distinguishes, where a legacy is paid in by the debtor, or coercion of law, which is no ademption, because no change of mind appears, and where it is called in by the testator, in which case the legacy is gone : The question then is, if here does not appear a sufficient intention in the testatrix to alter her mind ? The brother's estate consisted chiefly in securities, and he gives a moiety of two thirds of the residue of it, enumerating the particular species of which it consisted, to Mrs. *Colchester*, and she by her will gives this her undivided share, [376] *&c.*, afterwards a division is made of the brother's estate and stock, and bonds are allotted to her, part of which she sells, and keeps no account of the produce, and the grand-daughter would have her estate debtor to her for so much. Mrs. *Colchester*, if the debts were paid, might insist upon receiving the specifick estate, and have an injunction of this Court, to restrain the executor from touching or selling the species, and to have an equal share of every species with the other legatee, and not have one set off against the other, unless it was a prejudice to the estate : The executor, for instance, could not have given the leasehold estate to one or other of them, but each might say, I'll have a part of the real chattels. She might have sold her undivided share, and the vendee would have stood in her room, and that would have been an ademption, and will coming to a division of it, and then selling part of it, make any difference ? Mrs. *Colchester*, after making her will, first came to a division and receipt of her share, which did not amount to an ademption, because it was done in concert with the other legatee ; and by this step she put it more in her power to dispose of it, and accordingly she afterwards sells part of it, and keeps no account of the produce, but if she had, and the account had been framed in such a manner as shewed her intention, that this should still be considered as part of her brother's estate, it might then be said, she was only carrying on the intention of her will, but having blended the money with her own estate, it shews her intention, that it should be no longer considered as any part of her brother's estate. So I am of opinion, that this sale is an ademption *pro tanto* ; she had a property in her specifick undivided share, and if she had sold it before the division, that would have been an ademption, and why should it not be after division ? which enabled her the better to sell it, and she has kept no account of the money. (1 Vern. 95 ; Swinb. part 7, ch. 20 ; Raym. 325 ; 2 Vern. 521.)

Case 195.—MORGAN *versus* MORGAN. [1730.]*At the Rolls. Eodem die.*

A man cannot commit a devastavit by will, but nothing passes, but what the testator may lawfully grant. 'I give to A. all my personal estate which I shall be intitled to as administrator to my father, or otherwise howsoever, exonerated and discharged of all my debts and funerals,' and the testator subjected his lands to the payment of his debts and funerals. Nothing passes by these words that belonged to the father, but the distributive share of the son, and tho' if he wasted the assets, by construction of law he made his father's debts his own, yet the words of this will must not be taken in that sense, but they must be paid out of his personal estate. Swinb. part 3, sect. 6, 5, n. 2; Bro. tit. Adm. n. 7; Fitz. same tit. n. 3; Plowd. 525, 576; Wentw. Off. of Ex. 17, 26.

The testator made his will, *inter al'*, in these words; 'I give and bequeath to my grand-mother all my personal estate, of what kind, nature, or quality soever, which I shall be intitled to, as administrator to my father, or otherwise howsoever, exonerated and discharged of the payment of all my debts and funeral charges; and subjects his lands to the payment of his debts and funerals.' The defendant insisted that this was a specifick legacy discharged of the debts of the son, but not of the father, and would take in only the distributive share of the son. The plaintiff, that by the words and intention of the testator, all the personal estate of the father, as well as of the son would pass, and discharged of both [377] their debts, for the distributive share did not belong to him as administrator, but he had a right to it if he had not taken out administration, and the words signify all the legal estate he was intitled to, by taking out the letters of administration, which as he might dispose of in his life-time, so he might by his will, which will amount to a devastavit, and then the debts of the father will become his debts.

Master of the Rolls. A man, by law, cannot commit a devastavit by his will, but only by act executed in his life-time; for the testator can give nothing away by a devise, but what he lawfully may; and therefore only his distributive share of the personal estate, discharged of the debts, can pass. The debts are *Æs alienum*, not the personal estate of the father; and he says all my personal estate, not all his personal estate. And even if the son by committing a devastavit had made them his debts in construction of law, they should not be considered as such in this will, but his estate, &c., is only his share under the statute, of so much as remains after payment of the debts, but if he has wasted the assets of the father, so that there are not sufficient to satisfy his debts, as to so much they are the son's debts, and must be paid out of the personal estate.

*Thursday, June the 25th [1730].*Case 196.—WARD *versus* Sir JOHN EYLES.*At the Chancellor's house, Lord Chancellor.*

Mr. Attorney General for the plaintiff. A Bill was brought by Sir John Eyles, and the other trustees for the sale of the estates of the late Directors of the South Sea Company, against Sir John Blunt and Mr. Ward, to have £40,000 repaid, and £1000 South Sea stock transferred to them by Mr. Ward, which Sir John Blunt, one of the late Directors, had paid him for the purchase of an estate in *Gray's-Lane* and *Wapping*, in the year 1720, and to set aside the said purchase, as fraudulent and subsequent to the time allowed by act of Parliament. By the articles of agreement, Sir John Blunt was to pay £20,000 at a day certain, £20,000 when the conveyances were executed, and £10,000 by a transfer of £1000 South Sea stock with the dividends, and the purchase was decreed to be set aside, and the money repaid, and the cross bill is to have the purchase established. The defendants obtained an order to refer the depositions for irregularity, and the Master has certified that they are irregular, because the [378] witnesses were examined to the same matters that were in issue in the original cause, and they were settled by a decree of the Court. The great question in the original cause was, When the articles and conveyances were executed? *Mr. Annesly*

being examined, when Sir *John Blunt* laid the articles before him, but not the particular day, deposed it was some time in the winter 1720, and we had an order to examine Mr. *Pearce viva voce*, at the hearing, but your lordship was of opinion, we could not examine him to the time. But Mr. *Annesly* being examined in this cross cause, swears, that on looking over the book in which his fees are entered, he finds that the articles were laid before him for his perusal, 6th *January* 1720, which was before the disabling act took place; and Mr. *Pearce* swears, Mr. *Ward* shewed him the articles in *August* 1720; the witnesses are persons of undoubted reputation, and have not proved any thing that tends to contradict what was proved in the former cause, but only what tends to explain and illustrate it; and though I allow that the Court is very tender of examining witnesses after publication, yet they admit of auxiliary or explanatory proofs. *Keilw.* 96 a, b. As where A. and B. are supposed to have done such an act, the proof of which is but obscurely set forth in the witnesses depositions, they not giving any reasonable testimony of their knowledge touching the performance of such act in any particular: Now, if such obscure depositions be published, and the deponent happen to die, others may well depose that they were present at the performance of that act, and so explain the first depositions; but if they depose any thing contrary to the former depositions, or which may alter any part of the substance thereof, such deposition is void, and ought to be rejected. *Hardr.* 180, *Sir John Langham versus Lawrence*.

Mr. Wills. The Master has given two reasons why the depositions are irregular, because the witnesses were examined to the same matters in the original cause, and because all those matters were settled and determined by the decree; but this last reason is only proper for your lordship's judgment, and is out of the submission to the Master, the defendant may think the matter by the original bill is not brought properly before the Court, and may be willing to state his own case; but by this argument, no cross cause could be brought to hearing, after a decree in the original cause. The other reason goes to all the evidence, and so is in effect to say, we shall not bring our cause to a hearing, because we cannot read our depositions. It is not proper to examine witnesses to contradict what was sworn in the other cause, but it is agreeable to reason, and the practice of the Court, that where any matter is doubtful in the original cause, to allow auxiliary proofs in the cross [379] cause to explain it, and this is the reason, why the Court in many cases directs an issue, yet that is liable to the same objection, that the same witnesses may be examined to the same points; indeed if they swear contrary to their depositions, no weight will be laid on their evidence, and so your lordship at the hearing, may give what credit you please to these depositions where they contradict the former: The decree was made, not because the evidence was against us, but because we had not made out the facts necessary to our defence, nothing was proved against us, but we had not proved enough: All we have done in this cause is, to explain and supply what was doubtful, but not to contradict even the plaintiff's evidence. 1 Can. Cas. 228. On an appeal upon a commission of charitable uses, the question was, Whether certain houses were parcel of *Bridewell*, or of *Dorset* house? And the Court directed a trial of law, and a commission was moved for, to examine a witness eighty years old, who was not discovered before, and unable to travel: The motion was opposed, because of publication being past; and the *Lord Keeper* said, though the rule of non-examination after publication had been strict in this point, yet the Court was the judge, and so he ordered a commission. By this it appears, that is discretionary in the Court to grant a commission after publication; and though that was an examination after publication in the same cause, that does not make the case different from ours, for the reason why an examination is not allowed after publication, for fear to introduce fraud and perjury, when the parties know where the cause pinches, is equal, whether the examination is in the same, or another cause.

Mr. Mead. The trustees by their answer to our cross bill say, that the articles or the indorsement of the payment were not executed when they bear date: These then being matters particularly put in issue in this cause, and publication being past in the original cause before their answers came in, it was proper, and not inconsistent with the rules of the Court, to examine to these points, there was no examination in the original cause to the particular time the articles were executed, and upon the hearing Mr. Justice *Price* was of opinion, that there ought to have been a further inquiry; and the witnesses in this cause give their reasons from written evidences why they can remember the particular day; so this is no more than proving exhibits, and offering

explanatory evidence, and giving the witnesses an opportunity to see whether they can find any thing to explain, and fix their evidence: Mr. *Mason* says, he remembers it to be the seventh of *September*, because on that day he received a note from Sir *John Blunt*, drawn on the Sword Blade Company, which he makes an exhibit: So Mr. [380] *Annesly* in his former examination said, sometime in the year 1720, now he sets out the day, and Mr. *Pearce* is positive from a letter that he saw and perused the articles in *August*; and his deposition is not irregular, because the same witness cannot be twice examined, for he was not examined in the former cause. It is very usual on application, to examine a witness over again before the Master, after a hearing on matters of account and the like; and this being an examination in another cause, there was no reason to apply for leave.

Mr. Fazakerly. Here is an exhibit bearing date in *July*, which is to be presumed was executed at that time, and we have only examined to fortify that presumption; and since we have a right to proceed in our cross cause, it is reasonable we may examine to all the facts necessary to make out our case. The witnesses have refreshed their memories by written entries, which cannot mistake; and if your Lordship on application would have granted this examination in the same cause, as being just and reasonable, of common right we have liberty to examine to it in the cross cause without leave. When a Court directs an issue, it is liable to the same objections as this examination: If these depositions should be suppressed, we should be without remedy, though the justice of the case was with us: If your lordship permits them to be read, you may give what credit you please to them; and they will not conclude the property of the defendant; but if your lordship pleases you may direct an issue.

Mr. Solicitor General for the defendants. The only question is, Whether the examination in the cross cause is regular. In 1723 we brought our bill, and in *May* 1727 the cross bill was filed, publication past in our cause the 9th of *July* following, and our answer came in the *December* after. We set out by our bill, the whole fraud and contrivance, that the houses were set by ward upon fictitious leases to *Mason* at a £1000 a year rent, and fifty years purchase given for them by Sir *John Blunt*; that the agreement was not carried into execution 'till after the 5th of *January* 1720, and that the articles were antedated, and this was the most material point in issue in that cause: The cross bill relates to the same individual thing, to discharge the claims of the trustees, and to quiet the plaintiff in the enjoyment of the money and stock, and is as much by way of defence only, as their answer.

The cause was heard four days by your lordship, assisted by the Lord Chief Justice *Raymond*, the Master of the *Rolls*, and Mr. Justice *Price*, and your lordship declared the whole [381] proceedings to be fraudulent, and decreed, that *Blunt* and *Ward* should account for the money and stock; and this decree has been signed and inrolled, an account taken, and a report made: Our answer to the cross bill came in before the decree, or we might have pleaded it in bar to their relief, for a decree can never be varied by a new bill, but by a bill of review only, because the same Court might make contrary decrees on the same equity, and the parties would be intitled to the aid of the Court to carry them into execution, so that the process of the Court would fight with itself: They say, as they have a right to go on with their cause, they have a right to prove their case, but they cannot examine to the same matter after publication, either in the same cause, or in a cross cause, because they equally see what is sworn; and this occasions that constant application to the Court to enlarge publication in the original cause, till they have examined their witnesses in the cross cause, that they may not be precluded from examining; and the reason is to prevent perjury, and the contradiction of evidence, to misguide the Court by a misrepresentation of facts, and the eking out evidence by explanation. As this is a general rule, let us see whether there is any reason to dispense with it in the present case; they say they examine only to illustrate the former evidence, and to a point that was thought not material in the other cause; but this was the principal point in issue in that cause, and a fact they themselves examined to; but if, after a cause was heard, and the Court laid hold of a defect of evidence, the party might examine to the same matter in a cross cause, it would be the strongest temptation to make out and supply what they find material, and the examination is equally introductory of perjury, whether it contradicts the former evidence, or carries it further upon their finding it material; and they draw their arguments from what the witnesses have sworn in this examination, which cannot be considered; for the question is, Whether the same or new witnesses have been examined to the same matters that were

at issue in the original cause, not what they have sworn on the examination : We opposed the examining Mr. *Pearce viva voce*, in the other cause to the time ; because they could examine him only to the execution, and the reason is, because such a witness may have seen the depositions, and not to save the register a little trouble, but there is not that room for perjury, when he is examined only to the execution : So these depositions are not warranted by the course of the Court, nor by the reasons offered for the plaintiff. As to the cases that have been quoted, it is not said in *Keilway*, whether it was agreed by the Court, or by the council at the bar, as their opinion, and there the depositions were obscure, and the witness dead, but I am sure the contrary opinion has been held ever since, and their going so far back is a strong proof that the modern practice is against them. The case in *Hardress* is nothing to the purpose ; a [382] trial was directed, and a bill brought for a discovery, and the defendant demurred, because the plaintiff ought not to have supplemental proof in the same cause, and the demurrer was over-ruled ; here they would have supplemental proof in the same Court, and to overturn a decree, but it is proper to apply for evidence on a trial, and the one case has no relation to the other. They say the Court after publication often directs issues on the hearing ; true, and the defendants in the former cause pressed for a trial, but your lordship, and his Honour the *Master of the Rolls*, were of opinion against them, from the extreme danger of perjury, after the parties have measured their strength ; and because this whole case was a complication of fraud ; and if the Court at that time would not grant them what it often does to the suitors, there is greater reason to adhere strictly to the rules of the Court.

Lord Chancellor. You need not go on. There is no rule in this Court more sacred, than that witnesses shall not be examined in another cause, to matters in issue in a former : It is sometimes done on an appeal in the spiritual Court in the same cause, *viva voce*, and *informandam Conscientiam Judicis*, because the Court are to satisfy themselves all the ways they can. Cross bills were at first unwillingly allowed of ; the Court foresaw great inconveniences from them, and the rules relating to them were introduced by Sir *Nicholas Bacon* ; they are in the nature of a defence, and were allowed of, that the party might more fully have the benefit of somewhat he could not so well profit himself of being a defendant, though it was at issue in the other cause, but they cannot examine to the same matters after publication, as evidently appears from the motions that are every day made to enlarge publication in the original cause ; but the plaintiff has been guilty too of a breach of another rule, that a cross bill is to be brought, time enough to examine to, before publication passes in the original cause, the answer came in before the decree, so they could only answer and deny the facts, and if any thing happens after that hinders an examination to them, that cannot be helped : The decree has established these facts, and can be altered only by a bill of review, or an appeal, and the matters in issue in the original cause, or settled by the former decree, cannot be examined to in the cross cause ; so the exceptions to the Master's report must be over-ruled. (*Curs. Canc.* 323, 324, 327 ; 1 *Chan. Cas.* 234 ; *Keilw.* 100 a ; *Hardr.* 120 ; *Pract. Reg. in Canc.* 43, 362, 363 ; *Introd. to Clerk's Tut. in Canc.* 20, 74 ; 2 *Chan. Cas.* 75, 79, 217 ; 2 *Vern.* 409 ; 1 *Vern.* 253 ; 1 *Chan. Cas.* 155, 25, 233.)

[383] *Friday, June the 26th [1730].*

Case 197.—STANLEY versus STOCK.

At the Chancellor's house, Lord Chancellor.

If obligors are bound jointly and severally, the obligee may sue them here severally, as well as at law. 2 *Lev.* 74 ; 3 *Lev. Hail versus Langham* ; *Suppl. to Wentw.* 357.

Two were jointly and severally bound ; both died, and the plaintiff, who was administrator to one of the obligors, filed a bill against his heir, and it was objected at the hearing that the representatives of the other obligor ought to have been made parties ; but the objection was over-ruled, because the obligee may sue them jointly or severally in this Court, as well as at law.

Thursday, July the 2d [1730].
 APPEALS AND REHEARINGS.

Case 198.—HAWKINS *versus* CROKE.

At the Chancellor's house, Lord Chancellor. [S. C. 2 P. Wms. 556.]

Mr. Verney for the defendant. This cause comes before your lordship on an appeal (Ant. Cas. 158), from a decree of his Honour the *Master of the Rolls*, and on exceptions taken to the Master's report, of the regularity of issuing the sequestration; but as, if the decree is reversed, that will put an end to the other question, I shall, according to your lordship's commands, confine myself to that. On the 20th of *February* 1728, a sequestration issued for want of an answer, and on the 28th of the same month, the plaintiff obtained an order to set down the cause on the sequestration, that the bill might be taken *pro confesso*; when the cause came on to be heard, it being alleged for the defendant, that he was willing to answer, the cause was adjourned to the 7th of *March*. On the 4th of *March* we put in an answer, which the plaintiff excepted to, and on the 7th of *May* the Master reported insufficient, and the next day we were served with a *subpoena* for costs, and to make a better answer. On the 14th of *May* we paid the costs, and on the 10th of *July* we put in a second answer, which on the 13th of *July* the Master reported insufficient, then we put in a third answer, which was sworn and filed the 19th of *July*, and on the 21st of *July* 1729, the cause came to a hearing, and the bill was decreed to be taken *pro confesso*, though we produced a certificate that our third answer was filed, and which not being excepted to, must be taken for a full and sufficient answer, though only two answers are taken notice of in the decree: But as the cause is open on the appeal, we may read to your lordship the certificate, and if the decree was inrolled, we could have a bill of review for [384] error appearing on the face of it, that we had put in two answers; whereas the foundation of these decrees is, that the defendant would not answer, though the present practice is otherwise; yet anciently, if the defendant would not answer, and a sequestration was returned, the bill was not taken *pro confesso*, unless the plaintiff could prove the allegations of it, because in all bills they are greatly beyond the truth, in order to come at it. 1 Vern. 223. For since the defendant by refusing to answer, deprived the plaintiff of putting matters in issue, the Court gave him a liberty to prove them. In 1 Vern. 247, the *Lord Keeper* took time to consider whether he would decree the bill *pro confesso*; so it is not a very plain case. And 1 Vern. 228. If one of the defendants is in contempt, and stands out to a sequestration, and the cause is heard against the other, yet he may come in and answer, and the cause may be heard again as to him. And if a defendant puts in four insufficient answers, by the course of the Court, he is to be examined on interrogatories in vinculis, and 1 Chan. Cas. 279, where a defendant put in a plea, which was over-ruled, and after three insufficient answers, the Chancellor would not commit him to be examined on interrogatories. But in this case, the defendant was in prison at the suit of the King, on a conviction of forgery, in which case the bill ought never to be taken *pro confesso*, till he has been brought into Court by *habeas corpus*, and told of the danger he is in if he does not answer, and have a day given him to put in his answer, that the Court may judge whether he is obstinate or unable, through poverty or otherwise, to answer: And this is the practice, whether he is in custody at the suit of the plaintiff, or of a stranger; Cursus Canc. 115, of which the plaintiff was so sensible, that since the decree, he has constantly brought him into Court to enforce the execution of it, though it was more necessary before the decree than since, that the bill might be read to him, and he know what to answer. If the merits are with them, to reverse the decree will not rob them of the benefit, but if they are with us, we are precluded from the advantage of them, by this matter of form.

Mr. Attorney General for the plaintiff. This decree will appear to be very regular from the circumstances of the case, and the general practice of the Court; when the cause came first to be heard on the sequestration, the plaintiff was undoubtedly intitled of right to a decree, that his bill should be taken *pro confesso*, no answer being then on the file; but then the defendant applies for liberty to answer, and the *Master of the Rolls* gave him leave, and adjourned the cause; he puts in an answer, which the Master reported insufficient in fifty two exceptions, and the plaintiff obtains an order to bring the cause on again upon the sequestration, when it was alleged, that the

defendant had [385] put in a further answer, which being afterwards reported insufficient, the cause came on again, as it did originally, for the liberty to answer was only an indulgence given by the Court, out of the rules, which the defendant had no right to, and had abused; and the defendant in his petition, after the second answer, for the cause to stand over, confesses that he could not put in a full answer, being a prisoner, without a sight of the letters in the custody of the plaintiffs clerk in Court; and since he has not seen them, this is an admission that his third answer is insufficient; then the question is, Whether the cause being set down on the sequestration, the bill might not be decreed *pro confesso*, though the defendant had put in three insufficient answers, whatever was the ancient practice, the present course of the Court is, when the defendant is in contempt to a sequestration, for want of an answer, to take the bill *pro confesso*, and Courts of equity have established this rule in conformity to the Courts of law, where if the defendant appears, and will not plead, by the judgment on *nil dicit*, the whole declaration is taken for true; so if no answer was in, the decree must be admitted to be regular, and these insufficient answers will not vary the case, but they are to be considered as no answers, for the very reasons on which these decrees are founded (Curs. Canc. 294, 295), that by the defendant's fault, no issue can be joined for the plaintiff to prove his case, for if the answer is insufficient, the merits of the case are not put in issue; besides, the plaintiff wants the discovery of the defendant to assist him in his evidence, and that in cases of contempt an insufficient answer is considered as no answer, appears from hence; that if the process of contempt is once begun, and an insufficient answer is put in, the plaintiff is not to begin the process *de novo*, but may carry on the old process, so this bill ought to be taken *pro confesso*, because the defendant has done nothing to put the matters in issue, and the plaintiff wants his discovery, and cannot otherwise come at a decree. But this is said to be against the course of the Court, by which if the defendant puts in four insufficient answers, he is to be examined upon interrogatories *in vinculis*: But in that case, there never was any foundation to set down the cause on the sequestration, the process had not been carried on to a sequestration, before any answer came in; and as the plaintiff, if he had carried on the process in part, might have continued it to a sequestration, for want of a sufficient answer; so as he has gone the length, he may revive the sequestration for the insufficiency of the answer; but they say he was a prisoner, and therefore ought to have been brought up by *habeas corpus*; he was not in custody when he put in his first answer, and is not now at our suit, so we were not obliged to take that method, which is only observed when the defendant lies in prison on a process of contempt in that cause; and though his answer was filed, it was no answer, and we [386] were not obliged to receive it, because the costs of the contempt were not paid; for if an injunction is granted on an attachment till answer, and further order, though the defendant files an answer, he cannot move to dissolve the injunction on coming in of the answer, till he has cleared his contempts: So the strict rules of the Court are with us, The plaintiff was intitled to this decree before any answer came in, and the Court let the defendant put in an answer, not as his right, but as an extraordinary indulgence, to see whether he would make a proper use of it, and when they saw he abused it, only allowed the plaintiff to resort back to what he was at first intitled, and put him in the same state he was in before.

Lord Chancellor. By the old practice of the Court, the plaintiff was undoubtedly put to prove his bill by witnesses *viva voce*, and so was every plaintiff at law, his declaration, as appears by those words, *Et inde producit sectam*, where *secta* signifies the witnesses.

Mr. Solicitor General. If the reason of this case is the same with those in which the bill has been decreed to be taken *pro confesso*, the judgment ought to be the same; and if an insufficient answer was an objection, few bills could be taken *pro confesso*. When the cause came first on to be heard, there was no answer; so the plaintiff was intitled to this decree, and it was the mere indulgence of the Court to allow the defendant time to put in an answer, and the cause in the mean time was adjourned over in the same plight it stood before the defendant put in his answer, which was reported insufficient; and the cause came on again, and the defendant alleged he had put in a further answer, upon which an order was made, that if he did not procure a report within four days, that it was a sufficient answer, the cause should stand first in the paper to be heard; for the Court being suspicious of the defendant, insisted upon his procuring a report, the Master reported the answer insufficient, and then an order

was made, that the cause should stand for the 21st of *July*, and he says he put in a third answer on the 19th, but it is not the filing it with the clerk makes it an answer, for the plaintiff was not bound to receive it, because the costs were not paid, and the answer was only thrown in, that the cause might stand over again, and therefore this answer ought to be laid out of the case, and the two former, being insufficient, are no answers, which appears from the method of carrying on the process (1 Chan. Cas. 238), and the subpoena to make a better answer, is served on the clerk, and not on the defendant, as the first subpoena, and if the plaintiff is come [387] to the end of the line, he can go no further, but may indeed begin *de novo*; and there is this further reason, why a bill should be taken *pro confesso* upon an insufficient answer, because nothing material perhaps may be answered by it, but only combination and confederacy, What then can the plaintiff do? must he set down the cause on bill and answer? that would be an admission that the answer was good, though the Court had given their opinion that it was not sufficient, or must he reply to it, but then he loses the benefit of a discovery from the defendant, which is often the chief end of coming into this Court, because he cannot prove his case, and was the reason why the old practice of proving the bill was laid aside. But they say, if the defendant puts in four insufficient answers, he may be examined *in vinculis*; but suppose he will not be examined, and the process runs to a sequestration, because the party cannot be found, but an examination *in vinculis* supposes him found and taken: But still it must come to this at last, that the plaintiff must either set down the cause on bill and answer, or reply to the answer, or have a decree that the bill be taken *pro confesso*. But it is objected, that it will appear by the inrollment of the decree, that two answers were put in; but it will not appear, and there was no authority to open those answers, but the decree was made on reading only the bill. If there are six defendants, and some of them appear to hear judgment, and some do not, only the answers of those that appeared are opened and enrolled, and yet the answers of the others are parcel of the proceedings.

Mr. Wills. This decree may be considered as if no answer was in, for the cause must stand in *July* as it did in *February*, because the defendant did not comply with what the Court indulged him in, and which he was not intitled to by the rules of practice; and the Court considers an insufficient answer as no answer, by way of penalty on the party who will not submit to the judgment of the Court, that it is insufficient, which appears from hence, that at the hearing it cannot be opened, and if an injunction is granted till answer and further order; though the defendant answers, and denies all the equity on which the plaintiff prays his injunction, yet if he has not answered the other points of the bill fully, the injunction shall stand; but they say, a third answer came in on the 19th of *July*, which is not excepted to; there was no occasion to have the judgment of the Court on it, because the defendant himself had confessed it insufficient, for he said he could not put in a sufficient answer till he saw the letters, which he has not yet: So, on filing exceptions, it is sufficient if the defendant submits to answer; and this was the answer his Honour the *Master of the Rolls* gave, That there was no occasion to refer an answer, which [388] the party himself had allowed insufficient; but this was no answer, because he did not offer to pay us the costs.

Mr. Mead. The referring the answers was no acceptance of them, or a waiver of the costs; the plaintiff could not proceed till it was known whether the defendant had put in a good answer, or not; so he must refer it to a Master, who reports it insufficient, the plaintiff was only getting on his cause again by the proper method, and accordingly after the report he applies to have his cause set down again. If an answer is reported insufficient, and the process is carried on to a sequestration, cannot the plaintiff set down his cause on the sequestration? otherwise he is without remedy, or if the defendant is in custody, and will not answer personal interrogatories, may not the plaintiff carry on the process to a sequestration, and have a decree upon it?

Lord Chancellor. A decree *pro confesso* is like a judgment by *nihil dicit* at common law, on delivering a declaration, the defendant has time to appear, and plead; and if he appears, and the rules are out, the plaintiff may sign judgment, but if the rules are out, and the defendant pleads before judgment is signed, no judgment on *nihil dicit* can be given, but only on the plea. When this cause first came to be heard, the plaintiff was certainly intitled to this decree, which binds the defendant as to the truth, and cuts him out of any defence. (Moor, 522, Cas. 688; Gro. Eliz. 692 (1); Rol. Ab. 2 part, 70; Jon. 88). And, be his case what it will, he can have no remedy by appeal;

so it is reasonable, and one would wish, such a man, if possible, let in to make his defence. At the hearing, the defendant desires the liberty to answer, and the cause is adjourned for that purpose; he put in an answer, and the plaintiff allows his capacity by taking exceptions to it. This decree is, that the bill shall be taken for true, because the defendant will not answer, which is false, because there appears to be an answer, in which the defendant has denied several parts of the bill, and can I presume there is no answer when it appears there is, and that the defendant has confessed the bill (Hob. 115, *Glanvil* and *Allen's* case), when he has denied it: The same objections may be made in all other cases to the methods of process, and yet they have not been hitherto found unsuccessful. The defendant ought first to have paid the costs, but since the plaintiff has accepted the answers, he cannot say there are none; so I think these are contradictions, but since the defendant submitted to answer, he shall not now say the sequestration issued irregular, and he had a benefit by it; so the exceptions must be discharged. And the Court is of opinion, that [389] the matter of the plaintiff's bill cannot be decreed *pro confesso*, for want of an answer, because it appears by the records of this Court, that the defendant has put in an answer to the plaintiff's bill, which was accepted by the plaintiff as an answer, by excepting to it, and serving the defendant with a subpoena to make a further answer; and though in several points it was reported insufficient, yet the defendant having denied several material parts of the plaintiff's bill, it cannot be said in this case that he has put in no answer, or be presumed, that the plaintiff's bill is in those points true or confessed: And if the decree should be allowed, it would rob the party of the benefit of his defence. (Curs. Canc. 209, 387, 449; 2 Chan. Cas. 133, 237; 1 Prax. Canc. 7; Pract. Reg. in Canc. 330; Intro. to Clerks Tut. in Canc. 18, 23, 28.)

Tuesday, July the 7th [1730].

MOTIONS.

Case 199.—SHIRLEY *versus* FERRARS.

At the Chancellor's house, Lord Chancellor. [S. C. 3 P. Wms. 77.]

The plaintiff may examine a person *de bene esse*, though neither old or infirm, or going abroad, upon affidavit of his being the only person who has any knowledge of the forgery of a deed, or other material fact, for otherwise if he dies before he is examined in chief, the proof of the fact is gone. Curs. Canc. 275, 294, 300; 1 Prax. Canc. 2; Pract. Reg. in Canc. 166; 1 Vern. 331.

On the hearing of this cause, an issue was directed to try the validity of a deed; and Mr. *Lawrence Shirley* having sent a person to view it in the hands of the Master, he found the deed to be all of his own hand-writing, which he had copied from another, by the command of *Washington Earl Ferrars*; and that the names of the parties, and of the witnesses, and old labels and seals were since put, and affixed to it; and consequently, that this could not be a deed executed by *Robert Earl of Ferrars* the father of *Washington*, as was pretended. Upon this discovery the plaintiffs file a supplemental bill, and the defendants having prayed a month's time to answer, move to examine this person, *De bene esse*.

Lord Chancellor. In the Court of Exchequer, if the defendant prays time to answer, they suffer the plaintiff to examine *De bene esse* to a *modus* and other matters, which lie in the knowledge of several people: This examination is commonly granted by this Court, on affidavit of the great age or sickness of the witness, or that he is going abroad; but the affidavit in this case is not of that nature, but that this being a fact which lies only in the breast of this single person, if he dies before the trial, or is examined in chief, the proof of the fact is lost: So let the motion stand over to the next seal, to see if the defendants will consent to put in their answers in a fortnight, and go to [390] commission this vacation, and let the plaintiffs make affidavit, that they cannot prove this fact by any other person, and see if they can find any instance of such an order; though if the defendants will not agree to this proposal, I will grant a commission *Ex Debito Justitiæ*, if there is no precedent; and though I do not think the defendants have affected any delay, but that they are intitled of common right to a month's time to answer.

Friday, July the 10th [1730].

APPEALS AND RE-HEARINGS.

Case 200.—NIGHTINGALE *versus* LOCKMAN.

Ant. Cas. 125.

At the Chancellor's house, Lord Chancellor.

Lord Chancellor. Whatever the wife is possessed of, belongs by the coverture to the husband, and by reducing into possession the choses in action she has a right to, they become his property ; but when he sues in her right for things in action, he must join her with him in the action ; and if he dies before execution, though after judgment, the right will survive to her, and not to his executors ; for though the old debt is gone by the judgment, the new one survives ; for the judgment is, *Quod recuperent*, and it is not the husband's till it is reduced into actual possession. This bill was brought by the legatees of a third of the personal estate of Mr. *Sheldon*, after payment of the debts and legacies, for an account, and to have the debts and legacies paid ; one of the executors was intitled to the other two thirds of the estate, and she and her husband Mr. *Chitty* are made two of the defendants : At the hearing no distribution could be directed till the account was taken, and the debts and legacies paid, which was decreed accordingly, and the Court declared, that two thirds belonged to Mrs. *Chitty*, now Mrs. *Lockman*, and ordered payment ; and one of the executors, having admitted by his answer, that he was indebted to the estate of Mr. *Sheldon* the sum of £10,000, he was ordered by the decree to bring the money into Court, to be put out for the benefit of the parties to whom it should belong, not for the benefit of any one of the parties, or as a debt to one certain person, but as part of the estate of Mr. *Sheldon*, and it has been distributed and paid as such : Mr. *Chitty* had no right to any part of this money, but to one third of the estate, after the account was taken, and a distribution made ; but during his life no distribution was made, he never reduced his share into possession, but it still remained the estate of Mr. *Sheldon* ; and therefore I think that the decree of the *Master of the Rolls* is right.

[391] *Saturday, July the 11th [1730].*

PLEAS AND DEMURRERS.

Case 201.—LEGASTICK *versus* COWNE.

[See *Smith v. Porter*, 1807, 1 Binney (U.S.), 213.]

At the Chancellor's house, Lord Chancellor.

The testator devised his lands to two executors, equally to be divided between them, willing them to pay his debts. To a bill brought by a creditor, the executors plead the statute of limitations.

Lord Chancellor. I know Lord *Cowper* was of opinion that where lands were devised in trust for the payment of debts, debts barred by the statute should be paid : but to my knowledge, the lords were of another opinion in the case of the Earl of *Strafford*. I know no power a Court of equity has to controll an act of Parliament, and if lands are given to executors for payment of debts, they are as much legal assets as the personal estate ; but under the notion of a trust, you would have me subvert the statute ; and the debt has been due to the plaintiff since 1707, and therefore I allow the plea. (*Farres*. 63, *Lord Wharton versus Sir John Robinson* ; 1 Salk. 278 ; 1 Vern. 141 ; 1 Salk. 154.)

G. v.—15*

Wednesday, July the 22d [1730].

PETITIONS.

Case 202.—*Ex parte AYSCOUGHE.*

[S. C. 2 P. Wms. 591.]

At the Chancellor's house, Lord Chancellor.

The testator devised money to a charity, on condition his son died without issue male, the contingency happened, his widow in her answer to an information for the charity, swore she was with child, and the Court directed that the Master should appoint two discreet matrons to inspect her, and certify what condition they found her in.

Mr. Attorney General. This is a petition to your lordship, by the three sisters and heirs at law of the late Sir *John Chaplin*, deceased, and his uncle, who claims a part of the estate, as tenant in tail male under a settlement, for a writ de ventre inspiciendo of his widow, Lady *Chaplin*. Mr. *Maurice*, a bailiff of *Middlesex*, with his wife and daughter, went down to *Tatwell* in *Lincolnshire*, in order to ingratiate himself with Sir *John*, but missing of him there, he followed him to *York* races, and insinuated himself into his company, and hearing him say he designed for *Newmarket*, he offered to bear him company if he would first go to *London* with him, which he refused, but was at last prevailed on, and at *Dunstable* the wife and daughter of Mr. *Maurice* met them, and he persuaded Sir *John* to quit his horse, and travel in the coach with them [392] to *London*, and to lie at his house; and a few days after, Sir *John* went with him and his wife and daughter on a party of pleasure to *Windsor*, and there married the daughter about fifteen years of age, and Sir *John* was about nineteen, who in about three months after died of the small-pox, having first made his will, and devised to his lady all his personal estate; and she gives out that she is with child, and this petition is to prevent any fraud or imposition in that affair, and the manner the marriage was brought about is a foundation to believe that any other practice may be made use of to secure the estate, which was the great inducement of the match. And this writ was granted the 7th of *March*, 30th of *W.* and *M.* in the case of *Duncomb* and *Doyley*.

Mr. Solicitor General. One imposition on the family makes room to suspect another, and this writ is provided for cases of this nature, and is a writ of right for the heir, to protect his inheritance from being taken from him by these means. This writ was granted in Gro. Eliz. 566 (31); Moor, 523, Cas. 692. The father devised £4000 to a charity on contingency, his son died without issue male, and the son being extravagant, the father directed, that he should have only an allowance 'till he was thirty years of age, the son died without issue male, and an information was filed for the charity, setting forth, that he was drawn in to marry with a woman of an indifferent character, and in years, his widow in her answer swore she was with child, and at the hearing, though this was the case of a personal estate, and no provision made in the register, yet in conformity to the reason of the common law the present Master of the Rolls directed, that the Master should appoint two discreet matrons to inspect her, and certify what condition they found her in; and she being summoned to object before the Master to the matrons proposed, she owned she was not with child. But ours is a case provided for by the common law.

Mr. Strange. There are two things under the consideration of the Court, whether those who apply have a title to pray this writ. In the case in Moor, only one of the co-heirs applied, here all join in the petition, and it appears by the register 227 a, that it lies for *Veri Hæredes*. And the next thing is, Whether they lay a proper case before the Court; and there is no occasion to shew there was any ill practice made use of in bringing about the match, for the books take no notice of any such distinction; if the writ issues, there must be an inquisition, and a return made, whether she is with child or not; and if she is, when she is likely to bring forth, and since she [393] agrees before-hand that she is with child, we are intitled to the custody of her, 'till she is delivered, and we are willing, as there is no castle on the estate, that she be confined to the house she is now in.

Mr. Lutwyche for Lady Chaplin. This petition is an affirmation of the marriage, and Sir *John* had a right to choose for himself, and the Court is not to inquire what were his inducements, so all they have mentioned of that kind is out of the case. They have not suggested her to be one of a bad reputation; and this is not a writ of right, or of

course, but is to be granted only on a special application, where there is some probable ground of suspicion, and they have shewn no more in this case, than there is in every other ; the unusual terror and fright the execution of this writ may put so young a lady in, may be attended with very ill consequences, and occasion a miscarriage, which is what perhaps they desire, and the lady desires to come to town to lie in among her friends ; she is willing to give them all the satisfaction they can desire, or to submit to any directions the Court shall give, to prevent imposition, and we propose, that two ladies of the sister's acquaintance may attend and examine her if they please, and be at the lying in, which sure will be a greater satisfaction to them than a Jury, and was agreed to in the case of *Duncan* and *Doyley*, though the writ indeed afterwards issued, because she would not let the ladies inspect her according to the agreement. The foundation of the writ is, that she pretends to be with child, but they have no affidavit that they suspect she is not with child, and our affidavits are, that *Sir John* before his death, expressed great joy at her breeding.

Lord Chancellor. I think this writ in a great measure a writ of right ; all writs at first were obtained by petition, though afterwards they came to sue out the most common of course. The chief thing is to prevent a suppositious child, but the first writ issues, to see whether she is pregnant or not, because you cannot otherwise come at the second ; and if the sheriff returns that she is with child, then the second, which is the material writ, issues out of the Court of King's Bench or Common Pleas. I would have the writ executed on the young lady in the easiest manner, and most consistent with her modesty, and it would be hard to confine her to the country, since she desires to lie in in town, and you cannot hinder her, for the first does not confine her, but she may go where she pleases, till the second writ issues, which cannot be had till *Michaelmas* term ; and there is no fear of her being brought to bed immediately, and she is [394] willing in the mean time to give you any satisfaction, and that any ladies to be named in the order may wait on her, which will make the execution of the writ more easy. Be it ordered therefore, that the father in Court consenting for the daughter, that she shall come into the county of *Middlesex* by *Michaelmas* day ; in the mean time two ladies, mentioned in the order, wait on her at a reasonable notice, and that *Mr. Maurice* give notice to the solicitor of the other side, when she comes to town, and where she is, and that thereupon the writ issue to the sheriff of *Middlesex*, returnable the first day of next term.

[395] DE TERM. S. MICHAEL. 1730, IN CUR. CANCELLARIÆ.

Saturday, November the 7th [1730].

Case 203.—GOULD *versus* GRANGER.

In Court, Lord Chancellor.

You may appeal to the Lord Chancellor, or to the House of Lords, for costs only.

The *Lord Chancellor* allowed an appeal from the *Master of the Rolls*, for costs only, and his lordship said, he had known the House of Lords allow an appeal for costs only, tho' the old practice was otherwise.

Wednesday, November the 11th [1730].

Case 204.—GOODAL *versus* RIVERS.

In Court, Lord Chancellor. [S. C. W. Kel. 2.]

'The trust of the term was on failure of issue male, out of the rents, &c., or by sale, &c., to raise portions for daughters, payable at 21, or marriage, and maintenance till their portions grew due, to be paid by half yearly payments, viz. *Christmas* and *St. John Baptist*, the first payment to be made at the first of those feasts next coming or happening after the estate so limited to the trustees should take effect in possession. The father dies without issue male, leaving a daughter who attained her age of 21 ; it was adjudged that her portion could not be raised in the life-time of the mother, because the maintenance was to precede the portion, and that was not to be raised till after the death of the father and mother, when the term came into possession.'

Mr. Attorney General for the plaintiffs. By articles of intermarriage, dated the 28th of *February* 1688, subsequent to the marriage of *Sir George Rivers* with Dame

Dorothy Feveshram, but which are recited to have been agreed upon before the marriage, reciting, that whereas certain lands were charged with a portion of £3000 payable to the said Dame *Dorothy*, at her age of twenty-one years, or marriage, and whereas she was intitled to £3000 under the statute of distributions, as a moiety of her father's personal estate, and the lands therein mentioned. Sir *George Rivers* covenants, in consideration of the marriage, and her said portion, and for making a provision for her, and the issue of the [396] marriage, that he and his heirs will within six months, convey and assure the lands therein described, of the value of £500 a year to trustees and their heirs, in trust, to the use of himself for life, then to Dame *Dorothy* his wife, for her life, then to the first, and every other son of the marriage in tail male, and in default of issue male, 'and if he should have issue female, then to the trustees and their heirs. 'or to the heirs of the survivor of them, in trust, to sell, mortgage or otherwise dispose of 'a sufficient part of the said premises (the manor of *Chaford cum pertinentiis* excepted), 'for raising £4000 for her portion if he had but one daughter, £5000 if he had two, 'and £6000 if he had three or more daughters, to be equally divided between them, 'and to be paid to them at their respective ages of nineteen, or marriage, which should 'first happen, with interest for their maintenance and education, after the rate of '£4 per cent. from the death of Sir *George*, or Dame *Dorothy*, which should first happen, 'till the said portions become payable as aforesaid.' The 21st of April 1691, Sir *George Rivers* in pursuance of the said articles, settled the lands therein mentioned, in trust, for Sir *George* for life, remainder to trustees to preserve contingent remainders, remainder to Dame *Dorothy* for life, for her jointure, remainder to the first, and every other son of the marriage in tail male, 'Remainder to trustees for five hundred years 'without impeachment of waste, remainder to the right heirs of Sir *George*, and the 'trust of the term of five hundred years, is declared to be, that in default of issue male 'of Sir *George*, by the said Dame *Dorothy*, the said trustees shall and may either by 'and out of the rents, issues and profits, after the commencement of the said term, 'or else, by demising, selling, mortgaging or otherwise disposing of the said 'premises, or any part thereof (other than the manor house and park), for five 'hundred years, or for any lesser term or estate, when and in such manner as 'they, or the survivor of them, or the executors or administrators of such survivor, 'shall think fit, levy, and raise the sums hereafter mentioned, for proportions, and 'maintenance of daughters, if one only, who shall attain her age of nineteen years, 'or marry, £4000 if two, £5000 if three or more, £6000 to be equally divided between 'them, and the yearly sums for their maintenance and education, from the death of 'Sir *George*, or Dame *Dorothy*, which shall first happen, 'till such daughters shall attain 'the age of nineteen years, or marry, that is to say, £160 a year for one, £200 for two, 'and £250 for three or more, during such time as there shall be one, two, three, or 'more daughters, living after the death of Sir *George*, or Dame *Dorothy*, which shall 'first happen, to be equally divided among them. And the said portions are to be paid 'to the said daughters at their respective ages of nineteen, or marriage, or as soon after 'as they can be raised, and the said yearly sums for their [397] maintenance are to be 'paid from the death of Sir *George*, or Dame *Dorothy*, which shall first happen, 'till 'their portions become payable. Provided, if Sir *George* shall survive his wife, and shall 'well and sufficiently maintain and educate his daughters according to their quality, 'and with the approbation of the trustees, 'till their age of fourteen, then no maintenance 'shall be raised, 'till they respectively come to fourteen. Provided also, that the power 'given to the trustees of selling or mortgaging, shall not injure the estate limited to 'Dame *Dorothy*, but that she shall not enjoy the same for her life.' Dame *Dorothy* died in March 1707, leaving two sons and six daughters, one of the daughters is since dead, and both the sons, the survivor of them on the 9th of October 1727: And the five daughters, the youngest of whom is twenty years old, and three of them married, with their husbands, brought this bill against Sir *George Rivers*, and the trustees, to have the portions raised by a sale of the reversion, with interest from the death of the surviving brother, at which time they were above the age of nineteen years. In this case, it was the plain intention of the parties, that if the mother died, the portions should be raised in the father's life-time; the portions are to be raised at marriage, or nineteen, and they are to have maintenance in the mean time, either out of the rents and profits, or by sale and mortgage; and though it cannot be raised the first way, till the estate comes into possession, yet it may the other way, and this case stands clear of the objections that were made in the case of *Brome and Berkeley*, decreed in the House of Lords, March the 5th, 1728: there the trust was, on failure of issue male,

'by and out of the rents, issues, and profits, or by absolute sale, or leasing, or otherwise to raise the portions payable at twenty-one, or marriage, and to raise and pay yearly sums for their maintenance and education, until their portions grow due to be paid, by half yearly payments, viz. *Christmas* and *St. John the Baptist*, the first payment to begin and be made at the first of those feasts next coming or happening, after the estate so limited to the trustees should take effect in possession,' so the maintenance was to precede the portion, and that was not to be raised till after the death of the father and mother. But this case is the contrary; the maintenance is expressly to be raised after the death of either father or mother, till they arrive at the age of nineteen years, or marry, and so this case is within all the precedents for the sale of a reversion.

Mr. Solicitor General. It plainly appears to be the intention of the parties, that whenever there was a failure of issue male of the marriage, and [398] either the father or mother dead, that the portions should be raised. There is no direction in the articles to raise the portions by the rents, issues, and profits, because the whole estate being limited to *Sir George*, and *Dame Dorothy* for life, the estate could not come into possession while either lived, and therefore on the death of one of them they make the only possible provision for raising a maintenance and portion, by giving a power to the trustees to sell or mortgage. So our application is proper, if the question rested on the articles; and the settlement does not depart materially from them; it limits a term to trustees for five hundred years on failure of issue male, instead of a fee, but this is no material difference, if the term is sufficient for raising these maintenances and portions, or if it is a material one, as the settlement was made in pursuance of the articles, the intention of the articles must rule, govern, and control the settlement, or explain any thing ambiguous in it. The trust of the term is to arise in default of issue male, and is for raising portions and maintenances, either out of the rents, &c., or by demising, selling, &c., which extends to all ways of raising, and the words, *After the commencement of the said term*, have a different meaning in this case from what they bore in the case of *Buller and Dunscomb*, 2 Vern. 760; there they introduced the declaration of the trust of the term, as failure of issue male doth here, so there the term must first commence in possession, here the issue male must fail before the trust can arise, and therefore in that case the Court adjudged, that they governed the whole trust, and must first happen; here they are made use of in a different manner, and for a different purpose, and are plainly not relative to the whole trust; but to that part of it, *either by or out of the rents, &c.*, but then the trust is not confined to that method, but goes on, *or else by demising, &c.*, which are indefinite, and not confined to the term in possession; and in this too the settlement differs from the articles which are to control it; besides the portions are to be raised when they marry, or come to nineteen years of age; when those times arrive, nothing is contingent, but the maintenances are likewise to be raised from the death of *Sir George* or *Dame Dorothy*, till they arrive at nineteen years of age, or marry, the maintenances are to arise immediately on the death of the one or the other, yet the whole estate would survive to the other for life, so the plain intention of the parties must be, that they should be raised by sale or mortgage. So that if the portions can be raised by any of the methods of this trust, the daughters have a right to apply to the Court for that purpose, and the intention of the parties is further explained by the proviso in favour of *Sir George*; if he educate the daughters, no maintenance is to be provided till they are fourteen, which implies, if he did not educate them, the [399] maintenance was to be raised while they were under fourteen, and after they came to fourteen, even that privilege ceases, and the next proviso supposes, the wife might survive; that by their sale or mortgage, the trustees should not prejudice her estate, which though it be an abundant caution, plainly supposes there might be a sale or mortgage in her life-time.

Mr. Lutwyche for the defendants. I admit that articles entered into after marriage, on a consideration which the husband would not otherwise have, are to be looked upon as articles on a valuable consideration, but here *Sir George* was possessed of all the portion *Dame Dorothy* brought before marriage; and there is no instance, where the Court has decreed portions to be raised by sale of a reversion by a voluntary settlement. They say it appears to be the intention of the parties, that the reversion should be sold or mortgaged, both for the maintenance and the portions. As the maintenances are to be paid every half year, or at the end of every year, there must be an half yearly, or annual mortgage or sale, which would be very strange, and what was never

known to be decreed for maintenance ; so that if the settlement is capable of any other construction, the Court will avoid this absurdity, and not decree a sale of the reversion, which is always very injurious to the estate, and in this case will be a total disinherison to those in remainder. They say the words, *After the commencement of the term*, refer only to the rents and profits, but in this construction they signify nothing ; for nothing could be raised out of the rents, whilst the estate for life was in being, nor till the term came into possession : But I think they extend to the whole trust, and the Court will put this construction on them, to avoid the inconvenience of selling the reversion, which then will not be saleable, by the authority of the case of *Butler and Dunscomb*. But if this construction is with them, still there is left a great latitude to the trustees, by the words, *When and in such manner*, which leave the convenience of time to them ; then if the case turns on what is a reasonable and convenient time, since the trustees have submitted it by their answer to the judgment of the Court, they will not think it convenient to sell during the life of the father ; and *When* must signify, that if it was inconvenient, the trustees should have a liberty to defer the sale ; and though the portions are to be paid at a certain time, there are many cases where it has been adjudged, that the daughters must wait 'till the tenant for life dies, as *Brome and Berkeley*.

[400] *Lord Chancellor*. This case stands clear of all the authorities that are against the sale of a reversion ; and it is plain, from several decrees, that a reversion may be sold for daughters portions, though the Court always decrees a sale with great reluctance. These articles are not to be considered as voluntary between the parties, whatever they may be, with respect to creditors : By the articles, the estate in remainder after failure of issue male, is an interest vested, though subject to be defeated by the tenant in tail, and the trust is expressly to sell, mortgage, or otherwise dispose of (which take in all manner of conveyances), if there should be daughters and no issue male, for their portions, payable at nineteen years of age or marriage, with interest after the rate of £4 *per cent.* from the death of the husband or wife ; therefore the parties plainly intended the trustees should raise the portions and interest by any method ; for the maintenance being given from the death either of the husband or wife, which should first happen, it is plain they took notice that one might be alive, and then since the whole estate is limited to each of them, how can it otherwise be come at, whilst either is alive, but by sale or mortgage ? In the settlement, there is some variation from the articles, a term of five hundred years is limited in remainder after an estate tail instead of a fee, and the trust is to arise on default of issue male, which has happened, so that both the term and the trust of it, to raise these portions and maintenances, have begun ; if the trust was to begin on the commencement of the term, I should have understood those words, when the term came into possession, but the commencement of the trust was fixed before, and therefore the meaning of those words must be, if the term is commenced, you shall raise them out of the rents and profits, if it is not by sale or mortgage ; and the words cannot be carried to the other disjunctive. The words, *When and in what manner* only signify, that the estate shall be sold together, or in parcels, as the trustees think fit ; so if the intention can be pursued, the Court is to follow it, and there is no possibility of putting any other meaning on the words, the £6000 is to be paid at nineteen, or marriage ; and till then they are to have maintenance, which is to commence from the death of the husband or wife, and which other way can it be raised ? And the inconvenience is no objection, since the parties provided it should be so ; in case either [401] of the husband's or the wife's death, which has happened ; and this is further confirmed by the proviso, that the maintenances should not be raised 'till the daughters came to their respective age of fourteen years, if the father maintained them, by which it plainly appears that maintenance was to arise in his life-time, in case of a personal default on his side, and is to be paid 'till the portions are payable ; and the clause in favour of the jointure shews, the parties thought it might be raised in the life-time, either of the one, or the other, so the plain intention of the parties is, that the daughters should have a maintenance, either on the death of the father, or mother, 'till nineteen or marriage, by rents and profits, if the estate should come into possession ; if not, by sale or mortgage. So I am of opinion the portions are to be raised with interest from the death of the surviving brother, by a sale of the reversion.

A Report of CASES IN CHANCERY, The KING'S BENCH, Etc., in the Fourth, Fifth, Sixth, Seventh, and Eighth years of His Late Majesty KING GEORGE THE SECOND [1730-1735]; during the time when LORD KING was Lord High Chancellor of Great Britain, and the LORD RAYMOND and LORD HARDWICKE were Lord Chief Justices of England; to which are now added about Seventy Additional Cases. By WILLIAM KELYNGE, of the Inner Temple, Esq. 1764.

[1] CASES ADJUDGED IN CHANCERY.

1.—DOBBINS *versus* BLAND.

In Canc' coram King. Chancellor. June 13, 1730, 4 Geo. II.

Bill for Payment of a Legacy against Defendant as Executor.

This was a Bill, brought for Payment of a Legacy, against the Defendant as Executor of *John Hyett*. *John Hyett*, by Will 5 Sept. 1719, *inter al'*, devised unto the Plaintiff *Elizabeth*, by the Name and Description of his Grand-daughter *Elizabeth Hyett*, the Sum of £2500 to be paid her, when she should attain her Age of twenty-one Years, or be married with the Consent of his Executors or the Survivor of them; and such Consent to be testified in Writing under their Hands, and not otherwise.

The Testator also gave and bequeathed unto the Plaintiff *Elizabeth* the annual Sum of £100 for the Term of five Years, to commence from and after her Marriage with the Consent of his said Executors and Trustees, as aforesaid, if the Plaintiff should so long live. The first of which said annual Payments he willed should begin and be made unto the Plaintiff at the Expiration of the first Year after such her Marriage with Consent, as aforesaid. The Plaintiff *Elizabeth* intermarried with the Plaintiff her Husband after she attained the Age of twenty-one Years; and the Executors paid the Legacy of £2500, because the Words as to that were in the Disjunctive, *viz.* when she attained her Age of twenty-one Years, or be married with the Consent of his Executors. So that the Assent of the Executors was not necessary, in case she married under the Age of twenty-one Years.

And the Question was now only as to the £100 for five Years; and it was insisted, she having married the Plaintiff without the Consent of the Executors, she should never be intitled to the said £100 for five Years. Tho' in this Case there is no Limita-

tion over in case she married without Consent ; yet this is not a Restriction only *in terrorem*, but is a Condition precedent ; and a Court of Equity cannot dispense with the Non-performance of a Condition precedent. The Words are, " To commence from " and after such her Marriage with Consent of his said Executors and Trustees, as " aforesaid " ; and that has Reference to the for-[2]-mer Words where the Consent is directed to be testified in Writing.

King, Chancellor, inclined to be of Opinion, That the Plaintiff *Eliz.* by her Marriage without Consent, &c., had lost this Legacy of £100 for five Years, and that this was a Condition precedent ; but the Residuary Legatee, who was an Infant and Heir at Law, not being before the Court, it was ordered to stand over. *Vide* 2 Vern. 293, *Garrett & Uz' versus Pritty & al'*. Note : This is not a Gift defeasible on a Condition subsequent, but to commence upon the Performance of an Act which was to be performed. 2 Vent. 339 ; 2 Vern. 572.

2.—GOODALL *versus* RIVERS & al'. 4 Geo. II. [1730–31].

[S. C. Mos. 395.] Bill to oblige the surviving Trustee to pay Portions.

This was a Bill brought by the Plaintiff, who married one of the Daughters of Sir *Thomas Rivers*, wherein several other Daughters of Sir *Thomas Rivers* were Plaintiffs also, and Sir *George Rivers* and the surviving Trustee (for a Term of Years comprised in Sir *George Rivers's* Marriage-Settlement) were Defendants.

And the Bill was to oblige the surviving Trustee to pay the Plaintiffs their Portions, with Interest from the Time they became payable, and also a considerable Arrear which was allotted to them for Maintenance, by Sale of a Term during the Life of the Defendant Sir *George Rivers* their Father. The Case was as follows : Sir *George Rivers*, after his Marriage with Dame *Dorothy* his Wife, executed certain Articles which were recited to be made in Pursuance of a verbal Agreement between them two before Marriage, and by the said Articles agreed to make a Settlement of certain Lands to the following Uses, *viz.* To the Use of Sir *George* for Life ; Remainder to Trustees therein named, during the Life of Sir *George*, to preserve contingent Remainders ; Remainder to Dame *Dorothy* his Wife for Life for her Jointure ; Remainder to the first and every other Son in Tail Male ; Remainder to Trustees for 500 Years ; Remainder in Fee to Sir *George Rivers*. And a Marriage-Settlement was afterwards made in pursuance of the Articles, and the Trust for 500 Years was declared as follows, *viz.* That the said Term of 500 Years was so limited in Trust, that in Default of Issue Male of the said Sir *George* by Dame *Dorothy* his Wife, the said Trustees, their Executors, &c., should and might, either by and out of the Rents and Profits of the said Premises so limited after the Commencement of the said Term of 500 Years, or else by Lease or Sale, or Mortgage of [3] the same, or any Part thereof (except a Particular Part therein excepted), for 500 Years, or any lesser Term, when and in such Manner as the said Trustees or the Survivor of them, his or their Executors, should think fit, to raise the several Sums for the Portions, and for Maintenance and Education of such Daughter or Daughters, as herein after expressed (that is to say), if there be but one such Daughter that should attain the Age of twenty-one Years, or marry, the Sum of £4000, and if two, £5000, and if three or more Daughters which should attain that Age, or be married, £6000 equally to be divided amongst them ; and also the yearly Sums therein after mentioned for their Maintenance and Education ; and the said Portions to be paid them at nineteen Years, or when they should be married, with Interest at £4 *per Cent.* for their Maintenance from the Death of Sir *George* or Dame *Dorothy*, which should first happen, until their Portions became payable.

Sir *George Rivers* had Issue two Sons by his Wife, and both the said Sons are dead without Issue Male, the youngest of which died 1727, so that now here is a Term vested in the Trustees ; for the Term was limited to them upon Failure of Issue Male. The Case of *Buller versus Duncombe*, 2 Vern. 760, was cited ; and likewise Sir *Tho. Jones*, 201, and a Case in Point *totidem verbis*, 1 Salk. 159.

King, Chancellor. The Words, *After the Commencement of the Term*, govern the Trust, in the Case of *Buller and Duncombe* ; and here the Words, *from and after Default of Issue Male*, govern the Trust ; but as the Term does not vest in the Trustees till Failure of Issue Male, till then no Interest ought to be paid for the Portions, which is from the Year 1727. The Dame *Dorothy* died long before ; and decreed the

500 Years Term expectant upon the Determination of the Life-Estate in Sir *George Rivers* to be sold before a Master ; and if there was any Surplus remaining after Payment of the £6000 with Interest, then such Surplus to be paid to Sir *George Rivers* who had the Inheritance.

Vide Brome versus Berkley, House of Lords Cases ; 2 Vern. 458, *Gerrard versus Gerrard* ; 2 Vern. 460, *Staniforth versus Staniforth*.

3.—HARVEY *versus* WOODHOUSE & al'. 4 Geo. II. [1730–31].

Bill to have Satisfaction for a Judgment out of the personal Assets.

The Plaintiffs were the Appointees of the *Cestui que Trust* in a Defeasance of a Judgment acknowledged to A. by two Conuzees ; one of the Conuzees died soon after the [4] Judgment acknowledged ; the Survivor died in the Life-time of the Conuzor, and made the Conuzor his Executor, by which the Judgment at Law was extinguished ; whilst this Judgment was thus suspended, the Conuzor aliens Part of the Land to B. for a valuable Consideration, and by a Conveyance after Marriage settles the other Part upon his Wife and Children. *Note* : There was a Recital of a Marriage-Article in the Settlement, but no Articles were proved.

This Bill was now brought, the Conuzor being dead, against his Executors, against the Heir at Law, and against the Wife and Children, and against the Purchaser, to have a Satisfaction for this Judgment out of the personal Assets, and if they fall short, out of the Purchaser's and the settled Estate.

Dr. —. But it appearing the *Purchaser* had no Notice of the Judgment, the main Question was, Whether the whole Estate of the Volunteer shall be subject to this Judgment, or only a Moiety as would have been liable at Law, taking this Settlement to be voluntary. It was argued, that the Estate in the Hands of the Volunteer did not exceed a Moiety of the whole Estate which the Conuzor had at the Time of the Judgment, and before the Suspension of it ; so that as once that might have been taken by the Sheriff, it ought to be still liable in Equity, and sold for the Satisfaction of the Judgment.

It was afterwards moved in Behalf of the Conuzor's Widow, that she might be at Liberty to prove a Copy of her Marriage-Articles ; it was said that they were recited in the Settlement, and it would be hard, if this was a Provision before Marriage, that she should be deprived of it.

That this Court after a Cause is heard often directs a Will to be proved, and that is not merely an Exhibit ; for there the Sanity of the Testator, or whether it was duly attested, was to be litigated.

On the other Side it was said, that this Cause has been heard, and only stands for Judgment ; and no Instance, where the Court will give Leave, after the Hearing, to prove that which, if made out, will not be Evidence ; for a Copy of Articles is not Evidence without some other Account given of the Articles themselves.

King, Chancellor. I have considered of this Case, and determined with my self what Decree to make. And I think the Lands must be extended in Equity *in æquali jure* as at Law, and all the Lands comprised in this Settlement may be taken. If a Conuzee aliens Part of his Lands, and Part descends, the Part that descends may be extended ; and the Heir shall not have Contribution against the Alienee ; and if the present Defendant, who claims under the Settlement, is only a Volunteer, she ought to be considered as an Heir. But [5] I am not satisfied that this is a voluntary Settlement ; and therefore referred it to the Master, to see if any Marriage-Articles were executed, and when, and upon what Consideration.

4.—Lady ABERGAVENNY *versus* Lady ABERGAVENNY. 4 Geo. II. [1730–31].

Motion a Bill might be taken *pro Confesso* for want of an Answer.

Plaintiff filed a Bill against Defendant, to which Defendant put in an Answer ; the Plaintiff's Bill was twice after amended, and Discovery of new Matter required ; Defendant put in a Plea and Demurrer in Bar of such Discovery ; which being overruled, the Defendant was in Contempt to a Sequestration for want of an Answer. The Plaintiff said the Sequestration had been executed a Year ago, and therefore moved,

that the Bill might be taken *pro Confesso* for want of an Answer, alledging, that by the Practice of the Court, whenever a Defendant has appeared, and the Process of Contempt for want of an Answer is carried to the End of the Line, the Bill may be taken *pro Confesso*; or otherwise there would be a Failure of Justice, when a Matter is inquired of which lies only within the Knowledge of the Defendant, and of which the Plaintiff can have no other Discovery but by the Defendant's Oath. But it was objected, here was a sufficient Answer to the original Bill; and no Precedent could be produced, that where any Part of a Bill was answered, the Residue might be taken *pro Confesso*.

King, Chancellor. If an Action at Law be brought to several Trespasses, and the Defendant's Plea goes only to Part, Plaintiff may sign Judgment as to all the Rest; and here *pro tanto* of the amended Bill that is not answered, it may be taken *pro Confesso*. *Sed Adjournatur*.

Note: When a Defendant is in Contempt for want of an Answer, and an insufficient Answer is put in, that is no Answer at all; and the Plaintiff is not to begin his Process *de novo*, but go on regularly from the last Process.

5.—BEDFORD *versus* BACKHOUSE. Nov. 26, 1730, 4 Geo. II.

Lands mortgaged in Middlesex, and registred, whether the first Mortgagee, advancing a further Sum after a second Mortgagee, shall take place.

The Case was: A Man had made a Mortgage of Lands in *Middlesex*, and the same was duly registred; afterwards he made a Mortgage to another Person, which [6] was also registred according to the Statute; and after the making that second Mortgage, the first Mortgagee advanced a further Sum of Money to the Mortgagor on the Premises, without Notice of the second Mortgage; and the Question was, *Whether the Registry of the second Mortgage was constructive Notice, so as the Money lent subsequent to it should not be paid off till that was satisfied; and it was held by King, Chancellor, that it was not*; for the Statute declares Deeds not registred void as against Purchasers, but gives no greater Efficacy to Deeds registred than they had before the making of the Statute; and it is a known Rule in the Court of Equity, that when a first Mortgagee advances a further Sum of Money (without Notice) after a second Mortgage made, that he shall be paid his whole Money in the first place.

6.—ANONYMUS. Nov. 16, 1732, 4 Geo. II.

The Word *disposed* related to the Estate of the Devisor.

The Words of a Will were, "I give and bequeath my Lands, Tenements, and Hereditaments to my Wife, to be divided and disposed of amongst my youngest Children"; and it was held *per Jekyll*, M. R., that the Word *disposed* related to the Estate of the Devisor; for that the Lands could not be disposed of, but the Estate, and consequently the Wife had a Fee.

7.—WILLIAMS *versus* SAWYER & al'. Nov. 17, 1730, 4 Geo. II.

Voluntary Bond by the Husband to Trustees for Wife's Benefit, to be paid before Legacies.

It was said *per Jekyll*, and so decreed, that where a voluntary Bond is given by the Husband to Trustees for his Wife's Benefit, that a Court of Equity will postpone such Bond even to Debts on Simple Contract, but will admit it to be paid before Legacies.

8.—ANONYMUS. Pasch. 4 Geo. II. [1731].

Bankruptcy, the petitioning Creditor only Assignee of an Obligee, not a Creditor that can take out a Commission.

On Motion to supersede a Commission of Bankruptcy, the petitioning Creditor was only Assignee of an Obligee. And *per King*, Chancellor, He is not a Creditor that can

[7] take out a Commission ; it must be a Creditor in Point of Law, and not one who has only an equitable Right : The Obligee is Trustee for the Assignee, and at Law he must sue in his Name. Declaratory Clauses in Temporal Laws may be perpetual, as that Graziers, Farmers, &c., cannot be Bankrupts, as mentioned in the Statute Geo. 1, tho' the Act be expired.

9.—THOROTON *versus* BLACKBORNE & al'. May 12, 1731, 4 Geo. II.

Devise of Freehold Manors, Lands, &c., upon Trust to convey, &c.

William Hewett Esq., being seised and possessed of a large Real and Personal Estate, on the 9th of *Sept.* 1715, made his Will, and after several Bequests devised all his Freehold, Manors, Lands, and Hereditaments, and all his personal Estate to Trustees, and their Heirs, &c., upon Trust they and the Survivor of them, and the Heirs of such Survivor, should with all convenient Speed convey the said Freehold Premises to his Godson *Hewer Edgeley* for Life *sans* Waste ; Remainder to Trustees, to preserve contingent Remainders ; Remainder to the first and every other Son of *Edgeley* in Tail Male ; Remainder to the Daughters of *Hewer Edgeley*, and the Heirs of their Bodies, as Tenants in Common ; with a Power to *Hewer Edgeley* to make a Jointure upon any Wife, so that it exceed not a Moiety of the Estate : And directed, that his personal Estate so devised to Trustees, and the Produce thereof, as soon as any considerable Part thereof could be got in, should be disposed of in the Purchase of Lands and Tenements of Inheritance, and be settled to the same Use with the Freehold Premises ; and in case *Hewer Edgeley* should die without leaving Issue behind him, or if such Issue should happen to die without Issue, then his Will was, that his real Estate, and the Estate to be purchased with his personal Estate, should be so settled, that in case his Kinswoman *Anne Edgeley* should be then living, that she should enjoy the Rents of his whole Estate for Life ; and after her Decease, one fourth Part thereof was to be enjoyed by *William Blackbourne*, his Heirs and Assigns ; one other fourth Part by *Abraham Blackbourne*, his Heirs and Assigns ; one other fourth by *Anne Jackson*, her Heirs and Assigns, and the remaining fourth Part by *Susanna Edgeley*, her Heirs and Assigns ; and directed, that in case any of them the said *William Blackbourne*, *Abraham Blackbourne*, *Anne Jackson*, and *Susanna Edgeley*, should happen to be dead at the Time when by Virtue of the said Settlement the whole E-[8]-state should devolve upon them, that then the fourth Part to which the Person so dead would have been intitled to, if living, should be conveyed to the respective Heirs of the Person so dead.

The Testator died soon after making his said Will, and shortly after *Hewer Edgeley* married, and made a Jointure according to the Power given by the Testator's Will. *Abraham Blackbourne* made his Will 16 *March* 1709, and made his Wife *Mary* Residuary Legatee and sole Executrix ; and on the 16 *Feb.* 1720, duly made a Codicil to his Will, and after, reciting the Devise to him by *William Hewer* of the fourth Part of his Estate, under the Contingencies of his Will, the said *Abraham Blackbourne* devised, that whenever the fourth Part should come to his Son and Heir *Levett Blackbourne*, or to such other Person as should be his Heir, the same should be charged with the Payment of £12,000 to his Wife *Mary Blackbourne*, and £3000 a-piece to his three younger Children, and died soon after making such Codicil. And *Mary* his Widow soon after married with the Complainant *Thoroton*. On the 17 *Feb.* 1729, *Anne Edgeley* died, and on 6 *Nov.* 1728, *Hewer Edgeley* died without Issue ; and in *Hillary* Term 1729, the Complainant *Thoroton* and *Mary* his Wife, and her three younger Children by their next Friend, brought their Bill against *Lewett Blackbourne*, the Heir at Law of *Abraham*, & al', to have the £12,000 and £9000 raised out of *Abraham's* fourth Part of the Estate of *W. Hewett*. And it was objected by Defendant's Counsel, that the Charge made thereon by *Abraham* was void ; for the fourth Part vested in the Heir of *Abraham* as a Purchaser, *Abraham* being dead before the Settlement made, and before the Estate devolved upon him ; and his Will created two distinct Contingencies, viz. to *Abraham*, if he should be alive at that Time, if not, to his Heir. This therefore not being a Remainder vested in *Abraham*, is not subject to the Charges made upon it by his Will. *King*, Chancellor, said, that the first Part of the Will gave a Fee to *Abraham Blackbourne* of a fourth Part, upon the Contingencies there mentioned, and therefore it became a vested Remainder ; and the latter Clause or Proviso did not restrain the Devise, but was directory only to the Trustees how to convey, in case the

Parties who were to take the Benefit died before the Settlement made. Another Question arose, whether a Day should be given to *Levett Blackbourne* (he being an Infant) to shew Cause against the Decree ; and it was held, that were the legal Estate in Trustees, and not in the Infant, and an Execution of the Trust is to be directed, that there is no Occasion that a Day should be given ; and the Money was therefore decreed to be raised, [9] and no Day given to the Infant to shew Cause against the Decree. *Vide* 2 Vern. 429, *Coke* versus *Parsons*.

10.—VERNON *ver.* VERNON. *Pasch.* 4 *Geo.* II. 1731.

Bill for a specifick Performance of Articles. [S. C. 2 P. Wms. 595.]

Henry Vernon being at *Aleppo* in *Turkey*, and possessed of a large personal Estate, in the Year 1694, made his will, and thereby devised some particular Legacies, and gave the Residue of all his moveable Goods, &c., to his brother *Thomas Vernon* ; but if he died without Heirs Male of his Body, then he devised the Legacy given to *Thomas* to be divided equally between his other Brothers *George* and *Charles Vernon*, and made his Brother *Thomas Vernon* his Executor ; but in case *Thomas* should die first, he appointed his Father Sir *Thomas Vernon* his Executor ; and desired, that each of them (in the Name of God) would see his Will performed. The testator died soon after, and *Thomas* his Brother proved his Will in 1695, and possessed his personal Estate and Effects ; and afterwards, being in Treaty for a Marriage, in Consideration thereof and of the Marriage-Portion, and that certain Lands of the intended Wife were agreed to be settled, he enters into Articles under his Hand and Seal, and thereby covenants with Trustees to purchase Lands of the yearly Value of £350, within fifty Miles of *London*, or in the County of *Chester*, out of an Estate formerly belonging to the *Vernons* ; and which when purchased were to be settled to the Use of himself for Life ; and after his Decease, Part thereof to the yearly Value of £150 was to be settled to the Wife for Life, in Bar of her Dower, and the Residue to Trustees for ninety-nine Years, determinable upon the Death of the Wife ; and from and after her Decease, to the Use of the first and other Sons of the Marriage in Tail Male ; Remainder to the Heirs Male of the Body of *Thomas*, with Remainder to *George Vernon* for Life ; Remainder to his first and other Sons in Tail Male, with Remainder to *Charles Vernon* for Life ; Remainder to his first and other Sons in Tail Male, with Remainder to the right Heirs of *Thomas*.

Note : Sir *Thomas Vernon* the Father was a Party to and executed the Articles, but did not grant any Estate thereby, or covenant to make any Provision for his Son, nor did it appear that he parted with any Thing to his Son on Account of the Marriage. The Marriage took Effect soon after the Date of the Articles, and *Thomas* had Issue by his Wife three [10] Daughters and no Son, and *Thomas* did not purchase any real Estate in Pursuance of the Articles ; but in the Year 1726, made his Will in Writing, and gave each of his Daughters £5000 a-piece, and made his Wife *Jane* Executrix and Devisee of his real and personal Estate, subject to his Debts and Legacies, and soon after died.

George and *Charles Vernon* sent to the Widow to make a Purchase and settle it according to the Articles ; who (before she had advised) returned Answer. she would do it in convenient Time, and that her Husband had directed her so to do ; but she afterwards refused ; and thereupon *George* and *Charles Vernon* brought a Bill against her for a specifick Performance of the Articles.

Counsel *pro Quer'* insisted, that it did not weaken the Plaintiffs Title, that they were not Parties to the Articles ; for if a Remainder is limited by Deed to any Person not a Party, it is not to be questioned but such a Remainder is good ; that the Covenant entred into by the Articles, for the Benefit of *George* and *Charles Vernon*, was made upon a good Consideration, and it was intended thereby to keep up the Name and Family ; the Father was a Party thereto, and would not have otherwise consented to the Marriage ; and *Thomas*, who entred into the Covenant, had an Eye and Regard to his Brother *Henry's* Will ; and altho' the Devise over to *George* and *Charles* was void, yet it was sufficient to bind the Conscience of *Thomas*. And Courts of Law and Equity will allow such Things to be a good Consideration, tho' the Parties are not compellable otherwise to do the Act. As if there are Creditors upon whose Deaths the Statute of Limitations has run, and afterwards an Executor or Administrator promises to pay

them ; such a Promise shall bind, and shall not be accounted a *Nudum pactum*. And they quoted the Case of *Osgood versus Stroud*, which had been heard by Lord *Macclesfield*, and afterwards reheard by his present Lordship. (*Vide Cases in Law & Eq.* 533, 534.)

Mr. Solicitor General *Talbot & al' contra*. That the Covenant whereof the Plaintiffs prayed a specifick Performance was voluntary ; and that this Court had in no Instance decreed a specifick Performance of a voluntary Covenant ; that it did in no wise alter the Case ; that Sir *Thomas* the Father was a Party to the Articles, he was made so out of Respect and Reverence to him, but no Consideration could arise from thence ; for that he granted nothing, nor did he covenant to do any Thing for his Son ; which was otherwise in the Case of *Osgood versus Stroud* ; that there was no occasion in the present Case, nor could it stand in Reason to seek out and cast about for what Consideration the Articles were made, [11] the Considerations are expressed therein, & *expressio unius est exclusio alterius* ; nor can it be said with Reason, that *Thomas* had Respect to his Brother *Henry's* Will at the Time of making the Articles ; for the Limitations in the Articles do not pursue the Limitations in *Henry's* Will, but are evidently different ; and if the now plaintiffs had brought a Bill against *Thomas* for the Performance of the Articles, the Court would not have decreed it ; for it would have been in *Thomas's* Power to undo it the next Day ; and cited the Case of *Bellingham versus Louthier*, 1 Chan. Ca. 243, and the Case of *Thompson and Lord Eversham*, Trin. 1715. Lord *Eversham* covenanted with *Thompson* to present his Son to a certain Benefice when it became void, and he had the Estate ; the Event happened, and Lord *Eversham* refused to present *Thompson's* Son ; and he brought a Bill to compel the Performance ; but the Bill was dismiss'd with Costs, it being a voluntary Covenant.

King, Chancellor. He did not apprehend that all voluntary Covenants were not to be compelled to a Performance ; but he doubted whether this was a voluntary Conveyance ; *Thomas* must be supposed to have Regard to his Brother's Will at the Time of making the Articles ; and accordingly decreed a specifick Performance. *Quære* as to this Decree.

11.—MAN versus MAN. May 11, 1731, 4 Geo. II.

Coram Jekyll, Master of the Rolls.

Interest, Use, Profits, &c., to a Wife for Life.—Bill against the Widow, that the personal Estate might be secured for the Purposes in the Will.

Sampson Man being possessed of a personal Estate, on the 18th of December 1718, made his Will, and thereby gave all the Interest, Use, Profit, and Benefit of his personal Estate to his Wife *Agatha* for her Life, during her Widowhood, and after her Death directed that his personal Estate should be divided equally between his Brother *Benjamin* and his Sisters *Lydia*, *Mary*, and *Elizabeth*, and made his Wife sole Executrix. *Mary* and *Elizabeth* died before the Testator, and he dying in 1727, his Widow proved his Will and possessed his Effects. *Benjamin* and *Lydia*, the surviving Residuary Legatees, brought their Bill against the Widow and Executrix for an Account of the Testator's personal Estate, and that the whole might be secured for the Purposes in the Will.

It was agreed in arguing this Case, that the surviving Legatees were intitled only to two fourth Parts of the Testator's Estate upon the Contingency in the Will ; and the sole [12] Question was, whether the Executrix should take the two remaining fourth Parts to her own Use, or whether they should be distributed according to the Statute.

Talbot, Solicitor General, argued, that the Testator did not mean that the Executrix should have more than the Use and Profit of his Estate during her Widowhood, for that he had disposed of the whole by his Will, and therefore that the Shares of the Legatees who died before the Testator were distributive according to the Statute.

Mead pro Def' argued, that where the Intent does not plainly appear, that the Executrix should not take any Benefit by the Will, but what is therein expressed, the Law ought to take place ; and by Law the Executrix is intitled to what is not partly disposed of ; that it did not follow, because the Testator had given the Use

of his whole Estate to his Wife for Life, that she should stand as a Trustee for the next of Kin, in case any of the Legatees died before the Testator.

Jekyll, M. R., said, this Court had considered the Executrix as a Trustee for the next of Kin, chiefly in Cases where the Testator had not disposed of his whole Estate at the Time of his Will, but had left Part undisposed of.

That the Testator in this Case had disposed of the whole ; and it was natural for him to suppose that making his Wife Executrix intitled her to the Shares of the Legatees dying before him ; for otherwise he might have prevented it by a Codicil, had he thought fit. And decreed, that the Defendant the Widow was intitled to a Moiety in her own Right ; and directed, that the other Moiety of the Estate should be brought into it, and secured for the Purposes in the Will.

Note : This Decree was afterwards affirmed in the House of Lords 1731.

12.—WILLING *versus* BAINE. *June 21, 1731, 5 Geo. II.*

[See *In re Green's Estate*, 1860, 1 Drew. & S. 72.]

Legacy, whether lapsed.

Dorothy Baine by Will 1723, gave a Legacy of £200 to *Mary Billing*, £300 to another Legatee, £100 to a third Legatee (all Infants), payable at twenty-one, and if either of them died before twenty-one, then his or her Legacy to go to the Survivor or Survivors ; and one of the Legatees died in the Life-time of the Testator ; and the Question was, whether this was a lapsed Legacy, or should go over to the other Legatees.

[13] *King, Chancellor*. A legacy is lapsed where there is no Person to take according to the Will ; but if it can take Effect according to the Will, the Legacy cannot be lapsed ; here it may take Effect ; as if Lands are devised to A. for Life, and after to B. though A. dies in the Life-time of the Testator, B. shall take ; and so decreed that the Legacy should go to the other Legatees. Vide 2 Vern. 207, a Case in Point. 2 Vern. 467, 611. The Legacy also shall carry Interest from the Time of the Death of the Testator.

13.—ATTORNEY GENERAL *versus* HALL. *July 5, 1731, 5 Geo. II.*

[S. C. Fitz.-G. 314. See *Parnall v. Parnall*, 1878, 9 Ch. D. 97.]

Information to have both real and personal Estate appropriated to the Charity.

Thomas Hall by his Will bearing Date 16th of Feb. 1717, devised (*inter alia*) as follows, " I give and bequeath unto my Son *Francis Hall*, and the Heirs of his Body lawfully begotten, all my real and personal Estate to his and their own Use within three Years after my Decease ; but in case my Son *Francis Hall* shall depart this Life, leaving no Heirs of his Body lawfully begotten living, then I give all and so much of my Estate as he shall be actually possessed of at the Time of his Death to the Corporation and Company of Goldsmiths in London, upon Trust, &c." *F. Hall* died without any Children, and this Information was brought by the Goldsmith's Company to have the Estate of *Thomas Hall*, both Real and Personal Estate, appropriated to the Charity as directed by *Thomas Hall's* Will. As to the real Estate, the Defendant, who was the Executrix of *Francis Hall's* Will, pleaded a Common Recovery which her Husband had suffered, whereby he declared the Use thereof to himself in Fee, and devised the same afterwards to her. And upon arguing this Plea, the Court allowed the same, being of Opinion, that *Francis Hall* was Tenant in Tail of the real Estate under the Will of *Thomas Hall*, and that the same was consequently barred by the Common Recovery ; so that the only Question now before the Court was, whether this Limitation over to the Goldsmith's Company was a good Limitation over of the personal Estate.

Counsel *pro Quer'* : The only Question is, whether the Devise over to the Goldsmith's Company was a good Limitation or not ? I beg Leave to consider it in two Lights. 1st, Instead of the Words (*Heirs of his Body*) the Word (*Sons*) had been mentioned ; and 2dly, As it now stands with these Words (*of the Heirs of his Body*) ; and 1st, If the Word *Sons* [14] had only been mentioned, then the Devise over to the Goldsmith's Company would have been good.

These executory Devises were formerly not known in the Law ; and such Limitations over were allowed at first in Cases only of Chattels Real, as appears in *M. Manning's*

Case, 8 Rep. 94, which was the first Case ; afterwards *Lampel's* Case in 10 Rep. 46, was determined, where these Limitations were carried somewhat further ; and since those Cases were personal, meer personal Chattels have been allowed to have been limited over. In the present Case, the Contingency, upon which the Charity is given, is to arise within the Time limited by Law, viz. upon *Francis Hall's* dying without Issue living at the Time of his Death, and not after a general dying without Issue, which would be void ; the Words of the Will are, *If he shall depart this Life leaving no Heirs of his Body lawfully begotten living, then I give, &c. Heirs of the Body must be Heirs of his Body at the Time he shall depart this Life ;* and the Words *leaving and living* are very significant and express, and refer to the Point of Time before, which is the Time of *Francis Hall's* Death ; the Word *then* may likewise refer to the Time of *Francis Hall's* Death, and denote when the Contingency shall happen ; but tho' it may be in different Cases applied to either, yet in the present Case it refers to the Time, and not to the Contingency in Question. 1 Vern. 234, 250, 298 ; 2 Vern. 38, 59, 766. These Cases shew how it would have been, if instead of the Words *Heirs of the Body* there had been the Word *Sons* ; and if there are other Words in the Will which shew what the Testator meant by the Words *Heirs of his Body*, and that he only intended *Heirs of the Body at the Time of Francis Hall's* Death, it will come to the same Thing ; and the latter Words of the Will, viz. " But in case my Son *Francis* shall depart this Life, &c.," are restrictive of the Generality of the former Words (*Heirs of his Body*). As where a Devise is to A. and his Heirs, so long as B. shall have Heirs of his Body, there, tho' A. by the first Words takes an absolute Fee, yet they are restrained by the subsequent Words ; but the Words (*Heirs of the Body*) in this Case are only applicable to the Testator's Real Estate, which may be intailed ; and not to his personal Estate, which cannot be intailed and made capable of being taken and received by Discent ; but as to his Personalty, they were to vest a Property only ; and then the Question will be, whether this Limitation over will be good. 2 Vern. 86, 195. Tho' there is a Real Estate devised by his Will as well as a Personal Estate, and the same Words pass both Estates, yet such a Contingency may afterwards be inserted (as in the present Case) to determine the Property as to the Personal Estate.

[15] Counsel on the same Side : This Limitation to the Goldsmith's Company is good as an executory Devise. Executory Devises are not within the Rules prescribed by the antient Common Law, but are Evasions out of it, which the Courts of Law have allowed and come into, to answer and comply with the Intent of the Testator ; and if the present Words will bring this Case within the known Rules concerning executory Devises, this Court will countenance this Limitation ; and this Court has often allowed such Limitations over, to comply with the Intent of the Testator, tho' they have not been so strictly conformable to the Rules, as in the present Case. It is said there are two Contingencies in this Case, viz. *Francis Hall* dying without Issue at his Death, and also his being actually possessed, &c., for only such of the Personal Estate, as he should be possessed of at his Death, is limited over ; and therefore the Limitation over is void ; but I apprehend that such a Limitation may depend on a double Contingency ; and so several of the Cases cited in *Vernon* prove.

Talbot Solicitor General cont'. The Limitation to the Goldsmith's Company is void, and the Information must be dismissed. By Will the Residue both of the Real and Personal Estate is devised to *Francis Hall* and the Heirs of his Body, to his and their Use. As to the Real Estate, it is an Intail executed ; and as to the Personalty, which cannot be intailed, it gives an absolute Property ; and the Will limits nothing over to the Goldsmith's Company, but what *Francis Hall* should be actually possessed of at the Time of his Death ; so that there is Power left in him to alien and dispose of all or any Part of it ; besides, there are other Words in the Will which shew that *Francis Hall* had the sole Property of the Personalty vested in him ; for the Words are, " But my Will is, that the Company of Goldsmiths shall not give my Son any Trouble on any Account whatsoever concerning my Estate." So that taking it for granted, that *Francis Hall* had an Interest vested in the whole Personal Estate (and which, if he had pleased, he might have spent every Farthing), the single Question will be, whether this Limitation or executory Devise to the Goldsmiths Company will be good or not ; and I think it is void. 2 Vern. 245, *Clergis* versus *Dutchess of Albermarle*. There the Difference is taken between Chattels Personal that are vested, and where the Use only is devised. 2 Vern. 600, *Higgins* versus *Dowler* ; Salk. S. C. 156. And the Case of *Richards* versus *Lady Abergavenny* is in Point ; where a House together with

the Furniture thereof was limited to a Wife and such Heir of her Body as should be living at her Death, and in Default of such, Remainder over. The Wife has an Estate-[16]-tail in the House, and an absolute Property in the Furniture. 1 Vern. 326, 347, *Whitmore versus Wild*; 2 Vern. 367, is a strong Case; where such a Limitation of a Personalty over was held ill, because it was an Interest vested. 1 Vern. 478, *Deering versus Hanbury*; 2 Vern. 110, *Webb versus Webb*; Cro. Jac. 590, *Pell and Brown's* Case is the Intail of an Inheritance. The Counsel for the Plaintiff does not know what Decree to pray, whether only such specifick Part of the Personal Estate which *Francis Hall* was actually possessed of at the Time of his Death, or whether there should not be a Decree that his Representatives should account for so much as he spent; to insist upon the last is repugnant to the Will, because *Francis Hall* by the Will had Power to dispose of the whole as he thought proper; and as to the other, that makes the Devise over dependant on two Contingencies, and therefore void; so that if there be a Limitation over in the present Case (which there cannot, because an Interest and Property is actually vested); yet as the present Case stands, it would be a void executory Devise, because it is not confined to dying without Issue at the Time of *Francis Hall's* Death. The two Words insisted upon in the Will to confine the Dying without Issue to the Time of the Death of *Francis Hall* are (*living and leaving*); but if a Man dies without Heirs of his Body, he dies without Heirs of his Body living, and if he leaves no Issue, he dies without leaving Issue; but for the Reasons aforesaid this is not material to be determined.

King, Chancellor; *Jekyll*, Master of the Rolls; and *Reynolds*, Lord Chief Baron: In regard the Ownership and Property of the Personal Estate was vested in *Francis Hall*, and not the Use only; this was held to be a void Limitation to the Goldsmith's Company. It is giving a Man a Sum of Money to spend, and limiting over to another what does not happen to be spent; and therefore the Information was dismissed.

And so *Note* a Difference between a Devise of Chattels Real and Personal.

14.—SELBY versus SELBY. 5 Geo. II. [1731–32].

Whether Uncle or next of Kin should be Guardian.

Serjeant *Selby* made his Will, and appointed his Wife sole Executrix and sole Guardian of his Son, and then devised further, "That if my dear Wife shall marry again " before my Son shall attain his Age of twenty-one Years, that then and from thenceforth I appoint my Brother Executor and sole Guardian of my Son." The Mother died, the Son being about thirteen Years of Age; and the Question [17] was, whether the Uncle (who would have been Guardian in case the Wife had married again), should now be Guardian, or the next of Kin, who could not inherit.

King, Chancellor. Here is no Limitation of the Guardianship to the Wife for Life. It seems to me that the Uncle must have been Executor and Guardian at the same Time; he should not have much doubted but that the Uncle would not have been, was it not for the Case cited in Raym. 427, and 3 Lev. 125, and a Case was made of it for the Opinion of the Judges of *B. R.*

15.—ANONYMUS. 5 Geo. II. [1731–32].

Injunction to stay Proceeding against Bail.

Counsel moved to extend an Injunction to stay Proceedings against the Bail. The Plaintiff before he filed his Bill had been arrested, and Bail was given to the Sheriff. Plaintiff afterwards had obtained an Injunction upon a *Dedimus*, notwithstanding which the Defendant had taken an Assignment of the Bail-Bond, and was proceeding at Law against the Bail.

Lutwyche cont': A common Injunction extends only to delay Execution, it stays nothing else, and the Plaintiff at Law may proceed to Judgment; and whenever it is extended to stay Proceedings against the Bail, it is always particularly mentioned.

King, Chancellor. If a Declaration is delivered, the Party may proceed to Judgment notwithstanding an Injunction, and Execution is only stayed; and if no Declaration has been delivered, all Proceedings at Law are stayed; that is the Practice and

Construction that has been constantly put upon the Words in the latter End of the Writ it self. Motion was granted.

16.—VIZOD *versus* LONDEN. 5 *Geo. II.* [1731–32].

Bond before Marriage, if a Bar of Dower.

A Bond was entered into before Marriage by the Defendant's Husband for the Sum of £500, and the Condition recited the intended Marriage, and that the Obligor was to receive a competent Fortune, and thereupon the Obligor was to settle Lands of the yearly Value of £14 as Counsel should advise, to the use of the Defendant for Life, for her Livelihood and Maintenance, if the Marriage should take Effect and she should survive her Husband; otherwise the Bond to stand in full Force. The Question was, if this should be a Bar of Dower. The *Master of the Rolls* was of Opinion it [18] was not; but *King*, Chancellor, being of a different Opinion, reversed his Decree.

King, Chancellor. Several Estates that are not specified in the Statute 27 *H. 8.* c. 10, 1, b, are yet within the Equity of the Statute, and the present is not a Case within the Letter of it; but whenever an Estate is settled so as to fall and take Effect immediately upon the Death of the Husband, with a Covenant or other Instrument, declaring it to be as a Jointure or in Bar of Dower, and is tantamount to its being an actual Settlement within the Letter of the Statute. What is necessary to be done by the Words of the Statute? The Words are expressly (*for the Jointure of the Wife*), but the Statute does not say that the Jointure must be, to be expressed in Bar of Dower. The Bar of Dower is only a Consequence of its being a Jointure; and a Jointure, according to my Lord *Coke*, is a Provision and Maintenance for the Wife; and sure this is expressed to be so, and therefore within the Description of it. Before the Statute 29 *Car. 2.*, of Frauds, a parol Averment of any such Provision being made as a Jointure was sufficient. Decree reversed; *vide* 4 *Rep. Vernon's Case*; 2 *Vern.* 505.

17.—EVELYN *versus* EVELYN. 5 *Geo. II.* [26 Oct. 1731]. [S. C. 2 P. Wms. 659.]

This Cause came on to be heard before *King*, Chancellor, assisted by *Raymond*, C. J., and *Jekyll*, Master of the Rolls, on the 26th of Oct. 1730. The Case was this: *George Evelyn* the Grandfather being seised of several Estates, *viz.* of an Estate for Life, with Remainder to his Son *John* in Tail, and likewise of other Lands in Fee (all which Estates lay in the County of *Surry*, and were of the Value of £900 *per Annum* or thereabouts), settled the same by two several Deeds, the one dated 20th of October 1698, relating to the intailed Lands, and the other dated 21st of Nov. 1698, relating to the Fee-simple Lands, to the Use of *George* the Grandfather for his Life, with a Power to charge the same with £6000, and after his Decease to the Use of *John* for Life, Remainder to his first and other Sons in Tail Male, with like Remainders to the second, third and fourth Sons, &c., of *George* the Grandfather, with Remainder to himself in Fee; and in both these Deeds there was this Clause, *viz.* "That it should be lawful for *George* the Grandfather, together with such Son as should be next in Remainder, and after the Death of *George* the Grandfather, then and for every the Son and Sons as should be in Possession of the [19] Premises, to make any Lease or Leases *sans Waste* (so it be without Prejudice to any Jointure), for raising Portions for a Daughter or Daughters of such Son or Sons, and so as such Portions do not exceed the Fortune of the Wife, and so as such Lease be not to take till Failure of Issue Male." But there was some Difference in the Wording of the Clauses of the two Deeds; for in the Deed, by which the Fee-simple Lands were settled, it was expressed in this Manner, *viz.* "To make a Mortgage, or to make any Lease or Leases, so as the same be determinable upon raising such Portions, and the Costs and Charges attending the same."

George the Grandfather had Issue five Sons, *John*, *George*, *Edward* and two others; *George* the Grandfather died in 1699. *John* his eldest Son died without Issue in 1703. *George* the second Son entered, and a Marriage being afterwards agreed to be had between him and Mrs. *Garth*, in Consideration thereof, and of his intended Wife's Portion (which amounted to £8000), the said *George* covenanted by Deed 22d of August 1720, to appoint certain Lands contained in the former Settlement for his Wife's Jointure of the yearly Value of £790 or thereabouts, and also devised the said

Jointure Lands, and other Lands contained in the said two Deeds of Settlement, to Trustees for 500 Years, to take Effect on Failure of Issue Male by him, and subject to the Jointure ; upon Trust, that if there should be Failure of Issue Male of the Body of the said *George*, begotten on his said intended Wife, and the said *George* should have one or more Daughters so begotten, that then the said Trustees and the Survivor of them, and the Executors and Administrators of such Survivor, should out of the Rents, Issues and Profits, or by Sale, Mortgage or Lease, as to them in their Discretion should seem meet, as soon as conveniently might be after the Decease of the said *George*, or in his Life, if he should think fitting, to have the said Portion or Portions sooner raised, and should so direct, to levy and raise the Sum of £8000 to be paid to such Daughters, Share and Share alike (provided the Term shall not prejudice the Jointure). The Marriage took Effect, and *George* left Issue three Daughters (the eldest about five Years old), and died in the Year 1726. The Infant Daughters now brought the Bill by their Mother as *Prochein Amy*, to have their Portions raised.

It happened that *George* the Grandfather had charged the Premises by Way of Mortgage for £1500, according to his Power in the Settlement (whereby he had Power to charge the same with £6000), so that the Estate came to *George* his Son, subject to that Incumbrance ; and the Mortgagee calling in his Money, the said Mortgage was assigned over to a third [20] Person ; in which Assignment *George* then covenanted to pay the Mortgage-Money. *Edward Evelyn* the third Son, and next in Remainder, brought his Bill against the Assignee of the Mortgagee, and the Administratrix of *George* the Son, to have the Real Estate discharged, and that the Mortgage might be satisfied out of the Personal Estate of *George* his Brother ; but as to this Matter his Bill was dismissed.

Mr. *Lutwyche* and two others, Counsel with the Plaintiffs in the original Cause, argued, that altho' it would very much hurt *Edward* the next in Remainder, that the Portions should be raised immediately, yet the Court must regard only the Construction of the Settlement under which all Parties claim ; and if it was the Meaning of *George* the Grandfather to preserve the Estate in the Issue Male of the Family, yet it was subject to the Charges in the Settlement ; and for this Reason, because without Marriage there must be Failure of Issue Male ; and the present Inconveniency arises only from too large a Portion, which the Jointress brought into the Family ; the Power in the Settlement made in 1680, was to make Lease or Leases at a Pepper-Corn Rent, to raise Portions for Daughters upon Failure of Issue Male, and so as not to prejudice the Jointure ; and since the Person who had such Power had executed it, for that Purpose it was vested *instantly*, and became immediately due, for when it is said such Power to make Leases shall not be but upon Failure of Issue Male, the Party may do it, and that the Interest shall be then vested ; and so if a Portion be appointed to be paid out of Lands at twenty-one, it implies it shall not be paid before that Time ; but when there is no Time of Payment limited, it is left to the Discretion of the Party to whom the Power is given to appoint the Time of Payment as he pleases ; if the Portions are not to be raised now, at what Time shall they be raised ? or is Part of the Portions to be raised now upon the Lands in Possession, and Part to wait the Death of the Jointress ? This would be to construe the Words of the Settlement contrary to the natural Import and Construction of them. For the Clause which gives a Power to raise Portions is single and intire ; the Daughters have now a present Occasion for their Portions, for there is no further Provision made for their Maintenance in the *Interim* ; and if the Portions are not now to be raised, it may become a Question, if they shall not sink in the Lands, should the Infants die before they are raised ; and so the Portions may be intirely lost ; and from the Nature of Portions, which are considered as Sums in Gross, it appears they ought to be paid in intire Sums, and not by Parcels out of the Rents and Profits ; for the raising Portions in such a Manner would be like paying an uncertain Annuity, which would be more in one Year [21] than another, or Part or the Whole thereof must be spent in Maintenance ; whereas Portions are intended for the Advancement, and to be a lasting Provision for them, and to furnish a Maintenance from the Interest thereof. Neither is it an Objection to say, that the Portions in the present Case are restrained to be raised by way of Sale, and directed only to be raised by Lease and Leases ; for a Man that has a Power to make a Lease, may make a Lease absolute or conditional ; also he may take a Fine upon such a Lease, and is in the Nature of a Sale ; neither can it be objected that the Portions are not to be raised by a Sale ; because by the Words of the Settle-

ment it is said, "So as such Lease or Leases be determinable upon raising such Portions and the Costs attending thereon"; for a Proviso or a Restraint repugnant to the Thing granted is null and void; it must be intended to be meant, that the Lands comprised in the Settlement, and not leased, shall be wholly discharged. Besides, if a Man lends £8000 upon such a Security, it cannot be said that the Lands have raised, or that it has been paid out of them, until the Principal, Interest and Costs are paid. The Person indeed has lent his Money, but not without Regard to Interest, and until the End and Purpose of the Security is served, surely it shall not be construed to be discharged. *Kilmurray versus Green, in Canc'*, 1713. Neither is it strange reversionary Terms should be sold to raise the Daughters Portions; it has been frequently done. Jones, 201; 2 Vern. 458, *Gerrard versus Gerrard*. 2 Vern. 460, *Staniforth versus Staniforth*, which is a Case almost in Point; and 2 Vern. 72, *Earl of Rivers versus Earl of Derby*. That it was not to be disputed, but that *George* the Son had well executed the Power by the Deed of August 1720, and thereby directed, "That upon Failure of Issue Male, the Portions should be raised as soon as conveniently they might be; which imports they should be raised as soon after his Death as possibly might; the Father certainly intended the Benefit of his Daughters; and whose Conveniency could he be supposed to regard, that of his own Children, or the Persons in Remainder, to whom it might never be convenient to pay their Portions? besides, the Father has provided no other Support or Maintenance for his Daughters.

As to the demand of £1500 by the Defendant's Cross-Bill, it was said to be a meer Fancy; that altho' *George* the Son had covenanted with the Assignee of the Mortgagee to pay the Money, such Assignee could only have the Benefit of the Covenant; for that the Land in this Case was the principal Debtor; and *George* the Son gave his Covenant only by way of collateral Security. And the Counsel compared it to [22] the Case of a principal Debtor; and surely altho' both are liable at Law, yet a Court of Equity will lay the Burden where it ought to be born; and if the Surety is compelled at Law to pay the Debt, this Court will order the Repayment from the Principal. 1 Lev. *Jenkins versus Keymis*, 150.

Counsel argued *pro Def'*, That to raise the Portions by Sale of Part of the Estate during the Life of the Jointress, would be spoiling the whole Estate and rendring it of little Value; and that it never could be the Meaning of *George* the Grandfather, who made the Settlement, 1680, in View and Favour of the Heirs Male of the Family, to design the Portions for Daughters should be raised by Sale of a reversionary Term, and thereby defeat his principal Intent to preserve his Estate in his Heirs Male; and the Intent of the first Grantor ought to be considered in the Construction of his Deed, and which was made of no other Consideration but to preserve his Estate and Family. That his Intent appears plainly from the Restraints laid upon the Power, that the Portions must be raised out of the Rents and Profits only; for it is directed to be done by Lease only, and that to be determined upon raising such Portions. If it was to be raised by a Sum in gross, the Security is declared to be determined as soon as such Portion is raised; and that it is one Thing to lease, and another to mortgage and sell; which is not provided by the Settlement. If Lands are extended upon a Judgment by *Elegit*, the Party shall hold them only till the Debt is satisfied out of the Rents and Profits, and shall not hold them afterwards in respect of any Interest to rise by that Judgment. The Plaintiffs are of tender Years, and have no Occasion for their Portions which are given for Advancement; and the Court will after determine what is a convenient Time for the doing of a Thing where no Time is appointed by the Parties. 2 Vern. 439, *Bruen versus Bruen*. 2 Vern. 208, *Norfolk versus Gifford*.

As to the Demand of £1500 it was said, that this Court would always direct the Personal Estate to come in Aid of the Real Estate, either in Respect of an *Hæres natus* or an *Hæres factus*; that there was nothing to distinguish the present Case from the Case of *Sir John Nappier* and *Lady Effingham*; vide House of Lords Cases.

But it was answered, that the Case of *Sir John Nappier* was nothing to the Purpose; for that *Edward*, who has brought the Cross-Bill, is neither an *Hæres natus* or *factus*, for that he claimed nothing under *George* the Son, but under the Settlement which was made in 1680. The Court took Time to advise, and directed the several Precedents to be laid before them.

[23] 18.—SHERIFF *versus* MORLOCK. Dec. 2, 1731, 5 Geo. II.

At the Rolls.

Legacy with Proviso not to marry.

The testator by his Will devised a Legacy of £500 to his Niece out of certain Lands, Proviso if she should not marry in the Life-time of his Wife, or if she should marry in the Life of his Wife without her Consent, then the Legacy of £500 was to sink into the Estate of the Devisee. The Niece married in the Life-time of the Wife, not only without her Consent but directly contrary to it; and the Question was, whether this £500 was forfeited.

Counsel *pro Quer'*: Conditions of this kind are void by the Civil Law, because they are in Restriction of Marriage, which is for Publick Good; and there are many Cases in *Swinbourne* to that Purpose; but by this Court they are not totally void; for where there is no Limitation over, such Condition is only *in terrorem*, and the Legacy is not forfeited. But where there is a Limitation over, it is otherwise, and a Forfeiture. But he said there was a Difference between a Limitation over to a particular Person a Stranger, and when it is directed to sink into the *Residuum* of the Estate; and in the last it is esteemed *in terrorem* only, and occasions no Forfeiture, tho' such Consent is not obtained; and to prove this Distinction he cited 2 Vern. 293, *Garrett versus Pritty*.

Counsel on the same Side cited the Case of *Pamlori versus Berry*, before the *Master of the Rolls*; which was a Legacy devised to a Person, provided she married with the Consent of A. and B., and if she married without consent, such Limitation over to another. B. died before the Marriage, after the Legatee married without the Consent of A., and there held she should have the Portion notwithstanding the Limitation over. To which the Court answered, the Consent of A. and B. was jointly made necessary; and by the Death of B. that becoming impossible by the Act of God, the Condition was therefore intirely dispensed with.

Solicitor General *cont'*: All the Cases cited are only as to personal Legacies; but this differs because it is a Condition annexed to a real Estate, and the Consent is a Condition precedent, to be performed before the Party can be intitled. And when there is such a Charge upon a real Estate, the Distinction of a Limitation over and not, and the Difference also of its being limited to a particular Person, or being to sink [24] into the Surplus, fails. This therefore being a Charge upon the Lands, and the obtaining Consent, being a precedent Condition not performed, the Legacy becomes forfeited. And the Master of the Rolls, being of this Opinion, dismissed the Bill. *Vide ante*.

Note: There seems to be a Difference between Conditions precedent as to personal Legacies, and Conditions precedent as to such Charges on Land. *Vide* as to such Conditions annexed to real Estates, 1 Mod. 300, *Fry versus Porter*; 2 Vern. 333; & *vide* 1 Roll. Abr. 418. A lease for Life upon Condition, that if the Lessee marry without Licence the Lessor may re-enter; and this was held a good Limitation.

19.—*Ex parte* RILEY. 5 Geo. II. [1731–32].

Mutual Debts set against each other in a Commission of Bankruptcy

The Petitioner was indebted to *Woodward* a Banker upon Account of Cash-Notes that he had accommodated him with, and whilst he was so indebted *Woodward* became a Bankrupt, and the Assignees under the Commission against *Woodward* had brought an Action against *Riley* for the Money; it happened that *Riley*, against whom the Action was brought, and one *Chapman*, who were joint Partners, were Creditors of the Bankrupt *Woodward* on other Accounts, more than *Riley* on his own separate Account really owed to *Woodward*; therefore *Riley* insisted, as there was a mutual Credit between him and the Bankrupt, one Debt should be set against the other; and that it would be hard, that Assignees under the Commission should recover the whole against him, and he and his Partner come in only under the Commission proportionably for what *Woodward* owed them with other Creditors. It was insisted for the Petitioner, that altho' the 5 Geo. 1, as to mutual Credit was expired.

yet this Case was within the Equity of the Statute 2 Geo. 2, for Relief of Insolvent Debtors, whereby mutual Debts are to be set one against the other, upon Notice given, &c., and that it had lately been determined in a Case where *Woodward's* Assignees were Parties, that a Debtor of *Woodward's* tho' a Creditor in other Respects, should have one Debt set against the other upon the Foot of mutual Credit by the Commissioners.

It was said on the other Side, that joint Debts cannot be set against a separate Demand due to the Bankrupt.

King, Chancellor, was of Opinion, that this Case was not within the Meaning of the Statute 2 Geo. 2, of one Debt being joint and the other separate; but if *Woodward* had been indebted to *Riley* singly, he thought that was a mutual Cre-[25]-dit within the Statute. And tho' in such Case the Statute speaks only of setting one Debt against another upon Trials, yet Commissioners of Bankruptcy are within the Equity of the Statute, and may allow of mutual Debts being given in Discharge upon the Demand of Assignees.

20.—DUX CHANDOIS *ver.* TALBOTT. 5 Geo. II. [1731–32].

[S. C. 2 P. Wms. 601, sub nom. *Duke of Chandos v. Talbot*. Referred to, *Henty v. Wrey*, 1882, 21 Ch. D. 356.]

Legacy, whether lapsed and merged.

This was a special Matter for the Judgment of the Court upon the Master's Report, and the Question was, if a Sum is devised to A. to be paid him at twenty-one, and the Testator charges his real and personal Estate with the Payment thereof, and the personal Estate falls short, and A. dies before twenty-one Years of Age, whether in such Case the Legacy is lapsed and merged for the Benefit of the Heir at Law.

Solicitor General took the Difference between a Legacy given at twenty-one, and payable at twenty-one; with respect to a personal Legacy, when it is given to be paid at twenty-one, then it is a vested Interest; and the Courts of Equity have with Regard to personal Estates followed the Rules of the Ecclesiastical Court in that Particular: But with respect to real Estates it is otherwise; and if in such Case the Legatee dies before he is twenty-one, it is a lapsed Legacy, and shall sink into the Land and be merged for the Benefit of the Heir at Law; but in the Case of a Legacy merely personal, it would go to his Representatives. And of this Opinion was *King*, Chancellor, and ordered accordingly. *Vide* 2 Vern. 92, 248, 416, 457; 2 Vern. 72; 2 Vern. *Pawlett versus Doggett*, 86; Dy. 59, c, 15, b; 2 Salk. 415.

21.—PENDERIL *versus* PENDERIL. 5 Geo. II. [1731–32].

Petition that a Deposition in the Cause might be amended.

This Cause stood in the Paper for Hearing, and the Plaintiff applied to *King*, Chancellor, by Petition, that a Deposition taken in the Cause might be amended upon an Affidavit of the Witness; the Examiner had mistaken him in the following Manner: "The Witness had been examined when he saw such a Person"; and it was taken down in the Deposition, "About six Weeks after the Marriage of the Man inquired after"; whereas the Witness in his Affidavit swore that he said, "About six Weeks after the Fire which happened in *Drury-Lane* about August 1727.

[26] *King*, Chancellor, upon hearing the Depositions and Affidavits of the Witnesses, ordered the Witness who was present in Court to be sworn, which was done, and the Man examined, and, the Examiner attending, his Deposition was amended instantly, and the Cause proceeded.

But the like Application being made between the Seals in a Cause between *Traherne* and *Burdas*, he denied it, and said this Matter must be stopt in Time.

22.—MORTIMER *versus* MORTIMER. *Pasch.* 5 *Geo.* II. [1732].

[As to general devise including leaseholds see Wills Act, 1837, 7 Wm. 4 & 1 Vict. c. 26, s. 26.]

Devise with limitations.—Whether leasehold lands pass by this devise, or only his Freehold estate, &c.

Henry Smith by his will devised all his Lands, Tenements and Hereditaments whatsoever, whereof he was seised and possessed of, to Trustees for 1000 Years, in Trust to permit and suffer *James* his Son and his Issue to enjoy the Lands, and to receive the Profits during the said Term; but if his Son should die leaving no issue extant or ensient, then to permit and suffer his Daughter *Anne* and her Issue to enjoy the Lands, and to receive the profits during the Term; and if his said Daughter *Anne* died, leaving no issue extant or ensient, then to *Michael Smith* his Cousin, *ut supra*. *James* survived *Henry*, and died leaving no issue, and appointed his Wife Executrix. *Anne* the Sister of *James*, and Daughter of the Testator, died in the Life-time of her Brother *James*, leaving Issue *Anne Mortimer* the Plaintiff; the Father of *Anne Mortimer* took out administration of the Goods and Chattels of his Wife *Anne* deceased.

In arguing this Case three Points arose, 1st, Whether the Leasehold Lands of the Testator passed by his Devise, or only his Freehold Estate. 2dly, The Limitation to *Anne* the Daughter, in the Manner it is limited, is a good Limitation or not? and 3dly, Whether the Administrator of *Anne* the Daughter of the Testator, or *Anne* the Daughter and Issue of *Anne*, shall be intitled to the Term.

Counsel, as to the first Point, objected, that by a devise of all Lands, &c., generally the Freehold Lands only, and not the Leasehold Lands of the Devisor, will pass. Cro. Car. 293. But in case the Testator had no Freehold Lands, the Leasehold Lands will then pass, 2 Danv. Abr. 527. In this Case the Testator appears to have both Freehold and Leasehold Lands. The Testator was possessed of a Term for ninety-nine Years, determinable on the Death of a third Person, which he never had in his Intention to pass. If a Man seised of Freehold Lands, and possessed of a Term, grants a Rent-charge, the [27] Rent is issuing out of the Freehold Estate only. 1 Inst. Indeed the Leasehold Lands are liable to a distress. As to what is said, that the Word *seised* passes as to the Premises that are Freehold, and the Word (*possessed*) the Leasehold. It is not in the Disjunctive *seised (or) possessed*, but in the Copulative (*and possessed*); and a Man, if the strictness of the Words are to be regarded, is seised and possessed of Freehold Lands if he is in possession. The Term of 1000 Years, limited by his Will to the Trustees, is created out of the Reversion in Fee the Testator had expectant on an Estate-tail.

King, Chancellor. This is a Devise of all the Testator's Freehold and Leasehold Lands; it appears by the Proofs in the Cause, that the Testator had only one House which was Freehold, and he takes Notice in his Will, that the House was only Part of the Premises devised; he must therefore intend to pass his other Lands which are Leasehold. 2dly, The Limitation over to *Anne* the Testator's Daughter is also good; for this is not a Limitation of a Term, after a general Dying without Issue, which would be undoubtedly bad, but after a particular Dying without Issue, by reason of the Words (*extant* and *ensient*): *extant* implies without Issue at the Time of his Death, *ensient* is applicable to his Wife's being with Child at the Time of his Death. A Devise to an Infant *in Ventre sa mere* is a good executory Devise. Salk. 230. This therefore is a good executory Devise to *Anne*, tho' it would have been void as a Remainder. *Vide ante*.

3dly, Notwithstanding *Anne* died in *James* her Brother's Life-time, yet this Term shall now go to her Representative, and not to her Issue. *James* had the whole Term in him whilst he lived, subject to a Contingency.

23.—PAPILLION *versus* VOICE. *At the Rolls*, July 15, 1728, 2 *Geo.* II.

[S. C. 2 P. Wms. 471. See *Davenport v. Davenport*, 1863, 1 H. & M. 777.]

(*Reheard Hill.* 5 *Geo.* II. [1732]. *Vide post*, 34.)

Personal Estate devised in Moieties.

The Case was as follows: *Samuel Papillion*, being possessed of a considerable Personal Estate, by his Will Oct. 7, 1725, devised a Moiety of his Personal Estate to his

Son the Plaintiff, and the other Moiety to the Defendant *Voice* and others, in Trust, that as soon as conveniently might be after his Death, to lay it out in lands, and to convey and settle the same, to the Use of the Plaintiff *John Papillion* for Life, *sans Waste*; and from and after the determination of that Estate, to the Use and Behoof of the Trustees, during [28] the Life of *John Papillion*, to preserve contingent Remainders from being barred; and from and after the Decease of his said Son, to the Use of the Heirs of the Body of his said Son *John Papillion* lawfully to be begotten; and in Default of such Issue, to the Use of the Children of the Testator's late three Sisters, *Phæbe Smith*, *Mary Pell*, and *Anne Gledhil*, as Tenants in Common, and the Heirs of their Bodies (each of the said testator's Three Sisters Children to have an equal third Part), and for default of such Issue, to the Testator's own right Heirs.

And after, by the Testator's said Will, he devised to the Defendant *Voyce* and others, all that his Manor of *Great Bentley* and other Lands, to the Use of his said Son *John Papillion* for Life, *sans Waste*; and from and after the Determination of that Estate, to the Use of the Defendant *Voyce* and two others and their Heirs, during the Plaintiff's Life, to preserve contingent Remainders; and from and after the Plaintiff's Decease, to the Use of the Heirs of the Body of the Plaintiff; and in Default of such Issue, to the Use of the Children of the Testator's three Sisters, *P. S.*, *M. P.*, and *A. G.* deceased, and to the Heirs of their Bodies, as Tenants in Common (each of his three Sisters Children to have an equal Part), and in Default of such Issue, then to his own right Heirs; and after directs, that the Plaintiff in case he married, should have a Power to make a Jointure, as well of the Lands to be purchased as of the Lands devised, proportionably to the Portion he should receive; and if he married with Consent of Trustees, that then he might make any Settlement whatsoever.

The Testator made the Defendant *Voyce* and the other Trustees his Executors, and died; each of the Testator's Sisters left several Children, Defendants in the Cause; and the End of the Plaintiff's Bill was to have the Moiety of the Personal Estate devised to the Trustees either paid to him, or laid out in Lands to be settled on the Plaintiff in Tail.

Solicitor General and *Mr. Lutwyche pro Quer'*. That the Uses of the Lands to be purchased, being the same as the Uses limited of the Manor of *Great Bentley* devised by the Will, and which is an Estate-tail executed in the Plaintiff, the Court ought therefore to direct the Uses of the Lands to be purchased to be limited accordingly. They agreed, was this the Case of executory Marriage-Articles, it would be otherwise; and the Court in directing the Form of the Conveyance, instead of being limited to the Heirs of the Body of the Plaintiff, would direct the Limitation to be, to the first and other Sons, &c., because such articles are made upon a Consideration; and the Court will therefore in such Case take Care of the Issue, and not put it in the Power of the Father [29] to bar them, and therefore will not direct such a Settlement to be made as the Father may defeat the next Day.

But in the Case of a Will all is voluntary, and there this Court will not help further than the Law does. The Words in a Will must have their legal Operation, and the Court must take them as they find them; and for this Distinction between Articles and a Will was cited 2 Vern. 670, *Baile versus Coleman*; 2 Vern. 702, 2 Vern. 551, *Legatt versus Savill*; and *vide ibid.*

When Money is devised to be invested in Lands and settled in Tail, how far the Party, on whom such Settlement in Tail is to be made, can demand the Money before any Settlement. The next and chief Point was, whether, in case the Lands were purchased and settled as the will directs, the Plaintiff would be immediate Tenant in Tail or for Life only? And as to that, the same uses being limited as to the Lands to be purchased, as are of the Lands actually devised, all falls under one Consideration; and as the Plaintiff is Tenant in Tail by the Will of the Lands devised, consequently he will be so of the Lands to be purchased, and that notwithstanding the express Estate given to him for Life. And they relied on the rule laid down in *Shelley's Case*, 1 Rep. 104 a, viz. *That whenever an Estate of Freehold is limited to one, and after by the same gift and Conveyance an Estate is limited either mediately or immediately to his Heirs in Fee or in Tail, viz. To his Heirs or the Heirs of his Body; the Heirs cannot make themselves Purchasers, but must take by Descent, and this, tho' ever so many particular Estates be limited between; which comes exactly to the present Case; for John Papillion has in the first Instance an Estate of Freehold for Life, and then, notwithstanding the intermediate Estate to Trustees, the Words (Heirs of his Body) must be Words of Limitation; this Rule*

has never been denied to be Law ; if therefore, upon Construction of all the Uses, the Court should be of Opinion that the Plaintiff takes an Estate-tail, then the Court will decree a direct Limitation to the Plaintiff in Tail, and not direct a conveyance contrary to the Words of the Will ; and to this last Thing his Honour agreed ; saying, it was the Office of this Court to quiet, and not create disputes.

A. G. and others, Counsel for the Defendants, said little or nothing as to the first Point ; but argued chiefly, that by the Limitation in the Will the Plaintiff had only an Estate for Life in the Lands devised, and would have no more in the Lands to be purchased ; did not deny the Rule in *Shelley's Case*, but said that Rule goes only to Limitations by Deeds ; and that a greater Latitude is allowed in Constructions in Wills ; for the same Words shall have one Construction in a Deed and another [30] in a Will ; as a Devise to A. for ever is a Fee in a Will ; but only an Estate for Life in a Deed, for want of the Word *Heirs*. So a Devise to J. S. and his Issue in Tail, is an Intail in a Will ; but otherwise in a Deed : So to J. N. and his Heirs Male, is an Intail in a Will ; *aliter* in a Deed.

And here are many Circumstances in this Will to shew the Testator only intended the Plaintiff should take an Estate for Life. As the Clause without impeachment of Waste. The Limitation to the Trustees to perform contingent Remainders will be nugatory, if the Limitation to the Heirs of the Body of the Plaintiff are not construed contingent Remainders (and had this Clause been in the Case of the *King versus Melling*, that would have been adjudged an Estate for Life); and also the Power to make a jointure. All these Particulars, besides the express Estate for Life, demonstrate what was meant by the Words (*Heirs of his Body*). Vide 2 Salk. 679, *Broughton versus Langley* ; 1 Lutw. 823 ; S. C. 1 Salk. 224.

Jekyll, M. R. This is a Case of great Consequence and Difficulty ; and would take Time to consider of it. But to break the Case, as to Consideration of the Limitation of the Personal Estate. In the Case of *Bail versus Coleman*, Lord Chancellor *Cowper* held, that the Trustees should execute as in case of Articles ; but Lord *Harcourt* afterwards held the contrary, and with good Reason. 2 Vern. 536, *Sweetapple versus Bindon* ; there the Difference also which has been taken between a voluntary Devise and Marriage-Articles is agreed. The Rule of Construction of Wills must be governed by the Intent of the Party, consistent with the Rules of Law, i.e. the Rule of Law that has been received in Construction of Wills, and not of Deeds ; for there are many Differences that have been adjudged between them according to the Cases cited. The Limitation of the Money in this Case to be invested in Land, must ensue the Construction of the Devise of the Lands ; but it is too general to lay it down, that it must be in the same Words.

As to the main Point, I would see if there were any Cases where an Estate is devised for Life, with Remainder in the same Will to the Heirs of the Body of the Devisee ; with Circumstances shewing the Testator intended only an Estate for Life ; that the Heirs of the Body have taken by Purchase. As to the Case of *Peacock and Spooner*, 2 Vern. 43, 195, which was cited to shew, that the words *Heirs of the Body*, were held Words of Purchase, was dissatisfied with that Resolution, and said, that stood on its own Bottom ; and that Terms for Years was not within 11 Hen. 7, c. 10, and that *Webb and Webb*, 2 Vern. 668, was cited by the Counsel as resolved contrary : He stated the Case of *Peacock and Spooner* ; and it was a [31] Term for Years settled by the Husband ; and being a Settlement *ex provisione viri*, was within the Reason, and therefore within the Equity of 11 H. 7, against Discontinuances of Wills : But it seems a great Stretch to extend by Equity an Act of Parliament made in a particular Case touching Lands, to Terms for Years. Note : This Circumstance in the Case of *Peacock and Spooner*, viz. Of the Term being settled by the Husband, and which was the Reason that governed the Resolution, is not reported in *Vernon*, nor the Statute of H. 7 mentioned, which seems a great Omission. That of *Webb and Webb*, which was resolved contrary, was also a Case of the Right of the Husband, and not of the Wife.

Afterwards the *Master of the Rolls*, viz. on the 11th of December 1728, after very great Consideration, delivered his Opinion to the following Effect :

He made two general Questions, 1st, Whether the Words (*Heirs of the Body*) in this Case were Words of Limitation or Purchase. 2dly, How far the Court, in directing the Uses of the Settlement, was bound to follow the Words of the Will ?

As to the first, they are Words of Purchase in the present Case ; if they are to be taken as Words of Limitation, they denote only the Quality of the Estate ; but if

Words of Purchase, then they denote a contingent Remainder; to the first Son of the Plaintiff which is agreeable to the Words of the Will. The great Objection is the Rule in *Shelley's Case*, 1 Rep. 104. That if the Eldest should take by Purchase, that might prevent all the other Sons from taking an Estate-tail in Succession, contrary to the Testator's Intention.

This was denied by Lord *Macclesfield* in *Trevor and Trevor*, Trin. 1719, and 1 Inst. 26 b. is a direct Authority against it. I hold, that in the Case of Wills the Intention of the Party is principally to govern. 8 Rep. 95 b; Salk. 237, *Countess of Bridgewater's Case*; this Rule of the Intent of the Testator being to govern in Wills is universal, and will prevail over all particular Rules. I agree, his Intention must conform to the Rules of Law, Hob. 32, *Couden versus Clarke*; and therefore we are to steer between two Rules. Hob. 32.

All the Cases, where the Rule of Law over-rules the Intention of the Party, are reducible to four Instances. 1st, Where the Devise would make a Perpetuity. 2dly, Where it would put the Freehold in Abeyance. 3dly, Where Chattels are limited as Inheritances. And 4thly, Where a Fee is limited upon a Fee.

But the Judges have favoured the two last Kinds, and have made Limitations of Chattels good for Lives in Being, tho' never so many, and helping the other by inventing executory Devises; a Motion not mentioned in the old Books. 3 Rep. 19, *Boraston's Case*.

[32] But this Rule, that the Testator's Intent is to govern in Wills, is to be laid down with this Caution, viz. That the Intent must be clear and apparent, 6 Rep. 1, 6 b, *Wild's Case*; and there is no Instance where this has been contradicted. Consider the Cases which have been insisted on for the Plaintiff, and which seem contrary to this Rule. The Case of the *King and Melling*; and *Hale's* Opinion, who founded himself on the supposed Intention of the Testator. 1 Ventr. 214, 225, and vide the Opinion of *Raymond*, C. J., in the Case of *Shaw and Weigh*, with his Observations of the Case of *King and Melling*; but had there been in that Case, as there is in the present, a Limitation to Trustees, to preserve contingent Remainders, *Hale* would never have said, that the express Estate for Life, with all other the Circumstances of the Case shewing the Intention of the Testator, was ballanc'd by an apparent Intent which weighed as much on the other Side, (& mea equidem sententia) that of *Hale's* is a very absurd Opinion, to make such a collective Intent, viz. (that as long as *Bernard* should have Children, the Estate should never go over to *John*), controul a plain and express Intent before, and about which there would be no Doubt.

The next is *Goodright and Wright*, Hill. 3 Geo. 1 [1717], and *Goodright and Pullen*, Mich. 13 Geo. 1 [1726]. Consider the Reason of the Rule in *Shelley's Case*, that where the Ancestor takes an Estate for Life, his Heir cannot be a Purchaser. I apprehend the Reason to be (tho' it is not mentioned in any Book), that the Law concerning Fines of Inheritance in the Ancestor, to prevent the Freehold's being in Abeyance and to avoid Discontinuances, and to prevent which the Limitation to the Trustees for preserving the contingent Remainders has been invented of late Years. Q. the Authorities to support this Opinion.

Cro. El. 313, *Clerk versus Day*; where Heirs of the Body were adjudged Words of Purchase. (Note: This Case is not rightly reported in any of the Books, and for the true Account of it, vide the Opinion of *Raymond*, C. J., in the Case of *Shaw and Weigh*.) The Word *Heir* in a Will is to be taken either as a Word of Limitation & nomen collectivum, or as a Word of Purchase & nomen singulare. 1 Rep. 63, *Archer's Case*. 3 Lev. 431, *Loddington versus Kyme*. Mich. 12 Anne [1713], Cases in Law and Equity, 181, *Backhouse and Wells*; and stated per *Raymond*, C. J., in his Argument of *Shaw and Weigh*. In these last Cases it has been adjudged, that the Ancestor took only an Estate for Life; but it has been objected, that in all those Cases the Limitation is to the Issue. To this it is answered, that this is no Objection, since the Case of *King and Melling*, 1 Ventr. 231.

[33] But a stronger Case yet is the Case of *Lisle and Gray*, 2 Lev. 223; 2 Jones, 114. Where Heirs of the Body in a Deed took by Purchase; and that Case was affirmed in *Cam' Scacc'*, Nov. 26, 30 Car. 2 [1678], vide *Pollexfen*; that goes far beyond the present Case. The Limitation to Trustees to preserve contingent Remainders is very strong, to shew the Intent of the Testator; as if he had said, that the Heirs of the Body of the Plaintiff his Son should take by way of Remainder.

As to the second Point, viz. How the Court ought to direct the Settlement to be
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made of the Lands to be purchased ; he held it ought to be a strict Settlement. The Plaintiff's Counsel would not have it in the very Words of the Will ; because then there must be a Limitation to the Trustees to preserve contingent Remainders. What an odd Thing would it be, for this Court to direct such a Settlement which would certainly create a Suit ; whereas the Decree of this Court ought to be clear and certain. Differences have been made in this Court, as to directing Conveyances upon Wills ; the first Case as to this Matter is 2 Vern. 526, *Leonard versus Earl of Sussex*.

And there decreed, that an Estate for Life should only be conveyed ; and that is agreeable to the present Case. And this Settlement to be made in the present Case being only executory, and the Intent appearing clear and plain, the Plaintiff ought only to have an Estate for Life. 2 Vern. 551, *Legatt and Sewell* is also material to this Point. Agreed this Case differs from the Case of *Leonard and The Earl of Sussex prima facie* ; but the Intent there is not so certain. *Pasch. 1707, Sir John Hobart and The Countess of Stanford*. Upon *Sir John Maynard's Will* the Decree was, that the Money should be laid out according to the Will and Act of Parliament. And upon Exceptions to the Master's Report the Question was, whether the Settlement should be made in the Words of the Will ? Lord *Cowper* declared, that in Matters executory in Articles and Wills, where Words are unformal, the Court will not follow the Words but the Intent ; and in that Case, the Words being very plain to preserve the Estate in a strict Manner, accordingly a strict Settlement was decreed, with Limitation to Trustees to preserve contingent Remainders ; and confirmed afterwards upon Appeal to the House of Lords. The Limitations in that Will plainly tending to a Perpetuity, and the Court went as far as possible ; which shews how far the Court favoured the Intent.

The next Case is *Baile and Coleman*, 2 Vern. 607, *Pasch. 1711*. Lord *Cowper's* Decree was reversed by Lord *Harcourt*, and upon good Grounds ; and upon the Difference taken between Articles and Wills ; for in Wills, the first Taker is not [34] to be made Tenant for Life only, without it is the apparent Intent of the Testator.

As suppose a Devise to Trustees to convey to A. and the Heirs of his Body, with Remainders over ; the Intent does not appear that the Testator designed a strict Settlement.

The next is the Case of *Humberston and Humberston*, 2 Vern. 737, there decreed a strict Settlement ; for the Reasons before mentioned. He held the Devise of the Manor of *Great Bentley* was only for Life ; and therefore decreed, that the Writings of the Real Estate should be brought into Court, and the Lands to be purchased should be conveyed in a strict Settlement.

An Appeal was brought from this Decree *Hill. 5 Geo. 2 [1732]*, before *King*, Chancellor, and a Supplemental Bill came on also at the same Time, whereby the Plaintiff set forth, that since the former Decree he had discovered Marriage-Articles made on his father's the Testator's Marriage, whereby he covenanted to settle the Manor of *Great Bentley*, and other Lands in the Will, to the Use of himself for Life, Remainder to his Wife for Life, Remainder to the Heirs of his Body ; so that the Devise of the Real Estate was out of the Question. The Decree therefore was varied as to the Manor of *Great Bentley, &c.*, but upon the Construction of the Will, my Lord Chancellor was of the same Opinion with the Master of the Rolls ; and affirmed the Decree for a strict Settlement.

Note : In the case of *Williams and Brown*, *Pasch. 7 Geo. 2 [1734]*, ———, C. J., in citing this Case said, that *King*, Chancellor, was clear upon the Appeal, as to the Manor of *Great Bentley*, that the Devisee took an Estate-tail executed.

24.—ATTORNEY GENERAL versus HICKMAN. 5 Geo. II. [1731–32].

Information for Performance of a Charity.

This was an Information exhibited by the Attorney General for the Performance of a Charity, given by a Codicil annexed to the Testator's Will, by which he devised, that what should remain, and be the Residue of his Estate and Effects, be given for encouraging such Non-conforming Ministers as preach God's Word in Places where the People are not able to allow them sufficient and suitable Maintenance ; and for the encouraging such as are designed to labour in God's Vineyard as Dissenters ; and appointed two Persons to have the Disposal and Appointment of the said Charity, both which Persons died in the Life-time of the Testator.

[35] Two Questions arose, 1st, Whether both the Trustees, to whom the Disposal and Appointment of the said Charity was given, dying in the Life-time of the Testator, this Charity was not gone, and in the Nature of a lapsed Legacy ?

But *per King*, Chancellor. The Substance of the Charity remains notwithstanding the Death of the Trustees before the Testator ; and tho' at Law it is a lapsed Legacy, yet in Equity it is subsisting, and here is a sufficient Certainty of the Testator's Intentions to revive it ; the Intention of the Party therefore is sufficiently manifest that this Charity should continue within 43 *Eliz.* c. 4. It has been held, that if the Tenant in Tail devise a Charity, tho' no Recovery is suffered, yet that it shall take place and be effectual as an Appointment under 43 *Eliz.* 2 Vern. 453, *Attorney General versus Rye & al'*. 2 Vern. 755, *Attorney General versus Burdett & al'*.

The second Point, Whether this be a superstitious Use within the Statute 1 *Edw.* 6, c. 14, Non-conforming Ministers and Dissenters being such general Words, as that they comprehend any Persons however opposite to the Church of *England*.

King, Chancellor. This cannot be a superstitious Use within that Statute ; but the Dissenters here meant are Protestant Dissenters acting under the Toleration-Act, 1 *W. & M.* c. 18, and decreed the *Residuum* to be disposed of *in presenti*, and not in a perpetual Charity : and ordered a Scheme to be laid before him for that Purpose.

25.—PRATT versus PRATT. At the Rolls, May 11, 1732, 5 *Geo.* II.

Distribution of Copyhold Estate of the Nature and Tenure of Borough *English* Lands.

Pratt, G. J., being seised of a Copyhold Estate of the Nature and Tenure of Borough *English* Lands, surrendered the same to the Use of himself for Life, Remainder to his Wife for Life, Remainder to his own right Heirs, and died leaving several Sons and Daughters ; and upon hearing this Cause, touching the Distribution of the Personal Estate, two Questions arose, 1st, Whether the youngest Son, to whom these Lands descended, should bring this into Hotchpot, within the Statute 22 & 23 *Car.* 2, c. 10, or come within the Exception of an Heir at Law ?

2dly, Whether this Estate, with respect to such younger Son, was to be considered as an Advancement of the Father ?

His Honour in this Case was of Opinion, that the youngest Son was not Heir at Law within the Statute. Heir at Law is there to be considered and understood *Kar' εφορν.*

[36] It was objected, that by the Words of the Statute, *viz. Other than such Child or Children not being Heir at Law* ; it is plain, there may be Children which may be deemed Heir at Law besides the eldest Son ; but the Words there mean 'other than such younger Child or Children.' *Executio probat Regulam*. He also thought this a Settlement by the Testator, and decreed he should be brought into Hotchpot according to the Statute.

26.—EASTGOOD versus STYLES. 5 *Geo.* II. [1731-32].

Bond given by a Husband before Marriage to settle Freehold Lands.

A Bond was given by a Husband before Marriage, whereby he agreed, within four Months after his Marriage, to settle upon his intended Wife Freehold Lands for her Life, worth £100 *per Annum*, Remainder in Tail to the Issue of the Marriage ; or in Default thereof his Heirs or Executors to pay her £2000. The Husband died within four Months after the Marriage, leaving Assets, and by Will gave his Wife an inconsiderable Freehold, *viz.* One House and Copyhold of Inheritance amounting to £85 *per Annum*.

A Bill was brought by the Creditors and Legatees of the Husband, to compel the Wife to accept of the £100 *per Ann.* only, exclusive of what was given her by her Husband's Will ; or else, that what was given her by the Will might be deemed a Satisfaction of the Bond. And by the Counsel for the Plaintiff it was insisted, that if the £85 *per Annum* was not to be esteemed to complete Satisfaction of the Bond, yet that it ought to go *pro tanto*. Decreed *per Jekyll*, that the Widow was not intitled to the £2000, but the Heir should convey the £100 *per Annum* to her, and that she should also have the Lands of £85 *per Annum* devised to her by the Will.

The Plaintiffs appealed from this Decree, and the Counsel *pro Quer'* cited the Case of *Bird and Young*, 1723, in Chancery, which was a Bond before Marriage conditioned to leave the Wife an Annuity of £250 *per Annum*, and the Husband died about a Month after Marriage, and devised her Lands of £120 *per Annum* for Life, leaving Assets; held *per Price, J.*, who heard the Cause, that it should be deemed a Satisfaction in Part of the £250 *per Annum*. Reheard by *Macclesfield*, Chancellor, who varied the Decree; but upon Appeal to the Lords, Justice *Price's* Decree was confirmed.

The following Cases were cited, 2 Vern. 709, *Blandy and Widmore*. 2 Vern. 558, *Wilcox versus Wilcox*, and *Savile* and [37] *Savile*, which was relied on for the Defendant; *vide* Mod. Cases.

King, Chancellor, thought this Legacy was intended as a Bounty, and not as a Satisfaction; he considered when Devises of this Nature had been construed as a Satisfaction, and when not; the Devise, when it goes in Satisfaction, must be of the same Nature with the Thing to be performed; not Money instead of Lands, nor *vice versa*; nor, as in the present Case, Copyhold Lands instead of Freehold; for in those Cases it is to be looked on as a Bounty; the Devise must also be a complete Satisfaction, and not a partial one of an inferior Value, for such could never be intended a Satisfaction. He therefore affirmed the Decree.

27.—PAINTON *versus* BERRY & *Ux'*, & *al'*, Administrators of THORNTON deceased. May 6, 1732, 5 Geo. II.

Legacy with Proviso a Person marries with Consent of two Persons.

Thornton, Uncle to the Defendant's Wife *Berry* who was his Niece, by his Will gives the Interest of his Personal Estate to his Mother for Life, and then devised £100 Legacy, & *inter alia*, £500 to *Francis* the now Defendant, and £10 also for Mourning; and then as to the Residue, he gave the same to his said Niece, provided she marry with the Advice and Consent of Mr. *Lyddall* and Mr. *Clarke*; and in case she happen to marry otherwise, he devised the same to the now Plaintiff *Painton*; one of the Persons named, *viz. Clarke*, died soon after the Testator, *viz.* in 1713, and afterwards in 1729, the Defendants *Berry* and his Wife intermarried without any previous Application made to the Survivor *Lyddall* for his Consent. This Bill was therefore brought against the Administrator, &c., to have the *Residuum* given over to the Plaintiff on this supposed Forfeiture, the Marriage being without Consent. *N. B.* The Defendant *Berry* denied by her Answer she had any Notice of the Devise or Proviso when she married, and it was not proved she had. The principal Question was, whether this was a Condition precedent or subsequent, *viz.* Whether it was to be performed before the Legacy of the *Residuum* vested; or only a Condition subsequent to divest the Interest?

For the Plaintiff it was insisted, that this was a Condition precedent; and it was compared to the Case of *Fry and Porter*, 1 Vent. 199; and *Falkland and Bertie*, 2 Vern. 333. And it was argued, that *Clarke* and *Lyddall* were in the [38] Nature of Guardians, and that the Power given to them survived; and it was the Intention of the Testator to continue his Care over to his Niece till she should marry; and she ought to have applied to *Lyddall* the Survivor for his Consent; and cited the Case of *Rogers and Pain*, May 14, 1728, Where a Bond had been entred into by the Husband on an intended Marriage, in Consequence of an Agreement with the Father of the Wife, and a Portion of £1000, the Condition of which was to pay £1000 to a Daughter of the Marriage within so many Months after her Marriage, provided it was with the Consent of four Persons, or the major Part of them: In that Case two of the four Persons died, and the Daughter married without the Consent of the Survivors; and a Bill being brought against the Father the Obligor for the £1000 it was dismissed; because the Daughter had not done all she could, by asking the Consent of the Survivors. And even supposing this a Condition subsequent, it was not impossible to be performed in Substance; as in 1 Inst. 220 *b.* A Feoffment on Condition to infeoff the Feoffor, his Wife and their Heirs, where if the Wife dies, a Re-infeoffment shall be made to the Feoffor and his Heirs.

Solicitor General *cont'*: This is a Condition subsequent; there are no precise Words or any Method of placing a Condition that can distinguish it from being precedent or subsequent; but whether it is or not must be collected from the Consent

and Intent of the Parties. Here the Residue on the Death of the Mother must vest in the Defendant immediately, tho' unmarried ; for it cannot go over to the Plaintiff, but upon the Defendant's Marriage contrary to the Directions in the Will ; and if the *Residuum* did not vest in the Defendant upon the Mother's Death, the Testator with Respect to such Residue must be said to die Intestate.

The Proviso therefore is a Condition subsequent and to divest an Interest ; and the Death of one of them two Persons whose joint Consent was requisite, makes such joint Consent impossible ; and such Consent is not, as was said, an Interest that would survive, but a meer naked Power ; and there can be no Doubt, but a Condition subsequent, becoming impossible by the Act of God, must be dispensed with, and the Devise over to the Plaintiff is therefore become void. The Case of *Fry* and *Porter*, and *Falkland* and *Bertie*, were of Real Estates, and this only the *Residuum* of a Personal Estate, which is to be governed by the Rules of the Civil Law.

Conditions in Restraint of Marriage are void by the Civil Law ; but this Court has admitted of some Restrictions with respect to Marriages under certain Limitations. But in the present Case here is a beneficial Interest vested to be divested [39] on the Non-performance of a subsequent Condition, which is now become impossible, and is therefore such a Restraint on Marriage as is void both by the Civil and Common Law.

The Bill of the Rolls was dismissed with Costs ; and *per King*, Chancellor, being of the same Opinion, affirmed the Decree as to the Point in Question, but reversed it as to Costs.

28.—Lord WARRINGTON *versus* LEE. May 14, 1732, 5 Geo. II.

Bill brought for Satisfaction for £2000 by a Simple Contract Creditor.

On an Appeal from the Rolls this Bill was brought by the Plaintiff to have Satisfaction for the Sum of £2000, for which he was only a Simple Contract Creditor ; and the Question was upon the following Words of a Will, whether the Testator had subjected his Real Estate to the Payment of his Debts ? the Words were these,

"As to all my worldly Estate which it has pleased God to bless me with, I give and dispose of the same in the Manner and Form following, that is to say, *Imprimis*, I will that all my Debts be discharged and paid " ; and then devises Lands, &c., to particular Persons. The Testator died leaving a great Real Estate, but little or no Personal. Decree at the Rolls, that the Real Estate was not liable. It was argued *pro Quer'*, that the Words (*worldly Estate*) comprehended as well the Real as the Personal Estate, and meant all the Testator had in the World. It was the Testator's Intention, that before any Person should take any Part of his worldly Estate, that his Debts should be first paid and discharged. Indeed if a Man directs by Will generally that his Debts shall be paid, it is no more than what the Law says, and his Personal Estate, which is the proper Fund, shall only be liable. But here these Words are not to be considered as of Course, but manifest a plain Intent to subject the Real Estate to the Payment of the Testator's Debts. It is said, the Word made use of by the Testator is (*give*), which is applicable only to Personals, and not (*devise*), which is properly relative to Lands. But to prove this makes no Difference they cited 1 Vern. 411, *Cloudsly* *versus* *Pelham* ; there the Words were (*willing*) *his Debts should be paid* ; and held the Real Estate liable ; so here it is (*I will*). Besides, in another Part of the Will, when the Testator is giving away the Plaintiff's Estate and other Personals, he makes use of the Word (*Devise*), which shews he never understood any Difference between the Words.

[40] The following Cases were cited, 2 Vern. 708, *Trott & al'* *versus* *Vernon* ; 2 Vern. 228, *Allcock* *versus* *Sparhawk* ; 2 Vern. 690, *Beachcroft* *versus* *Beachcroft* ; which last was relied on as a Case in Point, tho' it was objected, that the Word *Remainder* in that Case, *viz.* *Out of the Remainder of my Estate I give*, &c., shewed a precedent Devise of it before ; and the Case of *Harris* *versus* *Ingleden*, 10 March 1730, at the Rolls ; *William Ingleden* by Will devised in these Words, " And as touching such "worldly Estate which God has blessed me with, my Debts being first paid and satisfied, "I will and devise the same in Manner following." And in that Case, a Bill brought by a Simple Contract Creditor (the Personal Estate not proving sufficient), it was decreed, the Freehold and Copyhold were both liable. In the Civil Law, as in the Case of Bankruptcy here, there is no Priority or Superiority of Debts, and in Conscience they

are all the same, and that is the Foundation this Court goes upon when the Intent is clear.

Counsel for the Defendant : The Real Estate is not liable to the Plaintiff's Demand ; and if such general Words as are here, were to be construed to affect Real Estates, it would render the Titles of all Persons claiming under Wills very precarious. He said, that after the Clause in the Will whereby the Defendants are directed to be paid, the Will goes on, *Item*, " I give to *M. S.* an annuity of £100 *per Annum*, to be paid out of my " *Manors, &c.*" He admitted, the Words (*worldly Estate*) were large enough to affect the Real as well as Personal Estate ; but the Question is here, Whether it was the Testator's Intent to charge both ? and it is plain it was not ; that general Direction of ordering all his Debts to be paid, is no more than what the Law says, and therefore *Expressio eorum quæ tacite insunt nihil operatur*. But here it is said *Imprimis*, which is insisted to be of the same Import as in the first place, and that therefore imports a Priority to be done ; and therefore say the Counsel for the Plaintiff, the Lands are therefore devised upon Condition, that my Debts be paid out of them in the first place. But the Word *Imprimis* has no such Import, it only denotes the Order of speaking, and serves for no other Purpose than to distinguish the subsequent Devices that they should not coincide. A Person cannot speak all his Words at once, and this therefore differs from all the Cases cited, where it appears the Testator had an Eye to his Real Estate. In the Case of *Bearcroft and Bearcroft* ; there the Words were (*Out of the Remainder of my Estate, and after my Debts paid, to my Wife*) ; so that in that Case there is a plain Intent to charge the Land : So the Case of *Trott versus Vernon*, and *Harris versus Ingleden* ; [41] in both these Cases the Words (*in the first place*) plainly shew the Testator's Intent ; and there is no Case in all the Books where such general Words in a Will, with a particular Charge on Lands afterwards, as in the present Case of an Annuity, have ever been held to make a Real Estate answerable for Debts ; not one of the Cases cited have any particular Charge laid on the Land.

Are the Debts to be an Incumbrance to the Annuity charged on the Lands ? the Testator by mentioning such particular Charge therefore shews his Intent only was to affect the Lands with that, and not with the Debts ; besides, if the Words were doubtful, they ought not to be interpreted to the Disinherison of an Heir at Law ; which is the present Case.

King, Chancellor, reversed the Decree, and held the Lands were liable to the Plaintiff's Demand.

28.—GORDON *versus* RAINS. 5 Geo. II. [1731–32].

Bill by the Husband as Administrator of his Wife, to recover £6000 Portion vested in his Wife. [S. C. 3 P. Wms. 134].

This was a Bill brought by the Husband, as Administrator of his Wife, in order to recover the Sum of £6000 Portion, due and vested in his Wife ; and the Question arose upon the following Trust of a Term ; the Trust was declared to be, " That in case " there be no Son of the Marriage born in the Life-time of *Henry Rains*, or after his " Decease, or if there be, and all of them die before the Age of twenty-one, and in either " Case there shall happen to be one or more Daughters born in the Life-time of the said " *Henry Rains*, or after his Decease, who shall attain the Age of sixteen Years ; in " that Case the Trustees, after the Decease of the said *Henry Rains* or *Elizabeth* his " Wife, shall by Demise, Sale, &c., or by Receipt of the Rents, &c., raise and levy the " Sum of £6000 (which was the present Case), to be paid at the Age of sixteen, in case " either *Henry* or *Elizabeth* shall be then dead."

There was also a Clause of Survivorship, in Case of several Daughters, with respect to the Portion or Portions of any that should die in the Manner therein mentioned. The Fact was : The Plaintiff's Wife was the only Issue of the Marriage, who lived till the Age of twenty-two Years, but happened to die before her Father or Mother *Henry* and *Elizabeth*, and they being also both since dead, this Bill was brought against the Defendant a Remainder-man for the said Portion. And the Question was, whether this Sum of £6000 was vested in the Daughter, so as to intitle the Plaintiff to it as her Administrator ? It was argued for the Plaintiff, that this Sum of [42] £6000 was a vested Interest in the Daughter immediately upon her arriving at the Age of sixteen, tho' not payable indeed till after the Decease of *Henry* or *Elizabeth* ; otherwise what can be

the Meaning of the Words (*A Daughter who shall attain the Age of sixteen*), the Clause of Survivorship shews it was vested, else how could it survive?

A. T. &c., Counsel cont': Upon the Trusts of this Deed the Plaintiff is not intitled to this Sum of Money; the Contingency, which was to intitle his Wife to it, not happening during her Life (which was the Death of *Henry* or *Elizabeth* in the Life-time of the Daughter, after she attained the Age of Sixteen). He said, it was now a general Rule not to be departed from, that wherever Portions are to be raised out of Lands, there is no Difference between Vesting and the Time of Payment; for when they are to be raised out of Lands, they never are vested till they are become payable; but in the Case of Personal Legacies it is otherwise; there the above Difference is allowed, and upon the Death of the Party intitled, such Interest is transmissible to the Representative; and to prove this Distinction he cited *Poulet versus Poulet*, 1 Vern. 204, and 2 Vent. 366, S. C., and said, the first Time it was so settled was in a Case of *Brown versus Brown*. In the present Case therefore the Daughter's Portion was never raisable; the Contingency of Failure of Issue Male did not happen in the Daughter's Life-time, for *Henry* and *Elizabeth* were both then alive, and as long as they lived there was a Possibility of Issue Male, so that it could not be a vested Interest in the Daughter at her Age of sixteen, which is only Part of the Description; the whole Sentence must be taken together, which is, "Such Daughter as shall have attained the Age of sixteen after the Decease" of the said *Henry* and *Elizabeth*." As to the Question, if this £6000 did not vest at the Age of sixteen, what can be the Meaning of those Words? Why the same Answer may be given as in all other Cases of this Nature, viz. it was to ascertain that she should not have it before; if she had died an Infant of six or seven Years old, or at any Time under the Age of sixteen, tho' her Father and Mother had been both dead, it would not have belonged to her in such Case till the Age of sixteen. The Clause of Survivorship does not necessarily imply that an Interest must vest in the first Taker; as if a Legacy devised to A. at the Age of twenty-one, and in case he dies before that Time, to B., in this Case it shall go to B. tho' it never vested in A. 2 Vern. 207, *Miller versus Warren*, it is a new Gift.

King, Chancellor, assisted by *Raymond*, G. J., and *Jekyll*, Master of the Rolls, were all of the same Opinion, that the Bill should be dismissed. The *Attorney General* said, in all [43] the Cases cited there were no Contingencies, or else, as in the Case of *Butler versus Duncombe*, 2 Vern. 760, the Contingency had happened.

29.—MORICE against THE BANK OF ENGLAND. *Mich. Term*, 6 *Geo. II.* [1732].

Motion to discharge an Injunction for Irregularity.

The Plaintiff, as Executrix of her Husband *Humphry Morice* deceased, filed her Bill in this Court, and in April 1732, obtained an Injunction, upon the Defendants praying Time to Answer, but never served it till the September following; the Defendants in the mean Time having got a Verdict at Law, and also put in their Answer in this Court; it was now insisted on for the Defendants, that this Injunction should be discharged; because the Plaintiff had acted irregularly, in not serving the Process before the Answer came in, it being an Injunction for want of an Answer, and it is to be regarded only as an Injunction from the Service on the Party, and not from the *Teste*. Formerly it was the Practice, upon coming in of an Answer, that the Injunction was dissolved of Course, unless the Plaintiff made a special Motion for its Continuance. Compared it to a Writ of Error with too long a Return, which is upon that Account no *Supersedeas*.

On the other Side it was argued, that the Plaintiff is perfectly regular in serving his Injunction, which in this Case could only stay Execution, the Action being brought at Law before the Bill filed; it is an Injunction upon the Party till Answer and further Order; here has only been an Answer put in, but no further Order; the Defendant ought therefore, as in other Cases, to move for an Order to dissolve it *nisi*, and not move to discharge it absolutely.

King, Chancellor. It is an Abuse of the Process of this Court to keep a Writ in a Person's Pocket so long and make no Use of it, and afterwards serve it on the Party. Discharg'd the Injunction, but gave Leave to the Plaintiff to move for an Injunction the next Seal upon the Merits; and in the same Cause it was moved, that the Defendants were guilty of a Breach of the Injunction by suing out a *Sci' fac'* upon the Judgment

Quando Assets acciderint ; and it was said such a *Sci' fac'* is in the Nature of a new Action, the former Suit was against the Executrix *in auter droit*, and this *Sci' Fac'* was in order to obtain Judgment *de bonis propriis* ; but it was resolved that it was not a new Suit, but only a Continuance of the former.

[57]* CASES IN THE KING'S BENCH, &c.

1.—LLOYD *versus* JONES. *Hill. 5 Geo. II. 1732. C. B.*

Action for Words.

Action for Words in *C. B.* Declaration sets forth, that the Plaintiff was sworn an Attorney in the Common Pleas according to the late Act of Parliament, and that being *well qualified for a Solicitor in Chancery*, he endeavoured to get himself admitted, but that the Defendant having spoken false, scandalous and malicious Words of him, *viz. that he could prove him guilty of Perjury and Forgery, and he deserved to be transported* ; he was by reason of this Aspersion refused to be admitted, &c., for which he brought his Action, and Verdict *pro Quer'* ; upon which a Writ of Error is brought.

Mr. S. Counsel argued for Plaintiff in Error, that where a Person is charged with several Facts in a Declaration, and *intire Damages* are given upon the whole, if it appears upon the Record that some of the Facts are not actionable, the Judgment is erroneous ; in this Case there are Words in the Declaration that are not actionable, *viz. You deserve to be transported*. To say a Man deserves to be transported is not actionable. *Yelv. 10 & 34.* Thou art a perjured Knave, and that will be proved by a Stake that stands between the Ground of *J. S.* and *J. D.*, and adjudged not actionable, for tho' the first Words are actionable, yet they are so qualified by the subsequent Words, that an Action will not lie. *Poph. 210.*

Mr. D. Counsel cont' : In this Case there are *special Damages* laid in the Declaration, so that provided the Words were not actionable in themselves, yet an Action will lie for the special Damages ; but admitting special Damages had not been alledged, yet the Words are actionable in themselves. Perhaps where the Words are general, without any Charge, as you deserve to be hanged, transported, &c., an Action will not lie ; but it is otherwise when there is a positive Charge.

Per Cur' : Judgment must be affirmed ; the Words are not only actionable in themselves, but here are special Damages alledged, and we will not take it, that Satisfaction is made for the special Damage.

[58] 2.—KING *versus* POWNELL. *5 Geo. II. [1731–32]. B. R.*

Information moved upon the libellous Matter.

Information was moved for against the Defendant for sending the Prosecutor a Letter wherein were these Words, *viz. You are a Scoundrel, and defrauded the King of his Duty, I will prick you to the Heart, and call you to an Account*. The original Motion was made upon the Foot of a Challenge, but the Court inclining to think the Words did not import a Challenge, Information was moved for upon the Libellous Matter, *viz. You are a Scoundrel, &c.*

Cur' : The Words do not import a Challenge ; but to call a Man a Scoundrel, and to reflect upon him in the Execution of his Office, is Matter of a libellous Nature, and deserves to be punished by Information. In *Barnardiston's Case, Trin. 5 Geo. 2 [1732]*, Information was granted for sending a Letter to *B.*, wherein were these Words, *You are a rascally Fellow and a Tom Fool, you had better have held your Tongue* ; but *B.* was Lord of a Manor, and this Letter was wrote to him by a Copyholder. The Court enlarged the Rule, *viz. to shew Cause why an Information should not go for the Libel*. Note : This was afterwards referred by Rule of Court.

[* See Prefatory Note.]

3.—PERRY *versus* CURTESAN. *Hill. 5 Geo. II. [1731-32]. B. R.*

Sham Plea. *Per Cur'*: To plead such a Plea as he will abide by.

Action, &c., Defendant pleaded a *sham Plea*, to which the Plaintiff demurred, and gave the Defendant the common Rule, to *join in Demurrer within four Days*; before the Expiration of the Rule, the Plaintiff moved that Defendant should plead such a Plea as he would abide by; this was opposed, and insisted upon, that the Plaintiff could not make such a Motion which was *contra* to his own Rule, which gave the Defendant *four Days Time to join in Demurrer*; there never was such a Motion made before.

Cur': There can be no Inconvenience in the Motion; on the other Hand, it looks like a Trick of the Defendant's to get over the Term; if the Demurrer stands, the Defendant will have the Benefit by it; if over-ruled, it is reasonable the Defendant should plead such a Plea as he will stand by, and then Trial may be had within Term. And *per Cur'*: The Defendant shall either stand by his Demurrer, or plead such a Plea as he will abide by.

[59] 4.—CATHEROLD *versus* COOPER & al'. *Hill. 5 Geo. II. [1731-32]. B. R.*

Treble Costs prayed.

In an Action of false Imprisonment against the Defendant & al', Commissioners of the Turnpike, Plaintiff was nonsuited, and now the Defendants came and prayed treble Costs according to 12 Geo. 1.

Mr. F. Counsel: This Motion is now improper, the Defendants should have prayed it at the Trial; in some Cases the Act directs there must be the *Judges Certificate*, but there is no such Provision in this Act. To grant this Motion would be to *determine this Matter upon Affidavits without giving the Plaintiff an Opportunity to controvert the Facts*. The Court held, from the Nature of the Thing, that the Defendants should have prayed *treble Costs at the Trial*; but only made a Rule to shew Cause. *Vide* the Case of *Devenish versus Burton, Hill. 7 Geo. 2 [1734]. Double Costs granted upon Motion; per Cur'*.

5.—MINOR *versus* WILSON. *Hill. 5 Geo. II. [1731-32]. B. R.*

Error.

A Writ of Enquiry was made returnable a *Sunday*, and was executed upon the *Monday following*; and this was assigned for *Error*, and the Judgment reversed. *So determined Trin. 3 Geo. 2 [1730], Peach versus Pascall, Vide 2 Salk. 626, Harvey versus Broad; ibid. Daves versus Salter.* A Writ of Enquiry was returnable *Tres Trin.* which was *Sunday*, and the Writ was executed on the 14th which was *Monday*; and upon *Error* being brought, Judgment was reversed. *Vide post.*

6.—At the *Sittings in C. B. at Guild-hall coram ROBERT EYRE Milite,*
inter BECK and TIMBRELL. 5 Geo. II. [1731-32].

Action for Goods sold and deliver'd; Defendant offered a Bond for Performance of Covenants in Evidence.

Action for Goods sold and delivered, &c., the Defendant, in Discharge of the Debt, offered to give in Evi-^[60]dence a *Bond for Performance of Covenants*, and relied upon the 2 Geo. 2, c. 22. Sed per E. C. J. *This Statute does not extend to Debts of that Nature, viz. to Bonds for Performance of Covenants upon Condition, &c., but only to mutual Promises upon simple Contract, or to Debts upon Bond for Money absolutely; for the Act does not intend that the Penalty shall be given in Evidence, but the Principal only, with the Interest which is legally due upon such Bonds.* *Vide Stat. 2 Geo. 2, c. 22, ad pedem.* *Vide Bank of England versus Morris*, said there, Penalty was the Debt in Law.

G. v.—16*

7.—PERRY & al' *versus* TREFUSIS. *Term. Pasch. 5 Geo. II. [1732]. B. R.*

Motion to set aside a Writ of Enquiry.

Mr. F. Counsel moved to set aside a Writ of Enquiry. Action in *B. R.* upon a stated Account, and Judgment *pro Quer'*. On the 8th of February the Plaintiff gave Notice to have a Writ of Enquiry executed on the 17th before the Sheriff, between the Hours of eleven and twelve, but before that Time applied to *B. R.* to have the Writ executed before the Lord Chief Justice at the Sittings after Term; and obtained a Rule to shew Cause the next Day; the Day following at two a Clock the Plaintiff served Defendant with the Rule, but the Defendant, not having sufficient Time to shew Cause, suffered the Rule to be made absolute, without making any Defence. The Sittings began 15th of February, and were adjourned to the 22d, when the Writ (Defendant not appearing) was executed before the Lord Chief Justice *ex parte*. Mr. F. Counsel insisted upon two Things, 1st, That the Rule to have the Writ executed before his Lordship was gained by Surprise, Defendant not having sufficient Time to make his Defence and shew Cause, Rule being served upon him only at 2 a Clock on the same Day it was made absolute. 2dly, That altho' the first Notice, to have the Writ executed before the Sheriff, was regular, yet the making Application to the Court to have it executed before his Lordship, was a Waiver of the Notice, and that fresh Notice ought to have been given; for in all Cases upon Executions, upon Writs of Enquiry, eight Days Notice is necessary, and this Notice must be exclusive of one of the Days, and inclusive of the other; whereas in the present Case, from the Time of serving the Rule, both the Days are inclusive, and so the Notice irregular.

[61] To this it was answered and resolved *per Cur'*: That the first Notice of executing the Writ of Enquiry before the Sheriff being regular, the Application to the Court was no Waiver of the Notice; nor was it necessary to give fresh Notice, or appoint any particular Hour for the executing it; the Court in these Cases take their own Time, and execute it when they think proper within the Sittings. This can be no Surprise upon the Defendant, he having had regular Notice of executing the Writ before the Sheriff; and he likewise had Notice before the Motion, that the Court would be moved to have it executed before his Lordship; so that altho' the Rule was only served upon the Defendant at two a Clock, being the Day the Rule was made absolute, yet it could be no Surprise, because he had Time before the Service of the Rule, and sufficient Notice to prepare himself to shew Cause.

8.—ANONYMUS. *Term. Pasch. 5 Geo. II. 1732. B. R.*

General Rule of Court.

Per Cur': The Court made a general Rule, viz. That where any Person moves for an Information, and has a Rule nisi, if, upon shewing Cause, that Rule is discharged, the Party who made the Motion shall pay Costs: Note: This Rule was never strictly followed, but always held discretionary.

9.—LAMPEN and HATCH. *Pasch. 5 Geo. II. [1732]. B. R.*

Action for Words; Judgment by Default.

Action for Words; Judgment by Default; Writ of Enquiry executed; 10s. Damages given, and £13 Costs *de incremento*; whereas by 21 Jac. 1, c. 16, there shall be no more Costs than Damages, when the Damages are under 40s. Plaintiff moved that the Judgment might be reversed for this Error. The Defendant prayed it might be reversed in Part only; viz. as to Costs, but that it might stand as to the Damages.

Sed per Cur': The Judgment is intire, and must be reversed in toto.

[62] 10.—KNOCK *ver.* WILKINS. *Pasch. 5 Geo. II. [1732]. B. R.*

Assault and Battery.

Action of Assault and Battery; Plaintiff gave Notice of Trial but did not proceed; Costs were taxed by the Master, and before Payment the Plaintiff brought a fresh

Action. Mr. H. Counsel moved that all Proceedings might be staid till the Plaintiff had paid the Costs of the first Action.

(Cur': You may have an Attachment for the Contempt, but we never stop Proceedings in these Cases, except in Ejectment.

11.—WHITHALL *versus* Sir GEO. SAUNDERS & al'. *Pasch. 5 Geo. II. [1732]. B. R.*

Evidence of a Wife denied, because the Husband might receive Advantage thereby.

In a Trial at Bar in *B. R.* upon an Issue directed out of Chancery, to find who was Heir to Sir Thomas Coleby deceased; A. B. being sworn, it was objected there, she could not be an Evidence in this Cause, because her Husband had already received a Bond of £30 and was to be paid £20 more, if the Determination of that Cause went in Favour of the Party who had summoned him to give in Evidence. The Court doubted, whether this was a sufficient Objection to destroy her Testimony; and the Cam' Scac' being at that Time sitting, Mr. Justice L. being the puisne Judge, went up into the Exchequer Court to ask the Opinions of the Barons in this Point of Evidence; who were all unanimous of Opinion, that she could not be examined as a Witness; and accordingly she was put by, and her Evidence rejected.

12.—PETTY *versus* HUTTY. *Pasch. 5 Geo. II. [1732]. B. R.*

Motion to quash the Writ, because not returnable at a certain Day.

A Sci' Fa' being brought to revive a Writ of Error upon a Judgment in the Marshalsea Court; Mr. P. Counsel, moved to quash the Writ, because it was not made returnable at a Day certain, and cited the Case of *Eden versus Wills, Pasch. 12 Geo. 1, Sci' Fac' to revive a Writ of Error upon a Judgment in C. B.* and the Sci' Fac' was quashed upon Motion; because not returnable at a Day certain.

[63] To this it was answered by Mr. M. Counsel, that when the Proceedings are by Process upon Bill of Middlesex, the Writ is always made returnable upon a Day certain, and therefore the Sci' Fac' must pursue the original Process; and this was the Reason, that in the Case of *Eden versus Wills the Sci' Fac' was quashed*; but the Practice of Proceedings in the Marshalsea and other inferior Courts is otherwise; the Writ there is always returnable generally at the next Court: and the Scire Facias in this Case pursues the original Process, which is sufficient. And the Court for this Reason held the Sci' Fac' well enough.

13.—THE KING *versus* WALBOURNE. *Pasch. 5 Geo. II. [1732]. B. R.*

Motion for an Information for not repairing the Highway.

Mr. A. Counsel, moved for an Information for not repairing the Highway; an Indictment had been brought, but the Grand Jury refused to find it; and an Affidavit being made of this Matter, and that the Way was foundrous and out of Repair, The Court made a Rule to shew Cause.

14. BILLINGSLEY *versus* TRAPPS. *Pasch. 5 Geo. II. [1732]. B. R.*

Upon a special Capias the Defendant craved Oyer of the Original.

Upon a special Capias the Defendant craved Oyer of the Original, which was tested in the Vacation, whereas the special Capias bore Teste the Term preceding; the Original is the first Process that ought to issue out, and is what warrants the Proceedings upon the Capias; so that it is repugnant that the Capias should bear Teste precedent to the Original, and for this Reason Mr. S. Counsel moved, that the Plaintiff might give Oyer of such an Original as could warrant the Proceedings upon the Capias, and that the Defendant might have four Days Time to plead.

Mr. F. Counsel answered, that the Capias was only to bring the Party into Court, and that after Appearance it was of no further Use, but was out of the Question; that from the Necessity of the Thing, the Capias must in this Case be tested before the

Original. *An Original, tho' it be taken out in the Vacation, yet bears teste from that Time only; but it is otherwise in a Capias, which only can Issuē out in Term-time; and therefore, from the Necessity of the Thing, must bear Teste* (when it is taken out in the Vacation), as if it had [64] issued the Term preceding; and cited the Case of *Andrews and Dingley, Trin. 3 Geo. 2 [1730], B. R. which was this*: The Cause of Action arose in Vacation, the Plaintiff took out a special *Capias*, which was tested the preceding Term; and upon Motion to quash this Writ, the Court adjudged the Writ to be *well enough*; otherwise the Plaintiff must have stayed till the Term following, which would be inconvenient, for the Defendant might in the Interim move off.

The Court refused to do any Thing in the present Case; and said, *if the Plaintiff was irregular, the Defendant might take what Advantage of it he thought proper.* Vide post, Case 16.

15.—ROBERTS *versus* HOLYWELL. *Pasch. 5 Geo. II. [1732]. B. R.*

Motion for full Costs, and allowed on special Damages laid in the Declaration.

In an Action for Words the Plaintiff laid special Damages in the Declaration, viz. *Loss of Marriage; Verdict for Plaintiff, and 20s. Damages.*

Mr. G. Counsel moved that the Plaintiff might have her *full Costs*; for it is not the Words, but the special Damages, which is the Cause of Action in this Case; and so it is held 1 Salk. 206, *Brown ver. Gibbons*; Cro. Car. 140, *Law ver. Harwood*.

D. Counsel *cont'*: He admitted, that if the Judgment was Right, the Plaintiff must have *full Costs*; but he moved in Arrest of Judgment, that it is not any where alledged, that the Plaintiff was capable of contracting Marriage at the Time of making the Promise; and it appears by the Record, she was a Widow at the Time of bringing the Action; so it may be that at the Time of the Promise she was under Coverture. 2d Objection, That there is no Colloquium of Marriage set forth; and a Communication of Marriage cannot be intended, and therefore she does not appear to have any Cause of Action. Cro Car. 322, *Brian versus Cookman*; 1 Rol. Rep. 79, *Sell versus Fairee*; 2 Bulst. 276.

Cur': There is a Colloquium of Marriage sufficiently set out in the Declaration; it is not necessary for the Plaintiff to alledge she was capable of Marriage; if it was otherwise, the Defendant might have proved it, and that would have been a proper Defence at the Trial; it is said, *per quod Maritagium amisit*, which could not be, had she not been capable of Marriage; and the Plaintiff had full Costs allowed.

[65] 16.—BILLINGSLEY *versus* TRAPPS. 5 Geo. II. [1731–32]. B. R.

Vide ante.

Plea. Motion to set it aside for Want of Affidavit. And so ordered by the Court, with Costs.

In an Action upon the Case Defendant pleaded, *quod petit auditum Breve de Capias*, and then alleges, that the *Capias* bore Teste precedent to the Original, and before the Cause of Action accrued. Mr. F. Counsel moved to set aside this Plea, because there was no Affidavit to verify it; there is nothing of this appears upon Record, it is Matter of Fact only, and there ought to have been an Affidavit.

Per Cur': The Plea must be set aside with Costs.

17.—THROGMORTON *versus* SMITH. 5 Geo. II. [1731–32]. B. R.

Ejectment.

Ejectment. The Lessor of the Plaintiff being an Infant, S. Counsel moved that he should be compelled by Rule of Court to appoint a Lessee who might be responsible for the Costs, if the Plaintiff was nonsuited, or a Verdict found for the Defendant. The Lessor is an Infant, and cannot bind himself in common Rule; it is reasonable therefore he should nominate such a Lessee as can. In the Case of *Noke and Windham. Pasch. 12 Geo. 1*, the Defendant moved for a Trial at Bar, and the Lessor of the Plaintiff, being an Infant, should appoint such a Lessee as might be liable; and the Court made a Rule accordingly. In an Action *Qui tam* the Court will stay Proceedings till it appears who

is the *Prosecutor* : and cited a Case, wherein he moved to have Proceedings stayed till it was known who was the *Prosecutor* ; and it being alledged that the *Prosecutor* was in *Russia*, the Court made a Rule, that all Proceedings should be stayed till the *Prosecutor* returned, unless he should find a substantial Person to give Security for Payment of Costs, if the Defendant had a Verdict.

A. Counsel *cont'* : In Ejectment an Infant may make a Lease. 2 Leon. 217 ; 3 Keb. 347. And if Judgment goes against the Plaintiff, a common Rule, which is always given in these Cases, will bind him.

L. Just. In the Case of *Noke* and *Windham* the Court held, that the Infant should nominate a Lessee who should be responsible ; and by Consent of both Parties the Father of the Lessee was appointed. And in the principal Case the [66] Court now made the same Rule, *viz.* That the Infant should nominate a Lessee who might be responsible.

Upon the Day of shewing Cause the Infant agreed to nominate his Mother the Lessee, who entred accordingly into the common Rule to pay Costs, &c.

18.—COWELL *ver.* WALLER. Pasch. 5 Geo. II. [1732]. B. R.

Vide post.

Motion to shew Cause why an Attachment should not go.

Mr. M. Counsel moved to shew Cause why an Attachment should not go against the Defendant for not obeying an Award which had been a Rule of Court. And his Objection was, that there was no Affidavit made to verify a Breach of the Award ; in the Case of the *King* and *Whiting*, the Court would not suffer the Affirmation of a Quaker to be read in Court, in order to ground an Attachment upon it. To this it was answered, there the Foundation of the Case was Criminal, and Quakers are precluded by the Act to give Evidence in Criminal Cases. In the Case of one *Gasper*, an Attachment was grounded upon the Affirmation of a Quaker ; vide 7 & 8 W. 3, c. 34. Any Quaker, who shall be required on any lawful Occasion to take an Oath, shall, instead of the usual Form, be permitted to make his solemn Affirmation.

The Court seemed to be of this Opinion. But the Rule was enlarged.

19.—MAINARD *versus* HARVEY. 5 Geo. II. [1731-32]. B. R.

Vide post, Case 22.

Scire facias to revive a Judgment.

Scire Facias to revive a Judgment ; Defendant pleaded, that the Plaintiff had already executed a *Ca' Sa'*. This being a sham Plea to prevent Execution, the Plaintiff moved to have Oyer of the *Ca' Sa'*, and cited a Case in *Carth.* 453. Shew Cause.

20.—DAVIES *versus* STOKES. 5 Geo. II. [1731-32]. B. R.

Judgment in Ejectment ; Defendant brought Error.

Judgment in Ejectment ; Defendant brought Error. F. Counsel moved, that he might enter into further Recognizance ; an Affidavit being made of the Value of the Estate, and likewise that he might find other Sureties, he himself being poor and insolvent.

[67] Mr. P. Counsel : Defendant must enter into further Recognizance ; but the Words of the Act are express, that the Writ shall be allowed upon his own Security ; vide 16 & 17 Car. 2, § 1, 3, the Words are, In Writs of Error to be brought upon any Judgment in Ejectment, no Execution shall be thereby stayed, unless the Plaintiff in Error be bound, &c., and so it was adjudged *Mich.* 2 Geo. 1 [1728], *Barlace versus Baker*. And of this Opinion was the Court. But Mr. P. Counsel desired Time to answer the Affidavit, as to the Value of the Estate ; and a Rule was made accordingly.

21.—MOORE *versus* ISLES. 5 Geo. II. [1731–32]. B. R.

Debt upon Bond against an Heir, who pleaded Infancy in Bar.

Action of Debt upon Bond against an Heir, who pleaded *Infancy in Bar*, and that the *Parol might demur*.

Mr. B. Counsel moved to set *aside this Plea*, because it was not *verified by Affidavit*. But the Court *denied the Motion*, and said an *Affidavit was not necessary*.

22.—MAINARD *versus* HARVEY. 5 Geo. II. [1731–32]. B. R.

Vide ante, Case 19.

Rule to shew Cause why Plaintiff should not have Oyer of a *Ca' Sa'*.

Rule to shew Cause why the Plaintiff should not have Oyer of a Ca' Sa', which was pleaded in Bar to a Sci' Fac', &c. The Court now discharged this Rule, and said, the Plaintiff might plead Nul tiel Record; the Case of Theobald versus Long, in Carthew's Rep. 453, was in Abatement only; when Defendant pleads in Bar a Judgment of this Court, he must give the Plaintiff a Note of the Roll, and of the Term, &c., but this is never done upon a Capias ad Satisfaciendum.

23.—MILLET *versus* FINDER & al'. Pasch. 5 Geo. II. [1731–32]. B. R.

Scire facias against Bail.

Sci' Fac' against Bail; and upon the Day that the Process was returnable, *but after the Court was up, they offered to surrender the Principal; but Plaintiff refused to receive him, and proceeded upon the Sci' Fac'*. Mr. D. Counsel obtained a Rule, to shew Cause why the *Sci' Fac'* should not be set aside upon Surrender of the Principal.

[68] Mr. S. Counsel insisted, that regularly the Principal ought to be surrendered upon the Return of the *Ca' Sa'*, but through the Indulgence of the Court, the Bail had Time given them to bring him in at any Time before the Return of the *Scire Facias*, and had so far indulged them, that if he was brought in upon the Return-day *sedente Cur'*, the Court would receive him; but if the Principal died before that Day, it was at the Peril of the Bail, and they are in that Case chargeable. It was objected, that the Plaintiff had not given the Bail four Days Notice; but it was answered, that if the *Sci' Fac'* lie in the Office four Days before the Return, it is sufficient to give Notice on the same Day, and so it hath been determined upon solemn Argument.

And the Rule was discharged *per Cur'*; for the Principal must be surrendered before the Court is up.

24.—FORREST *ver.* BENNETT. Pasch. 5 Geo. II. [1732]. B. R.

Motion for Costs for an irregular Countermand.

Action *Qui tam*, &c., Mr. W. Counsel moved for Costs for an Irregular Countermand in a popular Action, and insisted, that two Days was not sufficient in this Case, it being distinguished from the common Case by the Statute. Vide 18 El. Shew Cause. Note: The Rule was made absolute without shewing Cause.

25.—Lord CADOGAN *versus* COTES. Pasch. 5 Geo. II. [1732]. B. R.

Ejectment.—Affidavit upon Honour refused.

Ejectment, upon Condition of Re-entry for Non-payment of Rent. Judgment being now moved for against the casual Ejector, it was objected, that the late Act of Parliament requires Affidavits to be made that Rent was in Arrear. His Lordship insisted (being a Peer), an Affidavit upon Honour ought to be taken; but afterwards submitted to make it upon Oath, *salvo semper Privilegio*. Lord Conningesby's Case was remembered. where Affidavit upon Honour was refused by the Court in Lord Chief Justice Pratt's Time.

[69] *Term. Trin. 5 Geo. II. 1732. B. R.*26.—THE KING *versus* LOWFIELD.

Rule to pay Costs for not going on to Trial upon an Indictment, &c.

A Rule was made for the *Defendant to pay Costs for not going on to Trial upon an Indictment, &c.* Upon shewing Cause the Case appeared to be this: *The Defendant, upon Application to the Court, obtained a Rule for a special Jury, and brought down the Record in order to proceed to Trial, but eleven of the special Jury only appeared; the Defendant had likewise obtained a Warrant from the Attorney-General for a Tales, provided there should be defectus Juratorum, which he produced in Court, but did not pray a Tales; and it was under these Circumstances that the Costs were moved for against him.*

Mr. F. Counsel: There appears no Foundation for the Motion, the Defendant hath done every Thing that was Incumbent for him to do; he hath brought down the Record, and produced in Court the Warrant for a *Tales*; if the Prosecutor was willing to go to Trial, why did not he move for a *Tales*? *The Court never grant a Tales ex officio, notwithstanding there is a Warrant, if there was a Necessity for a Trial, it is as incumbent upon the Prosecutor equally with the Defendant to pray a Tales; the Warrant was produced, and he might have had the benefit of it; but the Truth is, both Parties refused.*

The Court said it was the Plaintiff's own Fault he did not proceed to Trial, and so discharged the Rule.

27.—DOYLEY *versus* DANIEL. *Trin. 5 Geo. II. [1732]. B. R.*Action in *Assumpsit*, Venue laid in *Norfolk*, Rule to change the Venue to *Essex*, &c.

Action in *Assumpsit* for Business done as an Attorney, and the Venue laid in *Norfolk*. A Rule was made to change the Venue to *Essex*. S. Counsel moved to discharge this Rule, and to change the Venue to *Middlesex* or *London*, upon Affidavit that this was for Business done as Agent to an Attorney, and that most of this Business was performed in *London* or *Middlesex*; and undertook to give material Evidence in which ever of these Places the Venue should be changed.

[70] Cur': *The proper Motion will be for the Plaintiff to amend his Declaration upon Payment of Costs, and then he may lay his Venue as he pleases. And a Rule was made accordingly.*

28.—BIRD *ver.* SMITH. *Trin. 5 Geo. II. [1732]. B. R.*

Action by Administrator discontinued, who afterwards brought a fresh Action, &c.

Action was brought by an Administrator, who afterwards discontinued his Action without payment of Costs, by Leave of the Court; the Administrator afterwards brought a fresh Action, which was grounded upon the same Cause of Action. And now Mr. S. Counsel moved to stay Proceedings in the second Action, till the Administrator had paid the Costs of the first. If the Court will put no Restraint upon Executors and Administrators in Affairs of this Nature, it gives them a great Latitude of being vexatious; they may discontinue Action upon Action, and yet the Party is without Remedy or Redress. But the Court refused the Motion, and said they would put no Terms upon Executors or Administrators; if they are nonsuited, or a Verdict goes against them, they pay no Costs.

29.—COWELL *ver.* WALLER. *Trin. 5 Geo. II. [1732]. B. R.*

Vide ante, Case 18.

Award. Motion to shew Cause why an Attachment should not go against the Defendant for not performing an Award.

M. Counsel moved to shew Cause why an Attachment should not go against the Defendant for not performing an Award which had been made a Rule of Court. The Parties

entered into Bonds of Arbitration to submit all Controversies to Arbitrators, who had Time give them till the 17th of January to make an Award, and if they could not agree to determine Matters by that Time, then a Power to chuse an Umpire, who was to make his Umpirage on or before the 21 Febr. On the 14 Jan. which was before the Determination of the Power of Arbitration by Process of Time, they chose an Umpire, who likewise made his Umpirage before the 17 Jan. which was the Time limited for the Arbitrators to make the Award in. The chief Objection to the Award it self was, that altho' the Arbitrators might chuse an Umpire before 17th of January, yet that Umpire could not make an Umpirage before that Time; because the Chusing the Umpire did not absolutely determine their Authority, but they had still a Power left in them to make an Award; so that here are two concurring Jurisdictions existing at the same Time, which is absurd; and it was adjudged in 1 Levinz, 302. *Donovan* ver-[71]-sus *Mascall*, and in *Raym.* 206, that the Umpirage is in this Case void; for tho' the Arbitrators may chuse an Umpire at any Time during the Continuance of their Power, yet the Umpire cannot act till the Arbitrator's Time is expired; he likewise cited the Case of *Reynolds* versus *Gray*, 1 Salk. 70, where it is held by *Holt*, C. J., that if the Arbitrators chuse an Umpire before the Time allowed for their Award be expired, it is *ipso facto* void, tho' they absolutely resolve to make no Award themselves.

Counsel on the same Side objected, that an Attachment ought not to go; because it does not appear by Affidavit when the Umpirage was executed; it is only alledged he made an Umpirage on such a Day, and that the same was signed, sealed, and delivered, but it does not appear when; so that it is probable that it might be executed after the Time limited by the Submission, and antedated to bring it within the Time, and make the Award good; and therefore in the Case of an Attachment it is necessary to verify by Affidavit, that the Award was made within the Time, and executed likewise; and of this Opinion was the whole Court. But as to the Validity of the Umpirage itself,

Raymond, C. J., said, he thought that it was well enough; for altho' the Arbitrators did chuse an Umpire, who likewise made an Umpirage before the Time allowed for the Award was expired, yet he held the Umpirage good, because the Arbitrators had determined their Power by chusing an Umpire; and so is *Mitchell* and *Harris's* Case, 1 Salk. 71; *Tho. Jones*, 167; 1 Roll. Abr. 262. Here are in this Case two distinct Powers given to the Arbitrators, viz. either to make an Award on or before the 17th of January, or to chuse an Umpire; and therefore, when the Arbitrators have once chosen an Umpire, that is an Execution of their Power, and determines their Authority; and of this Opinion were *Page* and *Probyn*, Justices; but they gave no absolute Opinion in this Point, because the Rule was discharged for the Defect in the Affidavit.

30.—PERRY versus PERRY. Trin. 5 Geo. II. [1732]. B. R.

Action for Words. Special Damages laid.

Action for Words which were in themselves actionable, and special Damages laid in the Declaration; upon Not guilty pleaded, and Verdict for the Plaintiff, and 5s. Damages, Mr. Serjeant B. moved for Costs *de incremento*, because special Damages are laid in the Declaration, and so the Statute does not extend to this Case. In the Case of *Phillip* [72] versus *Smith*, Trin. 11 Geo. 1 [1725], Action was brought against Defendant for speaking scandalous Words of the Plaintiff, and charging him and others with stealing his Cocks and Hens, and special Damages were likewise laid in the Declaration; a Verdict was found for the Plaintiff, and notwithstanding the Damages were under 40s. yet the Court awarded Costs *de incremento*.

Cur': The Words, as they are laid in the Declaration in this Case are in themselves actionable, and the special Damages are only Matter of Aggravation. It is alledged in this Case, that the Defendant spoke such and such Words, *per quod* the Plaintiff lost his Customers; the special Damages, as they are here alledged, are not actionable; for an Action will not lie for losing a Man his Custom; and therefore the Damages must be given in the Case upon the Words themselves. In the Case of *Phillips* and *Smith* there were two distinct Causes of Action, and the special Damages were as well actionable as the Words, and that was the Reason that full Costs were given in that Case. Vide 1 Salk. 206, *Brown* and *Gibbons*. Action for slanderous Words spoken by his Wife, viz. that she was a Whore, *per quod* he lost such and such Customers; Verdict for the Plaintiff, and Damages under 40s., and the Question was, whether the Plaintiff could have full Costs, notwithstanding 21 Jac. 1, c. 16. *Et per Cur'*: The

Plaintiff shall have his full Costs ; for it is not the Words but the special Damages which is the Cause of Action ; so held Cro. Car. 140, Law and Harwood, Pasch. 5 Geo. 2. *Roberts versus Hollywell, quod videas ante*, Case 15.

31.—HUTCHINS *versus* MOLTING. *Trin.* 5 Geo. II. [1732]. B. R.

Action of false Imprisonment ; Defendant prayed Leave to plead double.

An Action of false Imprisonment. Defendant prayed Leave to plead double, *viz.* Not guilty ; and a Warrant under the Hand and Seal of a Justice of Peace in America, who committed him for a Misdemeanor. It was objected, that these Pleas were contradictory ; but the Court over-ruled the Objection ; and said, in *Replevin* the Defendant may plead in *Avowry* and *Non Capit* ; and so granted the Motion.

[73] 32.—HOARE *versus* GATES. *Trin.* 5 Geo. II. [1732]. B. R.

Vide postea, Hill. 7 Geo. II. [1734].

Non assumpsit pleaded, &c.

Assumpsit. Defendant pleaded *non Assumpsit*, and *non Assumpsit infra sex annos*. Plaintiff replies, that in such a Term he took out a Bill of *Middlesex*, and then avers, *quod causa actionis accrevit infra sex annos ante prosecutionem Billæ prædictæ*. The Defendant rejoins, and says, that the Bill of *Middlesex* was taken out *post clausum Terminum* ; and altho' Bills that issue out in the Vacation are entered as of the Term preceding, yet *in rei veritate* the Bill of *Middlesex* issued out *post clausum Terminum*, *viz.* on such a Day, and concludes *quod causa actionis non accrevit, &c.* To this the Plaintiff demurred ; and on Demurrer the single Question was, whether this is a good Averment.

Mr. D. Counsel insisted, that the Party is estopped to aver, that the Bill of *Middlesex* issued at any other Time than that on which it was entered ; and cited 1 Lutw. 333, 334, *Aldworth versus Hutchinson*. 1 Sid. 271, *Baily versus Bunning*. A *Fi' Fa'* was sued out *Teste 4 Junii* ; 6 *Junii* he to whom the Goods belonged became a Bankrupt, and the Jury moreover found, that the said Writ of *Fi' Fa'* was made out the 11 *Junii*, and executed the 14th. All this Matter being returned upon a special Order, the Question was, whether the Goods were liable to the Execution from the *Teste*, or from the Time that the *Fi' Fa'* was actually sued out ; and the Court was of Opinion, that the Goods were liable from the Time of the *Teste* of the *Fi' Fa'* ; and that from thence it shall be said *emanatio Brevis*, and altho' in Fact it did issue at another Time.

Mr. D. Counsel cont' : There is a Difference between a Bill of *Middlesex* or *Latitat*, and any other Writ, for that a Bill of *Middlesex* or *Latitat* may be sued out before the Cause of Action ; and it hath been so held not only upon Motion, but upon special Demurrer. Cro. Eliz. 561, and such an Averment is not inconsistent with the Course of Proceedings. Cro. Eliz. 264 ; 1 Rol. Abr. 538 ; 2 Keb. 173, 198 ; 3 Keb. 212. What is done in Vacation is supposed to be done in the preceding Term. But the Question is, whether the Supposition is so strong that it will admit of no Averment to the contrary. The Court gave no Judgment, but adjourned it to a second Argument.

[74] *In the Common Pleas.*

33.—KEMISH *versus* BETSON. *Trin.* 5 Geo. II. [1732].

Mutual Debts in Evidence must be of the same Degree, &c.

Resolved per totam Cur' : Where the Party will take the Benefit of 2 Geo. 2, c. 22, by pleading in Bar, or giving mutual Debts in Evidence, &c., they must be Debts of the same Nature and Degree, otherwise in the Case of an Executor it might work a Devastavit.

34.—TRAVERSE *ver.* WOOD. *Trin.* 5 *Geo.* II. [1732]. *B. R.*

Error.

Where a Writ of Error is brought, and Rule is made to assign Errors, if Notice is hung up in the Office, and Plaintiff in Error does not assign Error, Defendant may come and pray a second Rule, and if the Plaintiff does not then assign Error, he shall be nonpross'd; and so it was agreed upon Mr. W's Motion, which was upon a Writ of Error out of Ireland, an Affidavit being made that the Defendant did not know who was Attorney in the Cause, and that the first Rule was hung up in the Office, unless the Plaintiff assign Error in a Week's Time.

35.—TWISLETON *ver.* DUELL. *Trin.* 5 *Geo.* II. [1732]. *B. R.*

Rule to quash a *Scire facias* because there was not fifteen Days between the *Teste* and Return.

Rule to quash a *Scire Facias*, because there were not fifteen Days between the *Teste* and Return. Mr. A. Counsel moved to discharge the Rule, and relied upon the 16 *Car.* 1, c. 6, §. 1, 7, that the Return is aided by the Statute, which expressly provides, that the Return shall be good notwithstanding there be not fifteen Days between the *Quarto die* and the Return. And Mr. T. and Mr. D. Counsel said, that so it was objected in two Cases in which they were Counsel; and therefore the Court discharged the Rule.

Raymond C. J. took Notice, that there was a Mistake in the Act, and that the Return-day, which is there called *Crastino Ascensionis Dom'*, should have been *Crastino Trinitatis*.

[75] 36.—TALLAND *ver.* WARREN. *Trin.* 5 *Geo.* II. [1732]. *B. R.*

Action of Debt; Defendant pleads Payment.

Action of Debt upon Bond payable 11 *June*. Defendant pleads Payment upon the 10th, upon which Issue was joined, and Verdict for the Plaintiff.

H. Counsel moved in Arrest of Judgment, that this was a bad Issue notwithstanding it was found for the Plaintiff, for it may be true, that he did not pay it on the 10th, and yet the Money might be paid upon the 11th. Vide *Cro. Jac.* 434, *Holms* and *Brochet*.

R. Counsel *cont'*: The Issue is, that the Money was paid *ante diem exhibitionis Billæ*, *scil.* on the 11th of *June*, if the *scil.* be rejected the Issue is good after Verdict; and of this Opinion was the Court, being aided by the Statute 4 & 5 *Anne*, c. 16, which enacts, that Payment *ante diem* shall be deemed Payment *ad diem*.

37.—OLDHAM *versus* LACK. *Trin.* 5 *Geo.* II. [1732]. *B. R.*

Assault and Battery. Defendant pleaded he lived in the County Palatine of *Chester*.

Action of Assault and Battery. Defendant pleaded, that he lived in the County Palatine of *Chester*, which he pleaded to the Jurisdiction of this Court; and it was now moved to set aside this Plea for Want of an Affidavit to verify, &c. It appeared only to be the Mistake of the Attorney's Clerk, who had an Affidavit but did not annex it to the Plea, and Mr. P. Counsel insisted, that a subsequent Affidavit might supply this Defect; and cited the Case of *Solennes versus Duvar*, *Mich.* 1 *Geo.* 2. Action against a Woman who pleaded *Coverture*; Plaintiff moved to set aside this Plea for Want of an Affidavit; Defendant came afterwards and produced an Affidavit, that in a Letter of Attorney then in the Hands of the Plaintiff's Attorney, one B. was mentioned as Husband to the Defendant; and this Affidavit was allowed, and the Plea held good; but the Reason was, because it appeared from the Plaintiff's own Confession, that the Defendant was under *Coverture*, and so no Occasion for Defendant to verify it by Affidavit; but otherwise an Affidavit had been necessary, and so it is in the present Case; and therefore the Plea was set aside.

[76] 38.—THE KING *versus* FRANKLIN. *Term. Hill. 5 Geo. II. 1731. B. R.*

Vide post, Case 39, 40.

Information for publishing a Libel.

Franklin was convicted upon an Information for publishing] a Libel against the Government; and now Mr. B. Counsel moved that the Prosecutor should bring in the *Postea*, and that the Jury Process, &c., might be filed; and said such a Motion was granted in the *King and Ward*, and also in the Case of the *King and Wright*.

It was objected by the Court, upon the Information of Mr. M., that this was contrary to the Practice of the Court in these Cases, to hasten and oblige the Crown to bring in the *Postea* upon Motion; and that the Defendant could not move in Arrest of Judgment till the Prosecutor had brought in the *Postea* and given a Rule, &c., to the Defendant.

Mr. B. Counsel: There seems to me no Reason for such a Practice: In all Cases relating to the Revenue, Assise, &c., when the Crown is Prosecutor the Defendant upon Motion hath a Rule of Course to bring in the *Postea*; the same Reason in this Case, and stronger, for should the Prosecutor refuse to bring in the *Postea*, which perhaps may never be brought in at all, and so the Party be without Remedy. Rule per Cur', nisi.

At another Day Mr. Attorney General came and shewed Cause; and alledged, that this Motion was contrary to Practice; that there never was one Instance that the *Postea* was ever filed in these Cases, but that it always remained in the Hands of the Clerk in Court; and that when it is brought into Court the *Distringas* is always annexed to it, and brought in along with it. The Defendant, if he pleases, may move to have the *Postea* brought in, which is the common Motion in these Cases in order to move in Arrest of Judgment. It is impossible the *Distringas* should be filed, there being no File for that Purpose in the Crown-Office; it is always annexed to the *Postea*, and cannot be separated from it upon Motion. As to the *Venire* he said, that was filed before the Motion was made, and if the Defendant had any Objection to that, it was open to his Inspection.

Mr. B. and Mr. F. Counsel cont': If the *Postea* and *Distringas* are brought into Court it will answer our Purpose. Altho' the *Distringas* is annexed to the *Postea* upon the Return, and is brought into Court along with it, yet it is always [77] sent back again to be filed; for it is no Part of the Record, nor is it entered upon the Plea.

Cur': The *Distringas* cannot be filed, there is no File in the Office for that Purpose; the Defendant after Conviction may come at any Time within the four first Days of the Term, and upon Motion oblige the Clerk in Court to attend and bring in the *Postea*, he is intitled to it *de jure*; and this is the constant Practice in these Cases; and so made a Rule, that the *Postea* and *Distringas* should be brought into Court, and the *Venire* filed.

39.*—KING *versus* FRANKLIN. *Hill. 5 Geo. II. [1732]. B. R.*

Vide ante, Case 38.

Franklin being convicted upon an Information for publishing a Libel, his Counsel moved to set aside the Verdict, the Trial being by a Jury who had no Authority; and objected, that a Rule being made in B. R. for a special Jury for the Trial, &c., the Sittings after Trinity Term expressly, and he, being then not tried, could not afterwards be tried by the same Rule the Sittings after Michaelmas Term, but that a new Rule should have been made by the Court, &c., and compared it to the Case of Laver, who, upon Motion to the Court to appoint a Day for Execution, a Rule was obtained, but at the Day of Execution was suspended by his Majesty. The subsequent Term new Application was made to the Court, and a second Day appointed, but his Majesty was then pleased to grant a further Reprieve, which occasioned a fresh Application, &c. The same Reason for a new Rule in this Case; for the old Rule being special, and restrained to a particular Time by express Words, viz. At the Sittings after Trinity Term, the Rule must expire with the Time, and therefore necessary to have a fresh Rule. It was further argued that this is the constant Practice in the Common Pleas, and that new Rules are always granted in Cases of this Nature; but what was chiefly relied

upon was the Statute of 3 Geo. 2, for Regulation of Juries, which now enforced the Practice, and made it absolutely necessary to have a fresh Rule. *Vide* the Statute.

To these Objections the King's Counsel made three Answers.

1st, *That the Objection was made out of Time* ; 2dly, *Before the late Act of Parliament there would have been no Weight in the Objection* ; and 3dly, *the late Act of Parliament does not extend to the Crown, and so the Crown is not bound or precluded by it*. As to the 1st it was insisted, that [78] the Defendant was now too late to make any Challenge to the Array, for after a Challenge to the Poll, the Party is precluded to his Challenge of the Array ; and so it is held in 1 Inst. 158, and laid down there as a Maxim, that after Challenge to the Poll, there can be no Challenge to the Array ; there is no Precedent to impeach this Maxim ; the Defendant in this Case falls within this Rule ; he made his Challenge to Poll ; and Captain Wingfield was struck off the Panel, and a *Tales* sworn in his Place ; and so the Defendant is now too late to make Objections to the Array : Suppose a Rule is made for a special Jury, and the Parties proceed to Trial before a common Jury, the Verdict afterwards shall not be impeached ; for the Defendant must either make Challenge to the Array, or let Judgment go by Default ; but if he appears, and a Defence is made, he is by that precluded to make any Objection to the Jury afterwards ; and so it was adjudged 13 W. 3 [1701-02]. *Anonymus Case, in an Action for Words*.

2dly, It was said, that before the late Act of Parliament this Objection could be of no Weight ; for before that Act the Authority of special Juries did not arise from the Rule of Court ; for the Purpose of the Rule is only to have a fair Jury ; and after that is once struck, the Rule hath had its Effect, and then the Authority of the Jury arises from the King's Writ ; for a Jury cannot be returned upon a Rule of Court, but upon the *Distringas* and *Venire* issuing to the Sheriff for that Purpose ; that Part of the Rule, which limits the Trial to a particular Time, can be of no Force ; for after the Parties have been before the Master, and a fair and impartial Jury is struck, that Jury is under the same Circumstances, and their Authority of the same Nature with all common Juries : Suppose this Rule had been limited to the first Sittings in Term, if the Cause be not then brought to Trial, would there be Occasion for a new Rule to try it at the second Sittings ? it would be absurd to imagine it ? the same Reason when the Rule is for Trial after Term. In these Cases a new Jury is never struck, nor does a new *Venire* issue for that Purpose, *Alias Distringas* issues out ; and the Continuance is entred upon that ; so the Trial is upon the old *Venire*, and by the old Jury ; *pari ratione*, when a Rule is made for a special Jury, and a Jury is struck accordingly, tho' the Trial be not precisely at the Time limited by the Rule, yet the Authority of the Jury is continued upon the *Alias Distringas* ; and yet there is the same Reason for a new Jury as for a new Rule. It is impossible to have a *Venire de novo* in this Case ; for the Statute 7 & 8 W. 3, which gives the new *Venire*, does not extend to the Crown ; and it is adjudged in 2 Vent. 173, that a new *Venire* is Error ; *a fortiori* if there [79] cannot be a *Venire de novo*, there cannot be a Rule *de novo* ; for the Court cannot make a Rule to have that particular Jury returned ; for that would be in Effect for the Court to strike the Jury ; and tho' it is said to be the Practice of the Common Pleas, yet the Practice of our Court is not the Practice of another. But admitting this to be the Practice of the Common Pleas, yet the King is not included within that Practice, for it extends only to Civil Cases. And when the general Words of an Act of Parliament do not extend to the Crown, the general Practice of a Court shall not ? There are no negative Words in this Rule ; and tho' the Time is strictly limited to the Sittings after Term, yet it cannot negatively be inferred from thence, that a Trial subsequent to that Time will be erroneous ; and when no Inconvenience can arise to the Party by extending the old Rule to a further Day, there can be no necessity for any fresh Application to the Court for a new one. In all Cases upon Trials at Bar, where a Time certain is limited for the Trial, if at the Day there is a *Defectus Juratorum*, upon which the Trial is adjourned ; yet there is never Application made to the Court for a new Trial at Bar *de novo*, but a *Decem Tales* is awarded, and the Trial is had upon the old Rule ; and yet in that Case the Jury is struck in the same Manner as it is here, and so falls within the same Reason. As to *Layer's Case*, where Rules *de novo* are granted for Execution, that Case makes nothing for them ; for there the Sheriff's Authority arises altogether from the Rule, and consequently expires with it ; but in this Case the Authority of the Jury takes its Foundation from the King's Writ ; and so long as the Writ continues in Force, so long the Authority

of the Jury remains. There would therefore have been no Weight in this Objection before the 3 Geo. 2, and what Alteration that will make in the present Case is proper for the Consideration of the Court ; which falls under the third Answer, *viz.* that the Act of Parliament does not extend to the Crown, and so the Crown is not bound or precluded by it.

All Acts of Parliament that are made for the Ease of Juries, and that prescribe particular Methods for the Form of Proceeding to be observed between Plaintiff and Defendant, *unless there are particular Words to extend those Acts to the Crown, the Crown is not included within the general Words* ; which is the Reason that the Stat. 7 & 8 W. 3, gives a new *Venire*, does not extend to the Prosecutor when the Crown is concerned ; and yet it is expressly enacted by that Statute, that if any Plaintiff or Demandant in any Cause depending in any of the Courts at *Westminster*, which shall be at Issue, shall bring or sue forth any *Venire facias, &c.*, in order to the Trial [80] of such Issue at the Assises, and shall not then proceed to Trial, that the Plaintiff or Demandant, whenever he shall think fit to try the said Issue, shall sue forth a *Venire de novo* ; here the Words are as express as possible ; any Plaintiff or Demandant cannot ; yet because there are no particular Words to extend it to the Crown, no *Venire de novo* does ever issue at the Suit of the Crown. By 29 Car. 2, c. 3, *Writs of Execution shall not bind the Property of the Goods, but from the Time the Writ is delivered to the Sheriff* ; but in Execution at the Suit of the Crown, *their Property is always bound from the Teste of the Writ*. In the Statute of Jeofails, Revenue Causes are expressly mentioned, otherwise the Crown had not been included within those Acts ; the Statute 35 H. 8, c. 6, *which gives a Tales de Circumstantibus*, does not extend to Juries impanelled to try Causes between the King and Party ; and therefore by the 4 & 5 P. & M. c. 7, *the Crown is expressly mentioned*. In the Case of the *King and Meredith*, Trin. 13 W. 3, upon an Information for Perjury, a *Venire facias* issued forth returnable *Tres Trin.* the then Attorney General died, and Sir Edward Northey succeeded him ; the Cause did not come on to Trial, but Continuances were entred upon the *Distringas* for a Year ; after Verdict it was objected, that no Continuances were entred upon the *Venire* ; and yet the Court adjudged that Jury to be a sufficient Jury. In the Exchequer there never issues a *Venire* ; and the Reason of this Practice is obvious, for the Stat. 7 & 8 W. 3 (which gives the new *Venire*) does not extend to the Crown ; the Act of 3 Geo. 2 is within the same Reason as these Cases. There are no particular Words to extend it to the Crown ; and it is impossible, from the Necessity of the Thing, that the Crown should be included by it ; for unless the Crown should have a new *Venire*, as hath been observed, they cannot have a new Rule ; and the Crown cannot have a new *Venire*, because the Statute which gives the new *Venire* does not extend to the Crown ; *ergo, &c.* But admitting the Crown to be included within the late Act, if it can have any Effect in the present Case, it will be in Favour of the Crown ; for by the express Words of the Act, when a special Jury is once struck and returned, the Cause must be tried by that Jury ; the Words are, *Which first Jury so struck as aforesaid shall be the Jury returned for the Trial of the said Issue* ; admitting therefore this Act to have any Weight in the present Question, there could not have been a new *Venire* ; the Cause must have been tried by the same Jury which was first struck and returned upon the old Rule.

To these Answers the Defendant's Counsel replied, That it was not too late to make the Objections. In *Gardiner's Case*, [81] 5 Rep. 37, and in *Cro. Car. 278*, a Defence was made, and yet Objections were taken to the Verdict, *the one in Arrest of Judgment, and the other in Error* ; and the Objection to both the Cases were to the Panel of the Jurors ; in *Gardiner's Case* twenty-three Jurors were only returned, of which twelve appeared and gave Verdict ; and tho' it was adjudged, that this was remedied by 18 Eliz. c. 14, yet if it had not been for that Statute, Judgment would have been arrested ; in the other Case of *Fines and Norton*, in *Cro. Car. 278*, twenty-three Jurors only were returned upon the *Venire*, and in the *Habeas Corpora* there were twenty-four, the last of which, *viz. W. L.* was not returned upon the *Venire*, the whole twenty-four being returned by *Distringas*, twelve of them were sworn, whereof the said *W. L.* was one ; and after Verdict this was held to be a manifest Error. The Objection in the present Case is to the Panel of the Jurors, *there ought to have been forty-eight returned*, whereas twenty-four have only been returned ; which is as manifest an Error in special Juries, as where twenty-three only were returned upon common Juries ; so if a bad Return be made to the *Venire*, a Writ of Error will lie after Verdict.

1 Rol. Abr. 800. It would be putting a Difficulty upon the Defendant, to oblige him to make his Objection *eo instanti*; where a Doubt arises, he ought to have Time to consider of it, to enable him to lay it properly before the Court. This Objection arises properly upon the Rule of Court, which is the best Judge of it's own Proceedings; it is not so much a Challenge to the Jury, as to the Proceedings of the Sheriff upon that Rule; and whether he acted according to the Directions of the Court is proper for the Consideration of the Court. The *Anonymus* Case, cited by the other Side, was upon a good Jury, there is no Distinction between a good Jury and a common Jury: Supposing no Defence had been made in that Case, could the Defendant have objected that the Jury was not a good Jury? the Sheriff is a proper Judge what is a good Jury; and that when he hath returned a fair Jury, be there a Defence or no Defence, it is the same Thing; a Verdict was never set aside because the Jury was not a good Jury. If the Plaintiff should move for a special Jury, he may waive his Motion, and try his Cause by a common Jury. Had the Verdict in this Case been by a common Jury, *viz. by a Jury chosen by Balloting according to the late Act*, the Conviction had been good; but in this Case the Authority of the Jury depends upon the Rule of Court; and altho' the Authority of Juries in general depends upon the King's Writ, yet the particular Manner of returning twenty-four depends upon the Rule of Court; and when the Rule falls, the Authority of the Jury is determined. [82] *The Act of Parliament expressly prescribes that forty-eight shall be returned, but special Juries struck by Rule of Court are excepted out of the Act*, so that these Juries have their Authority from the Rule of Court; but it is insisted on, that if the Act extends to the Crown, it is in this Case to be taken in Favour of the Crown; for it is said, the same Jury must be struck and returned to try the same Cause. The Act in this Case hath been complied with *ex omni*; a Jury hath been struck, and the same Jury returned, so the Intention of the Act hath been fulfilled in this Particular; and there is no Proviso made in the Act, that if the Trial should go off the same Jury shall subsist; the Intention of the Act is otherwise, and made to prevent Mischiefs arising from the Continuation of Juries; but should the Doctrine of the other Side prevail, the whole Force and Energy of the Act will be over-turned; *the Act recites several Abuses in the Impanelling and returning Juries. Vide 3 Geo. 2, and for preventing of such Abuses, directs and prescribes the Balloting, to prevent Fraud in soliciting Juries, to prevent Mischiefs arising from the picking up Talesmen. There are likewise Words that import there must be fresh Juries; the Act likewise enforces an Attendance, by giving Power to the Judge, &c., it likewise provides that Jurors shall have Certificates of their Discharge from serving for two Years. But if this Construction prevails, the Act will have no Effect as to these Particulars; will not Juries continue as they did before the Act? will they not be as liable to be tampered with and solicited? Supposing a Design to have a packed Jury, the Method will be this; the Plaintiff will get a Rule for a special Jury, will have a Jury struck, will have twenty-four returned, and those he will continue upon the Distringas till he hath Time and Opportunity to mould them to his Purpose. But admitting the Jury cannot be corrupted, the Plaintiff may continue them till one dies, and by this Means Talesmen will be added as before. By the same Reasons that this Construction prevails in Criminal Cases, it will prevail in Civil Cases; and so the essential End of the Act will be intirely over-turned. It is further insisted upon, that there could be no new Rule in this Case from the Necessity of the Thing, because the Crown cannot sue out a new *Venire*, &c., wherever a new Law is introduced, the Practice of the Court must conform to the Intention of that Law, and not the Intention of that Law to the Forms of the Court: Where a Rule cannot subsist by Reason of a new Law, but it is necessary *ut res valeat* to have a new Rule, in that Case a *Venire* must issue of Course. Bro. Ven. fac. pl. 30, and tho' the Matter does not appear upon record to intitle them to a new *Venire*, yet it may be suggested upon Record; for [83] if the Party can have Liberty, for the Sake of making Continuances, to suggest what is contrary to Matter of Fact, *a fortiori* where it is in Support of an Act of Parliament, which cannot subsist without such Suggestion. Supposing a *Venire* issue upon the Balloting Clause, will that preclude the Party to apply to the Court for a special Jury? this would be carrying the Act apparently further than was intended; for Trials by special Juries are in this Respect excepted out of the Act. The Statute for this Reason gives a general Direction, and takes no Notice whether the *Venire* issued before or no; for the Issue is the Thing the Act hath in View, and takes no Notice of the Process. Supposing before the Act a *Venire* was taken out, must Proceedings be upon that *Venire*? certainly no; therefore a new*

Venire may issue forth by Virtue of this Act ; and tho' the Words of the Act are general, yet such Construction must be made as is consistent with the Meaning of the Act ; in some Cases Continuances may be entred upon the *Venire*, as where the Array is quashed ; nothing more certain, than that a new *Venire* issues of Course. Bro. *Ven. fac.* ; Stanf. P. C. 155 *b* ; Bendlow, 56 *b* ; 2 Rep. Rowland's Case. *Venire* may be quashed at the Suit of the Party. Alleyn, 18. In the Case of Wright and Pindar, an *Alias Venire* was awarded. In this Case, had there been a new *Venire*, the Intention of the Act would have been answered. The *Venire* ought to have been returned and filed, to convince the Court the Crown could not have another *Venire* ; by the Continuance upon the *Venire* of *Vicecomes non misit Breve*, the Crown may have as many *Venires* as they please. Suppose there had been no *Venire* at all, would a Defence have aided the Error ? In the Case of Young and Watson, there was no Return to the *Venire*, and yet that was held Error after Verdict ; the Court might have granted a new Rule after the old one was expired, and a *Venire de novo* would have issued in that Case. 2 Rol. Abr. 720, *pl.* 2. If at the Return of the Inquest upon a *Venire*, a Writ comes from the King not to proceed, *Rege inconsulto*, and afterwards a *Procedendo* is granted, a new *Venire* issues, and not a *Habeas Corpora* ; and so is 2 Rol. Abr. 721, *pl.* 7, in the Case of Whitbey and Quensey, Hob. 130, the *Habeas Corpora* was returned *album Breve*, and thereupon a new *Venire* was awarded. Note : In the Case of Green and Cole, 2 Saund. 257, 258, Error was assigned upon this Misreturn of the *Venire* ; and it was objected, that the Defendant might have challenged the Array, but that it was the erroneous Act of the Court to Misaward the *Venire*. As to Trials at Bar, where the Cause does not come on to Trial at the Day appointed, it is put off by Adjournment ; [84] and when the Trial comes on, the Entry upon the Record is made upon that Day which was first appointed ; and in all these Cases the Adjournment is to a Day within the same Term ; there is no Instance of Trials being adjourned to a subsequent Term, without fresh Application to the Court to obtain a new Rule. In Trials at Bar, if at the Day appointed there is *Defectus Juratorum*, a *Decem Tales* or an *Octo Tales* issues, which is a Continuation of the same Process, and so a great Difference between Trials at Bar by Adjournment, and Trials by special Juries.

Raymond, C. J., delivered the Opinion of the Court ; *That there did not appear any Irregularity upon the Record to set aside the Verdict* ; he said the Act of Parliament was a beneficial Act, and ought to be supported ; he then mentioned the Mischiefs which occasioned the making of that Act, and the several Remedies that are applied in the Redress of them. *Vide* 3 Geo. 2. An Act for the better Regulation of Juries. The Act particularly prescribes, that no Jurors shall be returned which have served within such a Time, *i.e.* (two Years) ; it further provides, that no less than forty-eight shall be returned upon the *Venire*, unless in particular Cases, where, upon Application to the Court, a Rule is granted for a special Jury ; so that by the express Words of the Statute special Juries are excepted ; the Method therefore of proceeding by special Juries is in no wise altered, but must be in the same Form, and in the same Manner, as before the Act ; the Statute indeed goes further, and says, *after a special Jury is struck, the Jury so struck shall be the Persons returned for the Trial* ; but there are no additional Words to make it necessary for the same Jury to serve ; for if these Words had been inserted, they would have excluded Talesmen, which would have been inconvenient in these Cases ; the Case in Question is not included within the Words of the Act ; and the Court cannot extend the Words of the Act to it ; neither will the Intention or Force of the Act be any Ways impeached or offended by this Construction ; it is insisted upon by the Defendant, that the Rule was specially confined to a Time, *viz.* to the Sittings after Trinity Term, and that in these Cases it is the Rule of the Court which gives the Authority to the Jury. The Court is of another Opinion, that in all these Cases the Authority of a Jury arises from the King's Writ ; the Import of the Rule is to have a fair Jury struck before the Master, and after that is done the Return must be made by the Sheriff, as in other Cases, who returns the *Venire*, upon which the Power of the Jury depends ; and tho' the Rule is to have the Trial at a Time limited, yet it is not restrictive ; the Rule is *pro triatione* in general, and [85] the Time limited shews only the Intention of the Court to have it tried at that Time, but it is not to be taken negatively, at that Time and no other ; in this Case the Crown could not have a *Venire de novo* ; and therefore from the Necessity of the Thing the Trial must be upon the old Rule. Before 7 & 8 W. 3, a new *Venire* could issue in some Cases, as upon a Challenge to the Array ; so where the Verdict is imperfect, when there hath been a

Misreturn of the Jurors, &c., in these Cases, and the like, a *Venire de novo* would issue. In *Alleyn*, 18, it is said, an *Alias Venire* should be awarded, and not a *Venire de novo*; but he thought that an odd Case, and said he never before heard of an *Alias Venire*. In *Stiles*, 32, 34, it is held a *Venire de novo* would go; but even in that Case there are contradictory Opinions; and tho' it was adjudged a *Venire de novo* should be awarded, yet it was held, that the same Jury should be returned. This Case hath a great Resemblance to the Case in *Stiles*, the same Jury is returned in this Case, only the Continuances are kept on upon the *Distringas*, and an *Alias Distringas* is awarded; in all the Cases cited by the Defendant there hath been the same Mistake either in impanelling the Jury, or returning the Writ; but when there appears no Defect upon Record, a new *Venire* never goes; 7 & 8 Will. 3, does not extend to Criminal Cases, so that Cases of that Nature remain as they were before the Act; before this Act *Venire's de novo* have been granted, but never without the Consent of the Parties. It is said, that in *C. B.* in Cases of special Juries new Rules are always granted; admitting it to be so, it avails nothing here, for different Courts have different Forms, and their Practice varies in many Circumstances. When an Irregularity is complained of, the Party complaining must shew the Irregularity, and not put the other Party to vindicate his Proceedings, and shew that he is regular; there does not appear to be any Irregularity in the present Case; but the Court is unanimous, that the Verdict shall stand. Whether or no the Defendant was too late to make his Objection, he said, the Court would not determine, the Objection being over-ruled upon the Merits of it; but without Doubt in Cases of Irregularity Advantage must be taken of it in proper Season; otherwise no Advantage can be taken of it afterwards.

Mr. B. Counsel moved the Court, that the Defendant having given sufficient Security might not be committed before Judgment should be given.

The A. G. opposed the Motion, and said, there had been Instances where immediately after Verdict *ad Nisi prius*, the Defendant had been committed, and so insisted upon his Commitment.

[86] Mr. B. then moved in Arrest of Judgment, and desired a Day's Time to consider of it.

The A. G. refused to consent; and said, that when the Defendant was called to receive Judgment, then his Counsel might move in Arrest of Judgment; and so prayed the Defendant might be committed, and brought up to receive Judgment on the Day following.

40*.—THE KING versus FRANKLIN. Hil. 5 Geo. II. [1732]. B. R.

Vide ante, Case 38, 39.

Judgment being prayed against the Defendant, it was moved in Arrest of Judgment, that the Rule which was granted by the Court for returning a special Jury, and by Virtue of which a special Jury was returned, should have been suggested on Record. That this was an Objection arising upon the Record of *Nisi prius*; and tho' this Case is by a particular Exception taken out of the Balloting Clause, yet the Rule itself flows from the Authority of the Act; and therefore should have been taken Notice of upon Record, to shew that the Proceedings in this Case were not grounded upon the Rules of Common Law, nor yet according to the general Provision of the late Act upon the Balloting Clause; in this case the *Venire*, the Return of the Process, &c., are entered in the same Form as Proceedings at Common Law; and if they are considered as such, there is a manifest Error. Rules for Trials by special Juries are taken by Exception out of the Act; it must be considered therefore by what Authority the Rule in this Case was granted; for before the Act, Rules of this Kind were never granted but upon Consent of Parties; the Power therefore which hath been exercised in this Case is wholly depending and flowing from the Act, and so it ought to have been suggested upon Record. The Act of Parliament excepts special Juries appointed by Rule of Court, and says further, that the Jury so struck shall be the Jury returned to try the Issue; and it is by this Authority that twenty-four only are returned. Supposing there had been no Rule at all, that undoubtedly had been Error; here does not appear to be any Rule in this Case, nothing of that Matter is suggested upon Record; and the Court can take no Notice of any Thing now but what appears upon Record; it is for that Reason that the Rule, which is the essential Part of a Trial of this Nature,

ought to be entred upon Record. In the Case of *Savil and Candish*, Yelv. 213, a *Tales de Circumstantibus* was award-[87]-ed, and the *Tales* returned upon the *Postea*; but because it was not suggested upon the Record that the *Tales* were *Nomina Jurator' de novo apposit' secundum formam Statuti*, Judgment was arrested; for this ought to have been done, because at Common Law the Justices of Assize could not grant a *Tales* to supply the Defects of the first Jurors, which Power is merely by 35 H. 8, and for this Reason it ought to be particularly entred *Quod nomina jurator' de novo apposit' secund' formam Stat'*, to distinguish what is done by the Common Law and what is aided by the Statute. This Case is of great Weight in the present Objection, for in the Case before the Court there appears nothing to shew how this Jury was impanelled, whether by Common Law, or by Virtue of the Statute, and what makes a Suggestion more necessary in this Case than in the other; in this Case there might be Proceedings at Common Law, or it might be by Proceedings upon the Statute; whereas in the other Case the Jury was returned upon the *Postea*, which shewed that the Trial could only be by Virtue of the Statute; but it will be answered, that here the Entry will be made according to the established Practice. This Argument was insisted upon in Yelverton, 23, and divers Precedents were shewn, where *Nom' jur' de novo*, &c., were omitted upon the Panel, yet the Court did not regard it; for it seemed to them that those Cases had passed *sub silentio*, and without Exception. In all Cases where a new Law is introduced, which takes the Course of Proceedings out of the common Road, a Suggestion is always entered upon Record; as where a *Venire* is directed to the Coroner upon a Challenge to the Sheriff; so where the Trial is *per Medietatem Linguae*; in these Cases a Suggestion is always made accordingly. When a Defendant is convicted of a Misdemeanor, and before Judgment claims the Benefit of the King's Pardon, and that is allowed, it is always suggested upon Record, *Nihil de fine quia pardonatur*; and so Cro. Eliz. 153, *Lee versus Curveton*; and 2 Cro. 207, *Strickland and Thorp*. Where a Defendant prays Leave of the Court to plead double, Suggestion is always made upon the Record *cum licentia Cur' secundum form' Stat' in ejusmodi Cas' edit' & provis'*. This seems to be a Case in Point; the Act provides that the Defendant may plead double by Leave of the Court; and where this Leave is once obtained, it is always entered upon the Record as above, otherwise it would be Error; after the Restoration, in all Cases, where the Act of Indemnity was pleaded, the Party was obliged to suggest his Plea, that he was not the Person who struck the King's Head off, &c., and the Reason of this Suggestion was, because the particular Person was excepted out of the Act.

[88] At Common Law, if twenty-three Jurors only were returned, it was Error; the late Act requires that forty-eight shall be returned, but special Juries are excepted out of the Act; in the present Case here are only twenty-four Jurors returned, which is Error, unless something appear upon Record to take this Case out of the general Provision of the Act; but nothing appears to this Purpose, and so there is a manifest Error; it does not appear this was a Trial by a special Jury, and so within the Exception of the Act, and the Court cannot *ex officio* take Notice of it. Unless the Rule be suggested upon Record, it will introduce Confusion and great Inconvenience. Suppose a Rule is granted, and the Cause comes on to Trial before a Judge who did not grant the Rule, how can the Judge take Notice of it? nothing of this Matter will appear upon the Record, and the Judge *ex officio* is obliged to see the Cause tried according to the Act, which, by the general Provision of the Act, must be upon the Balloting Clause, unless something appears particularly to take it out of the Clause. Upon a Writ of Error out of an inferior Court, where the Trial hath been by special Jury, and Objection is made to the *Venire*, how can the Courts above judge what is Error and what is not? and whether the Proceedings below were pursuant to the late Act of Parliament or not? it is impossible a right Judgment can be made, unless the Rule be suggested upon Record. Where there are several Causes of the same Nature depending in the same Court between the same Parties, and Rule is granted for a special Jury in one Cause, and another Cause is tried by a special Jury upon that Rule, should this be alledged as Error? could not the Rule which was obtained in the first Cause be produced as Evidence, and warrant the Proceedings in this? It certainly might; for the Court could not distinguish upon the Face of the Rule in what Cause it was granted, and so the Defendant could take no Advantage by the Error. Since therefore there may be so great an Inconvenience introduced on the one Hand, and there can none arise on the other, we hope the Court will make such a Determination as will be agree-

able to Reason and Equity, viz. That it is necessary that the Rule should be suggested upon Record, and that the Omission of it is manifest Error.

Mr. A. G. Mr. S. G. & al' cont' : This is an objection equally arising in every Case since the making this Act; and the same Method has been observed in all other Cases as hath been pursued in this, and there is nothing offered to induce the Court to alter the Method; but if it should be necessary to suggest the Rule upon Record, we are still in Time; for we have entered nothing yet but the *Similiter*, and so have [89] still an Opportunity of amending the Roll of *Nisi prius*, and suggesting the Rule upon Record. It is insisted upon, that the late Act is an Introduction of a new Law; it is expressly provided otherwise by the very words of the Act, by which it is enacted, *That upon Motion made in any of the Courts at Westminster-hall for a special Jury, that the said Courts may order a special Jury to be struck in such Manner as such Juries are usually struck.* This Clause of the Act is made in Affirmance of the Common Law; and if at Common Law no Suggestion was entred on Record, in Trials at Bar, and Trials by special Juries, what Reason is there to make any in this Case? By the Act there is an express Reference to the old Method of proceeding; in this Case the old Method is therefore to be observed. In Trials at Bar, such a Suggestion never was made either before or since the Act; and there is no Instance of a Trial's being set aside for this Defect. If there had been no Rule at all, the Trial had been illegal, and not warranted by the Act; the Party indeed in that Case could not shew Error upon Record; but this does not conclude him from all Remedy; for upon Application to the Court, the Court would set aside the Judgment for Irregularity. By the express Provision of the Act trials by special Juries must be upon Application to the Court by Motion; there is a great Difference between things that must be done upon Motion and those Things which must be entred upon the Award of the Roll. In the Case of the Coroner there is no Motion made to have the Venire directed to him, but it is done by Suggestion upon the Award of the Venire; and the Reason of this Direction is to prevent the Necessity of putting the Party to challenge the Array. When a Pardon is pleaded, the Entry is always, *Nihil pro fine quia pardonatur*, but it does not say how pardoned; and whether by Act of Parliament, or the King's Letters Patent. Where the Party hath Leave to plead double, it is always suggested upon Record; but this does not prove that the Omission of it would be Error; and yet in this Case it is not prescribed by the Statute to be upon Motion, but only in general, that it must be by Leave of the Court; and where the Provision of an Act is in such general Terms, it may be thought necessary, as the most secure Way, to enter it upon Record; but where the Act is so restrictive, as to confine the Party to apply by Way of Motion, it is never done. The Statute which prevents dilatory Pleas provides, that no Plea shall be received in the Office but upon Affidavit of the Party to verify his Plea; but the Affidavit is never entered upon Record; no Complaint of any Inconvenience arising from this Practice; for if the Party refuse to make Affidavit, the Office will never receive the Plea, or if received, [90] the Court will set it aside for Irregularity. There is given by this Act a Power to the Judge of Assise to direct, that less than forty-eight shall be returned; and yet this Direction cannot be suggested upon Record, either before the Issuing of the Venire, or upon the Return of the Postea. The Case in Yelv. which is so much relied upon, is of no Weight in the present Question, the Trial by Tales is given intirely by the Statute, which in that Case is introductive of a new Law; for at common Law there could be no Tales; and where-ever an Alteration is made either in the Process of the Court, or where the Trial differs from a Trial at Common Law, as in the Case of a Tales, a Suggestion is necessary, and it must be entered upon Record *secund' formam Stat.*, &c. In this Case the Process of the Court is in no Respect altered; Proceedings by special Juries are left in the same Plight, and must be in the same Method as before; the Venire must be returned by the same Officer; and if in this Case a Suggestion is necessary, it is equally necessary upon the Balloting Clause. Where a Rule is made to pay Money into Court, this Rule is never entered upon Record: Neither in Ejectment is the Rule, which the Defendant enters into to confess Lease, Entry and Ouster at the Trial, ever entered on the Roll; and yet to the full as necessary as in the Case in Question. The Form of Proceedings by special Juries being a Method established by Rule of Court, if any Doubt arises relating to the Rule, it must be determined by the Court who granted the Rule. If in G. B. several Actions of Trespass are depending between the same Parties, some by Original and some not, and a Dispute arises, on Error brought for Want of an Original, the Truth of the Fact must be determined in that Court where

the Original first issued ; and so no such Inconvenience can arise as pretended. That Precedents were of Authority in the present Case, the Case of Budley, 11 Ann. [1712-13] was cited.

To this the Defendant's Counsel replied, Although it was said, that the Rule might still be entered upon Record, yet it was not thought proper to insist upon that Point, which was liable to so many Objections, and might so easily have been confuted. The late Act hath made a great Difference in the Manner of appointing special Juries : before the Act a special Jury was never appointed but by Consent of both Parties ; but the Act enables the Court *ad libitum*, upon the Prayer of either Party, to appoint them ; the Case of double Pleading is a *Case in Point*, and stands unanswered ; it is said, that the Statute directs that it shall be by leave of the Court in general, but that the present Case is confined to Motion ; this is no Distinction ; for where a Thing is to be done by Leave of the Court, and where upon Motion, it is in Effect the [91] same Thing ; for Leave must be obtained of the Court by Motion, for the Court cannot grant *ex officio*, without application upon Motion.

Unless upon special Juries the Rule be suggested upon Record, the Judge can have no Direction in what Manner to swear the Jury. Talesmen are excluded by the Balloting Clause ; but it hath been adjudged, that in special Juries the Party is intitled to them. Unless therefore the Rule appears upon Record, what can induce the Judge to determine in what Cases the Party is intitled to a *Tales*, and in what not ? Admitted, that before the Act there was no Necessity to suggest the Rule, &c., because no Difference in the Return of the *Venire*, as to special Juries and common Juries ; but the Act hath now made it necessary ; for by the general provision of the Act *forty-eight must be returned*, except in special Juries ; something therefore ought to appear upon Record to bring this Case within the Exception : Admitted likewise, that there was a Difference between Things done upon Record and Things done upon Motion. But the Question is, where the Act hath introduced a new Law, whether the Court must not conform their Practice to the Intention of that Law ; and if Error may arise upon Proceedings in this Law, the Proceedings ought to be suggested upon Record, to give the Party the Advantage of applying to Superior Courts in Order to have that Judgment reversed. In the Case of dilatory Pleas, no Plea shall be received but upon Affidavit ; but it is said the Affidavit is never suggested ; nor is it necessary ; for no Plea can be received but upon Affidavit ; besides, what Occasion for a Suggestion, when Advantage may be taken of the Plea it self ? for unless Affidavit, it is no Plea, and Plaintiff may sign Judgment. In Budley's Case, there was Error appearing upon Record, and so that Case was not absolutely determined upon Precedents of the Practice of the Court ; the Rule for bringing Money into Court is to be taken Advantage of upon Evidence, and cannot be suggested upon Record ; for it is considered as Payment of so much Money, and as such is given in Evidence. Ejectments are not parallel to other Cases, they are always considered as Creatures of the Court ; the Court will not permit the Plaintiff to release, will not permit the casual Ejector to bring a Writ of Error, and in all Respects are governed by the Directions of the Court ; and so whatever relates to them cannot be introduced as Authorities in the present Case.

Per Cur'. The Court delivered their Opinions separately to this Effect : The Determination of this present Case will depend much upon a Resolution lately delivered by the Court, which was unanimous, that the late Act does not *ex-[92]-tend to special Juries, but leaves them as they were before at Common Law* ; before the late Act Rules were often granted by the Court for special Juries ; but that Rule was never entered on Record ; and yet Proceedings by special Juries was as much contrary to the Common Law before the Act, as they are now contrary to the general Method prescribed by the Act ; it would be odd to adjudge it necessary to enter the Rule upon Record, when it is no Ways conducive to the Trial. By the Balloting Clause a new Law is introduced, but the Act leaves this Case to the Directions of the Common Law ; the Method of Proceedings that hath been pursued in this Case, is agreeable to the Proceedings at Common Law, and therefore not erroneous. This is an Exception in Arrest of Judgment, and therefore must be an Error appearing upon Record ; but it is said, that Error does appear upon the face of the Record, because the Rule, which warrants the Proceeding by a special Jury, is not suggested upon Record. The Act looks upon Proceedings by special Juries, and Proceedings upon the Balloting Clause, to be equally beneficial, and was so looked upon by the Legislature. Special Juries not treated by the Act as introductive of a new Law, but leaves them to the Directions of the Court and the old

Method of Proceedings in these Cases. *The Rule is no more than to direct the Officer in the Manner of returning his Writ, there is no Precedent to shew the Necessity of suggesting the Rule upon record ; and it seems equally necessary to suggest every Rule of pleading upon Record ; if a Question arises, whether a Rule or no Rule, it must be determined in its proper Court ; and if no Rule, the Court will relieve the Party by setting aside the Judgment.* Where an exception is made, as in the Act of Indemnity, 12 Car. 2, 11, the Party, that will take the Benefit of the general Provision of the Act, must shew himself not to be included within the Exception, other wise the general Provision of the Act will not extend to him. *Judge of Assise may direct a less number than forty-eight to be returned ; and yet these Directions cannot be entred upon Record ; this is a stronger Case than the case in question ; this is drawn by Exception out of the Balloting Clause, and is giving a power to the Judges which they had not by Common Law. In all the Cases cited by the Defendant there is manifest Error appearing upon the Face of the Record ; to plead double was Error at Common Law ; and therefore unless something be suggested upon Record, as cum licentia Cur' secundum form' Stat', &c., to draw that Part of the Case out of the general Proceedings by Common Law, it still remains Error ; so where the Venire is directed to the Coroner, for the Sheriff is the legal and proper Officer to make the Re[93]turn, and therefore something must appear to shew why the Venire was not directed to him.* The same Reason for that Determination in *Yelv.* where although the *Tales* was suggested upon Record, yet that was not thought sufficient ; for there could be no trial by *Tales* at Common Law, and therefore necessary to suggest *Nomina Jurator' de novo apposit' secund' formam Stat'*. Had the present Case been equal to any of those, the Want of Suggestion would have been Error ; but the Common Law supports Trials by special Juries, and therefore the want of the Suggestion is not error at the Common Law ; and so note a Difference, where an Act of Parliament makes an Alteration in the Common Law, and where it is made in Affirmance of it. Note : Per Page J. *Though the Court did not grant special Juries without Consent before the Act, yet the Court had a power to grant them.*

Per Cur': Judgment must be affirmed. Note : On the last Day of this Term, the Defendant being brought into Court to receive Judgment, Judgment was given against him accordingly, viz. *To pay pro Fine £100, to suffer one Year's Imprisonment, and to give £2000 Security for his Good Behaviour for seven Years.* Vide *Layer's* and *Haines's* Trial.

39.—WASHER versus SMITH & Ux'. Term. Mich. 6 Geo. II. [1732]. B. R.

Of Costs in Assault and Battery, on a Plea of *Molliter manus imposuit*, where the Damages found were under 40s., and Plaintiff had obtained no Certificate.

Action of Assault and Battery. There were two Counts laid in the Declaration ; the first was against Husband and Wife jointly, and the second was against Wife only. The Defendants, as to the *Vi & armis* in the first Count, pleaded Not guilty ; and as to the Assault, they pleaded a Justification in Defence of Property by a *Molliter manus imposuerunt*. The Feme pleaded in the same manner to the second Count ; and upon both these Issues they went to Trial. The Jury found the Defendants guilty, but gave under 40s. Damages.

Mr. M. Counsel moved, that the Plaintiff might have his full Costs, notwithstanding the Damages were under 40s. and laid it down for a Rule, that whenever the Defendant pleaded specially, and there was a verdict against him, the Plaintiff always had his full Costs, and there was no Necessity for a Certificate.

Mr. F. Counsel cont': The Plaintiff is not intitled to more Costs than Damages ; and insisted upon the 22 & 23 Car. 2, c. 9, which enacts, that in Trespass, Assault and Battery, and other Personal Action, if the Judge do not certify upon the Back of the Record, that the Assault and Battery was sufficiently [94] proved, or that the Title of the Land mentioned in the Plaintiff's Declaration was chiefly in Question, the Plaintiff, in case the Jury shall find the Damages to be under 40s., shall recover no more Costs than Damages. Here is no Certificate that the Battery was fully proved, and nothing to distinguish it from the common Case, where Not guilty is pleaded. Where the Defendant pleads Son Assault, he confesses the Battery, and therefore no Occasion for a Certificate ; but here the Battery is denied, and the special Pleadings go only to the Assault. Supposing the Defendants had pleaded generally Not guilty, and the Plaintiff had proved that

they *Molliter Manus imposuerunt*, without anything Further, would the Judge have certified it in this Case ? there is no more Reason to give Costs, because the Defendants have pleaded specially, than there would have been had the general Issue only been pleaded.

L. J. An odd Doctrine, that when the Defendant pleads specially in these Cases, the Plaintiff must have full costs ; indeed when Son Assault is pleaded, the Battery is admitted in express Terms, and amounts to a Certificate ; but *Molliter manus imposuit* goes only to the Assault, and the Defendants as to the Battery have pleaded Not guilty.

Cur' : The single Question is, Whether *Molliter manus imposuit* does not admit a Battery ? *Adjournatur*.

40.—MARTIN *versus* ALLTHOM. *Mich. 6 Geo. II. [1732]. B. R.*

On a frivolous Plea, the Defendant being an Attorney ordered to attend.

Action upon a promissory Note which was given and wrote by the Defendant himself, who was an Attorney, and in the Note the Plaintiff was named *Marten* with an *e*, but the Plaintiff in the declaration named himself *Martin* ; and this the Defendant pleaded in abatement, *viz.* that the Plaintiff's name was *Martin*, whereas the Note was given to one *Marten*.

Mr. T. Counsel moved to set aside the Plea with Costs, and the Plaintiff might be at Liberty to sign Judgment as if no Plea had been put in. The Court held the Plea to be frivolous, and reproved the Counsel for setting his Name to a sham Plea, and made a Rule to discharge the Plea ; and that the Defendant being an Attorney, should attend.

[95] 41.—HOAR *versus* GATES. *Mich. 6 Geo. II. [1732]. B. R.*

Vide ante, Case 32, & post, Hil. 7 Geo. II. [1734].

Where the Party is not estopped by the Record to aver the very Time of the Purchase of the Writ.

This Case was again argued, and for the Plaintiff insisted, that the Rejoinder was bad ; for a Bill of *Middlesex* cannot be supposed to issue but in Term-time ; besides, it is Matter of Record, and the Parties cannot aver contrary to that. *Lutw.* 232 ; 1 *Sid.* 53, 60 ; *Stiles*, 156. It is in the Nature of an Original. *Carth.* 232 ; 2 *Show.* 253 ; 4 *Mod.* 9 ; *Cro. Car.* 264 ; 1 *Roll. Abr.* 893 ; 1 *Mod.* 158 ; *Cro. Eliz.* 181 ; *Carter*, 227 ; *Hob.* 156, 297.

Mr. R. Counsel *cont'* : The Rejoinder in this Case is only an Answer to the Plaintiff's Replication, which goes to Matter of Fact only, *viz.* that he prosecuted his Bill of *Middlesex*, *Hil.* 13 *Geo.* 1, returnable the Term following. To this the Defendant rejoins what is Matter of Fact also, *viz.* that *in rei veritate* the Plaintiff did not prosecute his Bill in *Hil.* but that it issued afterwards, and not till the 30th of *March* ; which being Matter of Fact only, is confest by the Demurrer. The Cases that have been cited are all of them Cases upon *Latitats* which bear *Teste*, and that it is which makes the Estoppel, for the Record is against him ; but in the Bill of *Middlesex* there is no *Teste*, which makes a great Difference. Supposing upon a *Latitat* the *Teste* should be omitted, the Court would take no Notice of it by Way of Estoppel, but it may be averred against. The Case in *Lutw.* is not to the Purpose, for there the *Teste* appeared upon Record. Supposing a Man should be arrested in Vacation, without any Writ being sued out, and afterwards the Plaintiff should take out a Writ, pretending that it issued out the Term preceding, is the Defendant estopped to aver *in rei veritate* when the Writ issued ? Vide 2 *Keb.* 173, 198 ; 3 *Keb.* 213. When the Statute of Limitations hath given a Man a legal Advantage, tho' it is a hard Case, yet this Method shall not avoid it.

Cur' : The Bill of *Middlesex* is the Award of the Court, but the Party is not concluded by that Award. The Statute of Limitations is a remedial Law, and made to preserve Peace and Quietness, that People must either prosecute their Actions in Time or not at all ; it was the Plaintiff's Fault he did not take out his Bill sooner. There is a strong Case in *Raym.* 161, the Case of *Bilton versus Johnson*, which will [96] go a great Way in determining this Point. Vide the Case ; where it is held, that tho' the *Teste* of a *Latitat* is upon Record, and the Party cannot aver against it, yet there would be great

Inconvenience, if he could not set out the very Time of the Purchase of the Writ ; and the Relation of the *Teste* is only to prevent Fraud, and not justify a Tort. The Court further held, that the Plaintiff in this Case had no Remedy for his Debt, by Reason of the Statute of Limitations, unless given him by this Fiction in Law ; and it would not be right for the Court to give Remedy by Fiction, where it is expressly prohibited by the Statute. *Adjournatur*.

42.—PITMAN *ver.* HARDY. *Mich.* 6 *Geo.* II. [1732]. *B. R.*

Debt brought on a Warrant of Attorney to confess Judgment.

The Defendant gave a Warrant of Attorney to confess a Judgment, *Pasch.* 5 *Geo.* 2, but *Judgment was not entered up that Term* ; afterwards the Plaintiff brought an Action of Debt, and declared upon this Warrant of Attorney ; to which the Defendant demurred. Mr. G. Counsel insisted, that the Defendant, by his Warrant of Attorney, had confessed the Debt.

The Court said, they never heard of an Action being brought upon a Warrant of Attorney ; that the Judgment not being entered within the Time limited, the Authority was determined ; nor can the Warrant of Attorney be any Acknowledgment of a Debt ; and so Judgment for the Defendant per totam Cur'.

43.—WILKINSON *versus* DRAPER. *Mich.* 6 *Geo.* II. [1732]. *B. R.*

Verdict set aside, because the Pleadings which were special, were not entered with the Clerk of the Papers.

Mr. F. Counsel moved to set aside a Verdict, because there was a special Plea and Replication, and no Entry was made thereof with the Clerk of the Papers, which is irregular and contrary to Practice. Mr. S. Counsel : The Defendant should have objected to this in proper Time, but after Verdict it is too late to take Advantage of it.

But the Court said they would not suffer the Officer to be cheated of his Fees ; and so set aside the Verdict, and obliged the Parties to go back to the first Fault.

[97] 44.—DANIEL *ver.* PURBECK. *Mich.* 6 *Geo.* II. [1732]. *B. R.*

Costs for not Countermanding a Notice of Trial in Time.

Mr. S. Counsel : *It is an established Rule in this Court, that where Notice of Trial is countermanded, the Countermand to save Costs must be two Days before, &c., in a Town-Cause, and four Days in a Country Cause.* Notice of Trial was given in this Case for the 19th of August at Warwick, and no Countermand till the Sixteenth ; he therefore moved, that the Defendant might have his Costs ; there is no Respect to be paid to the Circumstances of the Case, but the Rule is general, and must be pursued ; and the Court ordered accordingly, that the Defendant should have Costs.

45.—DANIEL *versus* PURKIS. *Mich.* 6 *Geo.* II. [1732]. *B. R.*

Motion for a new Writ of Inquiry, the Jury having found Damages for the Defendant.

Action by the Plaintiff, who was an Attorney, for his Fees ; pending which the Parties came to an Agreement, that, upon Payment of so much Money by the Defendant, Proceedings should be stayed. The Defendant paid the Money, and took a Discharge from the Plaintiff ; notwithstanding which the Plaintiff afterwards proceeded to Judgment, and gave the Defendant Notice of executing a Writ of Inquiry ; a Writ of Inquiry was executed accordingly, and the Jury, upon the *Circumstances of the Case, gave one Penny Damages for the Defendant.*

Mr. P. Counsel moved for a new Writ of Inquiry ; upon Issue joined the Jury may find for the Plaintiff or Defendant, at their Discretion ; *but after Judgment they are only to inquire into the Quantum of the Damages the Plaintiff has sustained, and cannot give Damages against him ; and of this Opinion was the Court, and therefore thought a new Writ ought to go.*

Mr. S. Counsel *cont'*: *It must be upon the common Terms then, upon Payment of Costs.*

Mr. P. Counsel cited the Case of the *Earl of Rotchford* and the *Bishop of Norwich* in the G. P. A *Quare Impedit* was brought, and Judgment by Default, and upon executing a Writ of Inquiry, the Jury found there was no such Church; and upon that Application was made to the Court, who granted a new Writ without Payment of Costs.

[98] Mr. S. Counsel: The Reason is, because no Costs are given upon a *Quare Impedit*. It is the constant Practice to pay Costs upon Motions of this Nature; if the Plaintiff will waive his Judgment, we will waive our Costs, and plead the General Issue. *But the Plaintiff not consenting, the Court enlarged the Rule.*

46.—THE KING *versus* ANNE, Ux' of HANNIBAL CARTOR. *Mich. 6 Geo. II.*
[1732]. *B. R.*

One committed as a loose, idle disorderly Person, till she find Security, bailed on a *Habeas Corpus*.

The Defendant, being a Negro Slave, was carried by her Master before a Justice of Peace, who committed her to *Bridewell* as a loose, idle disorderly Person, and for Insulting and Abusing her Master. It was further set forth, that she was committed for Want of Sureties; and Directions to the Gaoler to keep her till she found good and sufficient Bail; she was now brought down by *Habeas Corpus*, and Mr. K. Counsel moved to have her discharged; the Commitment is by one Justice of Peace only, and is not a *Conviction* upon the Act of Parliament, like *Mary Talbot's* Case; for there she ought to have been sent to the *County-Gaol*. She is committed as a *loose, idle disorderly Person, for Insulting and Abusing her Master*; if the Court is of opinion that the Commitment is legal, we have got good Bail for Sureties.

Mr. R. Counsel *cont'*: The Insulting and Abusing her Master is an Offence bailable; *but being committed likewise as a loose, idle disorderly Person, she is not bailable.*

Cur': By the Commitment the Gaoler is charged to keep her in Custody only till she find Security. There is no certain Time limited in the Commitment how long she shall remain a Prisoner, as till the next Sessions, &c., and so by this Means she may remain a Prisoner for Life.

Mr. R. Counsel then offered to prove her a Slave, and that the Master might keep her a Prisoner, if he pleased; but the Court would not suffer him to enter upon that Point. She is committed for Want of Sureties, and must be bailed if she hath got any. There was an Affidavit read that she was married to a Freeman.

47.—BERRINGTON *versus* PARKHURST. *Mich. 6 Geo. II.* [1732]. *B. R.*

Vide post, Case 49.

Amendment of Issue in Ejectment.

Mr. R. and Mr. F. moved to shew Cause. *This is a Rule to amend a Declaration in Ejectment, by altering the County and laying the Demise in Bucks, whereas [99] now it is for Tithes in Middlesex.* This Amendment goes to the very Substance and Jett of the Action, and the Defendants have pleaded to the Demise, as laid in the Declaration. There is a Difference between Actions in Ejectment and all other Cases; and the Court will never suffer the Plaintiff in Ejectment to amend his Declaration.

Mr. A. Counsel *cont'*: The Court have frequently suffered the Plaintiff to amend his Declaration, where the Mistakes have been more material. *In Assumpsit by the Executors of the Duke of Marlborough, the Court gave the Plaintiffs Leave to amend, by laying the Assumpsit as a Promise made to them, whereas before it was laid as a Promise made to the Duke himself.* So where the Word *Felonice* hath been omitted, the Court have given Leave to amend after Issue joined, and the Cause been actually carried down to Trial. Ejectments are the Creatures of the Court, and therefore may take greater Liberties in rectifying these Mistakes. *In this Case the Declaration which was delivered in the County is right, it is the Declaration in the Copy of the Issue which is wrong.*

Cur': *We never suffer Declarations in Ejectment to be amended where it alters the*

Substance of the Action; but if the Declaration delivered in the Country is right, the Copy of the Issue may be amended by it; but here the Rule is only to amend the Declaration, and you cannot amend the Copy of the Issue by this Rule; and therefore the Rule must be discharged.

48.—THE KING *versus* INHABITANTS of ECCLESHOME. *Mich. 6 Geo. II. [1732]. B. R.*
Highways.

Mr. P. for a *Certiorari* to remove an Order of the Justices relating to the Repairs of the Highway, and obtained a Rule to shew Cause. Mr. L. There is no Act which prescribes a Method for the Repair of the Ways but the 3 & 4 W. & M., by that Statute, no *Certiorari* lies, unless the Right come in Question; by 7 & 8 W., when a Township is not able to repair the Ways, if the Inhabitants will contribute 6d. *per Pound*, the *Parish is to repair*; but how? by the Method prescribed by 3 & 4 W.

Cur': How can the Justices make an Order to repair, and how can they make a Rate but by 3 & 4 W.? Rule discharged.

[100] 49.—BERRINGTON *versus* PARKHURST. *Mich. 6 Geo. II. [1732]. B. R.*

Vide ante, Case 47.

Issue in Ejectment amended by the Declaration.

Mr. A. now moved again to mend the *Copy of the Issue by the Declaration delivered*, by changing the County from *Middlesex* to *Bucks*, which was granted by the Court; but they refused to let the Plaintiff strike out *Tenementa prædict'*, and insert *dimissa præmissa* instead of them, or to let him strike out the 5s. *Rent*.

50.—LANCE *versus* DRAPER. *Term. Hil. 6 Geo. II. 1732. B. R.*

Motion to quash a *Testatum Ca' Sa'* for a Variance between the Writ and Record.

Plaintiff had Judgment to recover his Debt and £5 *pro Dam' & Custagiis*. The Defendant brought Error; and Judgment being affirmed, the Plaintiff had £12 for his Costs allowed him upon the Writ of Error. Whereupon he took out a *Cap' ad satisfaciendum* to levy the Debt and Costs upon the original Judgment, *acetiā* the £12. Costs upon the Writ of Error. The Plaintiff afterwards took out a *Testatum Ca' Sa'* to levy the Debt and Costs recovered below, but took no Notice of the Costs upon the Writ of Error.

Mr. R. Counsel moved to quash the *Testatum Ca' Sa'* for this Variance.

Mr. S. *conl'*: Here is no Variance, but the *Testatum* is agreeable to the original Record; before the Statute for Amendment of Writs of Error, where the Writ contained more than the original Record, that was always held to be a material Variance; but where the Writ contained less, as where Judgment was against A. of B. in the County of, &c., and a Writ of Error had been brought to reverse the Judgment against A. without mentioning the Addition, yet the Writ was always held sufficient; and the Reason is, because it is agreeable to the original Record; and tho' it is not set out in so full a Manner as it might be, yet there is sufficient to make it answer the original Record.

But the Court took Time to consider.

[101] 51.—KENT & Ux' *versus* WRIGHT. *Hil. 6 Geo. II. [1733]. B. R.*

Bond conditional.

The Defendant and another were jointly and severally bound in a Bond of £200, conditioned to pay £100 at a Day certain; but it was further provided, that if the other Obligor became insolvent, that then the Defendant, upon Payment of £50 at the Day, should be discharged of the Bond. The Plaintiff brought his Action upon this Bond against the Defendant, who paid £50 into Court, and then pleaded a Tender, and that the other Obligor was become insolvent; the Plaintiff took the £50 out of Court, and

then demurred to the Defendant's Plea, in order to have his Damages and Costs ; whereupon the Defendant moved the Court to stay Proceedings.

Mr. T. Counsel for the Plaintiff insisted, that the Tender was not well pleaded ; for that it did not appear when the other Obligor became insolvent ; and if he did not become so till after the Day of Payment, then the Condition was broke, and the whole Penalty forfeited ; and cited 2 Cro. 594.

Mr. S. Counsel *cont'* : The Defendant must go before the Master to see what Damages accrued before the Money was paid into Court. The Plaintiff insists, that the Tender is not well pleaded ; *but he has waived that by taking the £50 out of Court*, so that nothing is now to be considered but the Costs and Damages.

Cur' : The Condition of the Insolvency must have Reference to the Day of Payment ; but if the Insolvency happened after that, the whole is forfeited ; it does not appear by this Plea when the Insolvency happened, but the Plaintiff *has waived this by accepting the £50*, and so referred it to the Master, to see what was due for Costs and Damages before the £50 was brought into Court.

52.—MUSGRAVE *ver.* POVEE. *Hil.* 6 *Geo.* II. [1733]. *B. R.*

Vide *post*, Case 54.

Prohibition to a Libel in the Spiritual Court for Words.

The Defendant was libelled against in the Bishop of Ely's Court, for calling the Plaintiff *Rogue and Rascal*.

Mr. F. Counsel moved for a Prohibition, and suggested that these were Words *only of Heat and Passion, and occasioned by the Plaintiff's giving ill Language first, and calling the Defendant a Liar. These Words are not punishable in the Spiritual Court. To shew Cause.*

53.—CRIPS *versus* LANDER. *Hil.* 6 *Geo.* II. [1733]. *B. R.*

Error.

Mr. M. Counsel for the Plaintiff in Error. *Assumpsit* against the Defendant an Attorney in C. B. by Bill, *Hil.* 5 *Geo.* 2, and an Imparlance to a Day certain in Easter Term ; Judgment for the Plaintiff by Default, and a Writ of Inquiry taken out returnable *Cras' Ascens' Dom.*, which is the last general Return in Easter Term, and thereupon final Judgment. And the Error insisted upon was, *that Bills in C. B. are of the same Nature with Bills in this Court, and that all Process issued out in Consequence thereof ought to be made returnable at a Day certain.* That this Error is a Misaward of Process, and not amendable within any of the Acts of Jeofails, which extend only to Judgments after Verdict.

S. Counsel : This is a *Discontinuance*, and aided by 32 *H.* 8, which aids Discontinuances after Verdict only ; but the late Act for Amendment of the Law extends to *Judgments by Default*, and brings them within the Remedy of that Statute ; and the Case of *Leppor and Hobbs* was cited by Mr. Draper (*amicus Cur'*) which Case was in *Pasch.* 3 *Geo.* 2, *Action against the Defendant an Attorney in C. B. by Bill*, and Judgment by Default ; the Plaintiff took out a Writ of Inquiry, returnable at the General Return ; Error was brought in this Court, and held to be within the Statute of Jeofails.

The same Cause argued again.

Mr. S. Counsel now spoke to this Cause again, and said it was nothing but a Miscontinuance aided by 32 *Hen.* 8, and cited the Case of the *King and the Bishop of Meath in Ireland* ; which was a *Quare Impedit* returnable at a Day certain, but the Return in the *Venire* was made upon the general Return-Day, and a Writ of Error being brought in this Court, *Pasch.* 3 *Geo.* 1, this was assigned for Error ; and after it had been spoke to several Times by the Counsel at the Bar, *Parker, C. J.*, in *Trin.* 3 *Geo.* 1, delivered the Opinion of the Court in Confirmation of the Judgment ; that *this was amendable by the Statute, being only a Miscontin[103]nuance of the Process, and cited 1 Inst. 325 a*, the Difference between a Discontinuance and a Miscontinuance. A *Discontinuance*

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in Process consisting in not doing where a Process is not continued; and a Miscontinuance is when one Process is awarded instead of another, or when a Day is given which is not legal. It was likewise held, that this Statute extended to Civil Causes at the Suit of the Crown. As to the Case of *Lepper and Hobbs* he said, he had looked into it, but it was entered with an *Adjournatur* only, and not determined. The Court held the first Case to be in Point; and that there was no Difference, only in the present Case the Jury appear upon a Writ of Inquiry, and there they were returned by *Venire*; and so Judgment was affirmed *per Cur.* And it was adjudged afterwards in *Easter Term* following, *inter Burrows versus Dogley.*

54.—MUSGRAVE *ver.* POVEE. *Hil.* 6 *Geo.* II. [1733]. *B. R.*

Vide ante, Case 52.

Prohibition.

Mr. F. Counsel moved to shew Cause, &c. These Words being spoken by one Clergyman against another, are Words of Scandal and Detraction, and *properly within the Cognisance of the Spiritual Court, and cited* 2 Roll. Abr. 295, *pl.* 8, 297; 2 Lutw. 1053, 1054, 1055; 3 Lev. 17.

Mr. F. Counsel *cont'*: These are only Words of Heat and Passion, and in no wise reflecting upon his Function, and cited Comb. 253; 2 Show. 454.

Cur': In the sixth of the late Queen this Distinction was taken upon Motion of the like Nature. Where the Words in themselves import a Reflection upon the Profession or Business of another Person, and where they are general, and have no Tendency to any particular Function, as in the present Case; *Rogue and Rascal* are general Words, and do not in the least relate to the Function of a Clergyman; and therefore made the Rule absolute for the Prohibition.

55.—THE KING *ver.* MOOR. *Hil.* 6 *Geo.* II. [1733]. *B. R.*

Perjury.—Motion to quash the Indictment.

Indictment for Perjury removed by Certiorari into this Court; the Defendant carried down the Record, and gave Notice of Trial, but not being ready with the Evidence he never entered the Record, and therefore was obliged to pay [104] the Prosecutor Costs. And now in this Term, Mr. S. Counsel moved in Behalf of the Prosecutor to quash the Indictment.

Mr. F. Counsel *cont'*: The Prosecutor is now too late; the Defendant has pleaded, and the Parties are at Issue. If the Indictment is now quashed, it must be upon Payment of the Defendant's Costs; and of this Opinion was the Court. And because the Prosecutor would not agree to pay Costs, the Court refused to quash the Indictment.

56.—HARCOURT *versus* SEAGRAVE. *Pasch.* 6 *Geo.* II. [1733]. *B. R.*

Special Demurrer waived, and *Nil debet* pleaded to Debt on a Judgment.—Refused to be set aside on Motion.

Action of Debt upon a Judgment; Defendant demurred specially, and there was a Joinder in Demurrer; but before the Time for Pleading was out, the Defendant struck his Demurrer out of the Paper, and pleaded Nil debet per Patriam.

Mr. B. Counsel to set aside this Plea. Whenever the Defendant demurs specially, and afterwards waives his Demurrer, he can plead nothing but the General Issue; but *Nil debet* is no Plea to an Action of Debt upon a Judgment.

Sed per Cur': In all Cases where a Plea in Bar is pleaded, we never suppress it upon Motion; *Nil debet* is a general Issue; and tho' it may not be a proper Plea in this Case, yet it is a Plea in Bar, and so falls within the general Rule; if the Plea is ill the Plaintiff may demur.

57.—HIL. *versus* Sir THOMAS REYNOLDS. *Pasch. 6 Geo. II. [1733]. B. R.*

Demurrer.—Motion to set it aside.

Upon Motion to set aside a Demurrer, the Case was this : Action upon several Covenants ; the Defendant, without craving Oyer of the Indentures, set forth Indentures of Covenant in his Plea, and then demurred generally to the Declaration ; but the Court set aside the Demurrer ; because the Defendant cannot set forth any Deed, &c., without craving Oyer.

Sed Quære. For tho' the Party demanding is not bound to plead without it, yet he may plead without it, if he will, on taking upon himself to recover the Bond or Deed ; tho' if he plead without Oyer, he cannot after waive his Plea and demand Oyer. *Mo. Ca. 28 ; 3 Salk. 199 ; and in Wymark's Case, 5 Rep. 74.* A Defendant pleaded a Deed without a Prof', [105] &c., the Plaintiff confessed a Deed, but without Oyer shewed the Condition, and assigned a Breach ; and held good.

58.—HERON *ver.* BUSHELL. *Pasch. 6 Geo. II. [1733]. B. R.*Error *coram vobis* will not lie after Affirmance.

Action in the Palace-Court ; the Defendant being a married Woman pleaded Coverture, but the Plea being over-ruled Judgment was given against her. A Writ of Error was brought in B. R. and general Errors assigned, and upon that Judgment affirmed. Defendant then brought Error coram vobis, intending to assign Error in Law ; and thereupon the Plaintiff moved to have Execution ; for after Judgment affirmed a Writ of Error coram vobis will not lie ; but in Support of this Writ was cited the Case of Tompson and Lyon, Pasch. 4 Geo. 2. In an Action in the Marshalsea-Court, the Defendant gave Coverture in Evidence, notwithstanding which Judgment was given against her ; whereupon she brought Error in this Court, and Judgment was affirmed ; she afterwards brought Error coram vobis, and assigned for Error that she was a Feme Covert, and the Court allowed this for Error in Fact, and reversed the Judgment. But the Court afterwards in the present Case granted the Motion, and held, that Error coram vobis will not lie after affirmance of Judgment ; for this Writ shall not be allowed but at the Discretion of the Court ; and L. J. cited 1 Vent. 31. Vide Cro. El. 281, Error coram vobis.

59.—CHARLTON *versus* BANKCROFT. *Pasch. 6 Geo. II. [1733].*

Error.

After Judgment in B. R. the Parties entered into an Agreement not to bring Error in Parliament, notwithstanding which the Defendant brought Error, &c., upon this the Plaintiff applied to the Court to quash it, and had a Rule accordingly ; upon which he immediately took out Execution ; and the Court being now moved to set aside this Execution, it was insisted upon, and so ruled by the Court, that the Rule was no Superseas to the Writ of Error ; if the Defendant refused to obey the Rule, the Plaintiff might have had an Attachment ; but while the Writ was in Being the Plaintiff could not sue out Execution.

[106] 60.—DARBY *versus* GOLD. *Pasch. 6 Geo. II. [1733]. B. R.*Record of *Nisi prius* lost.—Motion to make a new one.

Action of Debt upon a Bond, and a Verdict for the Plaintiff ; but the Record of Nisi prius being lost, Mr. F. Counsel moved for leave to make a new Record, and cited the Case of Harvey and James, 1 Vent. 92, 93, and said, there were several other Cases to this Purpose ; and upon this a Rule was made accordingly.

In the Case of Needham and Granger, 9 Geo. 1, the Distringas being lost a new Writ was granted per Cur', returnable by the Sheriff of Bristol.

61.—JURANTS *ver.* WILLIAMS. *Pasch.* 6 *Geo.* II. [1733]. *B. R.*

Error.

Error upon a Judgment in C. B. upon an Action brought by an Attorney of that Court by Bill against the Defendant Executor, &c., for his Fees and Business solicited for his Testator; and the Declaration set forth, that the Defendant being indebted to him in the Sum of £6 for Business done and performed, &c., he in Consideration inde promised to pay him £60. Defendant pleaded several Judgments had against him as an Executor, and that he had not Assets ultra to satisfy the Plaintiff's Demands. The Plaintiff confessed the Defendant's Plea, and entred Judgment with Prayer of Execution of Assets quando acciderent; and a Writ of Error being brought upon this Judgment, Mr. M. Counsel took two Exceptions, first, That this being an Action upon several Promises, the Consideration must be mutual, or otherwise the Action will not lie; and the Sum of £6 is not sufficient to raise a Consideration for the Payment of £60. His second Objection was, that the Proceedings being by Bill, the Defendant in his Plea ought to have concluded no Assets die impetrationis Billæ, and not as he has done in this Case, that he had no Assets die impetrationis Brevis originalis.

Mr. D. Counsel cont': As to the first objection he said, the Sexagint' Libras, mentioned in the Consideration, was only Surplusage, and the Declaration is well enough without it; for it is said in the Consideration inde he promised to pay prædict' Sexagint' Libras; so that if the Sexagint' be omitted, the prædict' libras is good. To the second Objection he said, [107] if the Defendant's Plea is naught, Judgment must be for the Plaintiff in either Court, for the Defendant cannot take Advantage of his own Error; and the Judgment was affirmed per Cur'. Vide 1 Lutw. 445; Cro. El. 647; Palm. 74; Savil 71. Sexagint' rejected as Surplusage. Cro. El. 747, pl. 28, the Sum of £10 sufficient to raise a Consideration for Payment of £100.

62.—KING *versus* HORWELL. *Pasch.* 6 *Geo.* II. [1733]. *B. R.*

Certiorari.

Mr. R. Counsel, to quash a Certiorari, which was granted to remove several Orders of Justices of the Peace, that were made at the General Sessions for the Repair of Highways, according to a Power granted to them by the 3 & 4 W. & M. c. 12, by Virtue of which Statute, the Justices may in Sessions order an Assessment to be made to repair the Highways, &c., provided such Assessment does not exceed 6d. in the Pound; and it is further enacted by the same Statute, that all Matters concerning Highways, &c., shall be determined in the County where the same do lie, and not elsewhere; and that no Presentment, Indictment or Order, made by Virtue of this Act shall be removed by Certiorari out of the said County into any other Court. Per Cur': A Rule to shew Cause.

63.—GOODTITLE *ver.* PETTOE. *Pasch.* 6 *Geo.* II. [1733]. *B. R.*

Ejectment.

In Ejectment the Case was thus: Birk being seised of Lands in Fee covenanted (out of the natural Love and Affection which he had for his Wife Anne, and for her better Provision and Maintenance after his Decease), to stand seised to the Use of himself and Anne his Wife during their Lives, and the Life of the Survivor of them; and after his Decease, and the Decease of the Survivor of them, then to the Issue of their two Bodies lawfully to be begotten; and for Default of such Issue, Remainder to his Wife for Life, with a Power to limit over the Estate to such Persons, and to such Uses, as she should appoint; and for Want of such Appointment, Remainder to William Thornton the Lessor of the Plaintiff in Fee. Birk died without Issue; Anne entred; and by Lease and Release conveyed the Lands in Question to her sister Jane Smallpiece in Fee, who made a Lease of the Premises in [108] Question to the Defendant. Anne dies; after whose Death William Thornton enters; upon whom Pettoe the Lessee of Jane Smallpiece re-enters, upon which the Ejectment is brought. And this Matter being made a Case for the Determination of this Court, Mr. R. Counsel argued for the Plaintiff, and Mr. F. for the Defendant.

Mr. R. the Doubt in Question depends upon these two Points, viz. what passed by the Lease and Release to Jane Smallpiece; and if it should be adjudged that nothing passed

by that Conveyance, then 2dly, whether the Limitation of the Use to William Thornton was a good Limitation to raise a Use to him or no. As to the first Point, whether a Use is raised by Fine or Feoffment, there is no Occasion for any Consideration ; because the Uses are raised out of the Estate of the Trustees, in whom the whole Fee-simple is vested ; but in all Cases upon Covenants to stand seised, the Use arises out of the Estate of the Covenantor, in whom the Fee remains till the contingent Use arise ; and therefore there must be a Consideration, otherwise no Use can arise upon such Limitations. 2 Sid. 66. Natural Love and Affection is a good Consideration by Reason of Proximity of Blood ; so the Love and Affection which a Man bears towards his Wife, is a good Consideration ; but where there wants Privy of Blood, or a valuable Consideration in Money, there the Limitation is absolutely void. In this Case therefore the Limitation of the Use to the Wife is a good Limitation, there appearing a sufficient Consideration upon the Face of the Deed itself to raise a Use to her ; she takes an express Estate for Life ; but what makes the Doubt in this Case is, the Power which is given to the Wife of limiting over the Estate to such Persons, and to such Uses, as she shall appoint ; so that here is no *Cestui que Use* named in certain, neither can any Consideration be intended in Blood ; if Jane Smallpeice hath any Title, she must claim by the first Covenantor ; but she cannot claim under him, because she is a Stranger to the Covenantor, and likewise there is no Consideration ; supposing the Covenantor had covenanted out of Love, &c., to his Wife, to stand seised to the Use of his Wife for Life, Remainder to Anne Smallpeice ; in this Case no Use could arise to Anne Smallpeice ; for there is no Consideration either express or implied ; and being altogether a Stranger in Blood, she cannot claim under the first Covenant. Nor can any Consideration be averred in this Case, because the Appointee, at the Time of raising the Use, was uncertain ; and this agrees with Mildmay's Case. Where Uses are raised by Covenant in Consideration of paternal Love, &c., or for the Advancement of any of his Blood, and after in the same Covenant a Proviso is added, that [109] the Covenantor for divers good Considerations, may make Leases for Years to his Sons or Daughters, or any other of his Blood ; yet the Covenantor in such Case cannot make Leases to his Sons, &c., much less to any other Person ; because the Power to make Leases for Years was void when the Indenture was sealed and delivered ; for the Covenant upon such general Consideration cannot raise an Use ; and no particular Averment can be made, because his Intent was as general as the Consideration was ; and his Intent at the Time of the Delivery of the Deed was not to make a Lease to any Person in certain, but a Demise generally to whom he pleased ; and therefore the Power to make Leases, the Uses being created and raised by Covenant upon the Consideration aforesaid, were void *ab initio* ; and no Averment can make it good, or reduce it to any Certainty, for the Intent of the Covenantor is as general as the Words are, 1 Rep. 176 b. As to the second Point, viz, Whether there appears sufficient Matter upon the Face of the Deed to raise a Use to William Thornton, he argued, a good Use would arise to William Thornton. If a Man covenants for divers good Causes and Considerations to stand seised to the Use of John a Stiles, tho' J. S. is not mentioned to be of his Blood, yet the Relation he bears to the Covenantor may be averred ; in this Case there is no Question but if William Thornton had been mentioned to be the Sister's Son, but then a good Use would have arisen to him upon that Covenant ; and the Consideration of Love, &c., might have been averred, as is adjudged in Mildmay's Case, 1 Rep. 176 b, 177 a.

It is the Intent of the Covenantor not only to provide for his Wife, but his Intent is likewise to provide for William Thornton who was his Sister's Son ; if Love and Affection to his Wife had been omitted, yet all Uses in Remainder to Relations and the next of Kin had been good ; nor can the Consideration of Love, &c., to his Wife, mentioned and expressed in the first Limitation, destroy these subsequent Uses ; for a Consideration, when it is not inconsistent with the Deed, may be averred ; tho' a Consideration be expressly mentioned in the first Limitation ; and so is Bedel's Case, 7 Rep. 40 ; Harpur's Case, 11 Rep. 24 b, 25 a, where it is also resolved, that altho' she be not mentioned to be his Wife, yet an Averment may be made to that Purpose ; so if a Man covenants to stand seised to the Use of J. B. without mentioning him particularly to be his Son, yet J. B. may be averred to be his Son.

Mr. F. cont' : He agreed, that the two Points were the Proper Points in Question ; in this Case, the Power which is given to the Feme of limiting over, &c., depends upon the first Consideration, and the Uses which fall within that Consideration will be good ; the Reason of Mildmay's Case is, because the Uses arising from the Power reserved

to the Covenantor do not fall within the Consideration mentioned in the Covenant ; it is admitted, that if the Estate had been limited to Anne in Fee, that in that Case the Lease and Release to her Sister Jane Smallpiece would have been good ; the Limitation, as it now stands, falls strongly within that Reason, only the Method in which it is now limited is more advantageous to her than if it had been actually limited in Fee ; for as it now stands, if she had remarried with another Husband, she might notwithstanding her Coverture have disposed of it by Will or otherwise to her own Relations. Here is an express Power given to Anne upon Consideration of Love and Affection ; which Power she hath put in Execution by making a Lease and Release to Jane Smallpiece, who does not claim as by a Conveyance from Anne, but is in by Virtue of the first Covenant ; if a Man, in Consideration of Money given by B., covenants to stand seised to the Use of B. for Life, Remainder to C. in Fee, the Remainder to C. is good ; and yet he is a Stranger to the Gift of the Money. 2 Roll. Abr. 784, pl. 6 & 7. But the Remainder is grounded upon the Consideration ; and yet the Conveyance in that Case did not operate by Way of Bargain and Sale, but by Way of Covenants to stand seised, and the Power of limiting over ; this Case is grounded upon that Consideration. Note : Since the Statute, where a Person covenants to stand seised in Consideration of Money, after the Covenant is inrolled it operates by Way of Bargain and Sale ; and yet it does not take its Effect from the Inrolment, but from the first Covenants. In the Case of Knight and Tomlinson, the Testator devised Lands for one to Life, with a Power to the Devisee to limit the Estate over in Fee ; and adjudged, that where a Person takes an express Estate for Life, he cannot take a greater Estate by Implication ; but nevertheless the Devisee may dispose of the Estate according to the Power given him by the Testator ; which Determination falls within the Reason of this Case. And yet in that Case, had the Power been general, without giving an express Estate, a Fee would have passed. 1 Salk. 239.

As to the second Point, viz. whether there appeared sufficient Consideration to raise a Use to William Thornton, he held there did not ; for the Consideration must be such a Consideration as the Testator had in View ; if a Man covenants to stand seised without mentioning any Consideration, there can be no Averment of a Consideration ; in Mildmay's Case, where Love and Affection is expressed, the Person to whom the Use is made may aver in what Degree he stands related ; as that he is Son, Brother, &c., so if the Covenant be general with Consideration, and the Person and the Relation he bears the Covenantor be shewed, the Consideration may be averred ; but in this Case there is no Consideration, nor does it appear in what Degree William Thornton stands related to the Covenantor ; and so a Difference between this and Mildmay's Case, and therefore cannot be aided by Averment. The Statute of Frauds makes this Case much stronger ; for by that Statute, all Declarations and Uses of Trusts, &c., are made void, unless proved by some Writing signed by the Party, or by his Last Will in Writing ; now here appears nothing in this Writing to raise a Use ; for altho' Uses are declared, yet if there does not appear sufficient Matter to create them, the Declaration is made void by that Statute ; for since the Statute, no Use can be averred by Parol, but must be reduced into Writing, &c. He urged further, that the Consideration is not sufficiently found in this Case, which is now to be considered in the Nature of a Special Verdict ; it ought to have been found certain, that the Use arises upon Consideration of Love and Affection ; for in Pleading, it is not sufficient to alledge he is Son, &c., without averring the Consideration ; for upon Issue joined nothing can be found upon Verdict, but that he is Son, &c., so that if no Consideration be found, none can be inferred afterwards to raise the Use.

Mr. R.'s Reply : The Case of Knight and Tomlinson is a Case in Point, so far as it manifests that Anne took an Estate for Life. It is expressly laid down in Bedel's Case, that an Averment may be made that is consistent with the Deed, provided the Person is certain ; and that this Averment is traversable and issuable appears in Mildmay's Case, 1 Rep. 176 b. In the present Case the Person is certain, viz. to William Thornton ; and had he been mentioned in the Deed as Sister's Son, without Doubt that would have been a good Consideration to have raised a Use. The Statute of Frauds doth not extend to this Case ; the Limitation is here by Deed, &c., and the Averment is only to make and explain the Consideration available ; but it does not extend to create the Uses, but is only to make the Consideration sufficient to support the Uses which are declared by the Covenants to stand seised, and reduced into Writing according to the Statute.

Raymond, G. J. Under whom does Jane Smallpiece, to whom the Lease and Release was made, claim, and how does that Conveyance to her operate ? It arises out of the

Estate limited by the Husband, and she being a Stranger in Blood to him, and there having been no Consideration of Money made to him, the Lease and Release is void ; for she does not claim by that only, but by Virtue of the first Cove[nant] ; Averments in these Cases are not altered by the Statute, nor does the Act extend to them. The Intent of the Covenant is plain ; but the Question in this Case is, how the Use will arise, and whether the Consideration is made good by Averment.

P. J. No Part of the Consideration can extend to the Lessor ; for natural Love and Affection to the Wife cannot be extended to the Nephew ; neither can the Intent of the Covenant make the Uses good, for there must be a Consideration, or the Limitation is void ; and the Intent can go no further than appears upon the naked Limitation of the Uses themselves.

P. J. This case will deserve Consideration. If Jane Smallpiece hath any Estate, she must claim it from the Covenantor. But she can claim no Estate from him, because there is neither Privy in Blood, nor Consideration in Money ; and in all Covenants to stand seised there must be a Consideration, or the Limitation is void. When a Consideration is once expressed, it will extend to all to whom a Use is limited ; provided the Persons are certain, and mentioned by Name within the Deed. The finding helps the Plaintiff in this Case ; he is found to be the Sister's Son, which is as strong as if he had been so named in the Deed.

L. J. The Defendant can have no Title in this Case ; for the Person who conveyed to her had but an Estate for Life, and no Fee ; if therefore the Defendant hath any Title, it must arise out of the Estate of the first Covenantor ; but it cannot arise out of his Estate, because no Privy in Blood, nor other valuable Consideration. As to the second Point, there arises some Difficulty, tho' upon the Equity of those Cases which have been cited, the Plaintiff seems to have good Title. Wherever in a Deed the Considerations are general, an Averment which is consistent with the Deed may be made ; so where the Consideration is particular, as if a Man covenants out of Love, &c., to his eldest Son to stand seised, &c., Remainder to his second Son, notwithstanding the Consideration is particular, and restrained to the eldest Son, yet it may be extended to an Averment to relate to the second Son ; but there he is expressed to be his Son, which is an Explanation of the Consideration upon which the first Use arises. In this Case, here is no Explanation, and yet he said he was inclinable to think it aided by the Averment. The Statute of Frauds is not in Question, nor of any Force in this Case ; for when the Use is created by Deed, the Consideration may be averred, as Payment of Money, &c. Sed adjournatur, in order for a second Argument.

[113] Upon the second Argument, Raymond, C. J., delivered the Opinion of the Court as follows, viz.

That the Remainder to the Wife, with a Power to limit over the Estate to such Person or Persons as she should appoint, was a void Limitation, and consequently her Conveyance to Anne Smallpiece by Lease and Release was a void Conveyance, and therefore the Defendant can have no Title. 2dly, That the Remainder to William Thornton was good ; for here is a Cestuique Use named in certain, and he is found by the Verdict to be Nephew to the Covenantor ; and according to the Resolutions in 1 Rep. 176 b, 177 a, Mildmay's Case. 7 Rep. 40, Bedel's Case. 11 Rep. 24, 25, Harpur's Case. The Consideration may in this Case be averred ; and therefore Judgment was given for the Plaintiff per totam Cur'.

64.—GALE ver. MOTTRAM. Pasch. 6 Geo. II. [1733]. B. R.

Vide post, Case 103.

Arbitration Bond.—Defendant, after further Time given him by the Court to plead, may demur generally.

In an Action upon an Arbitration Bond the Defendant pleaded no Award. The Plaintiff in his Replication set forth an Award, and assigned a Breach ; whereupon the Defendant applied to the Court for further Time, and had a Rule for further Time to plead ; the Defendant staid till the Time was expired, and then demurred generally. Mr. F. Counsel now moved to set aside the Demurrer, and that the Plaintiff might have Liberty to sign Judgment ; because the Defendant had not pleaded an issuable Plea, as is the usual Practice in all Cases where he moves for Time to plead, and it is

under these Circumstances only that the Rule is granted ; so is the common Practice in Cam' Scacc' ; and tho' he could not produce a Precedent in this Court, yet the Reason of the Thing is the same ; for otherwise the Obtaining the Rule would only be a Trick of the Defendant's to get Time in Order to delay the Plaintiff's Proceedings ; for the Defendant may, at any Time before Judgment, waive his Demurrer and plead over.

P. and the rest of the Justices against the Motion. There are two ways of Pleading the General Issue ; the one when the Plea goes to the Fact, and concludes to the Country ; the other is by Demurrer, which is an Issuable Plea in Law ; we do not indeed in these Cases allow him to plead a dilatory Plea, as in Abatement, &c., but upon Demurrer the Plaintiff may join Issue, and have Judgment upon the Pleadings. I do not see how the Defendant could have pleaded a [114] general Plea to the Country ; for should he rejoin and plead no Breach, that would have been a Departure from his first Plea, and would admit an Award. When the Defendant moves for Time to plead, he does not by that Means waive any other Advantage ; and so the Motion was denied per Cur'.

65.—INNYS versus SINCLEAR. Pasch. 6 Geo. II. [1733]. B. R.

Vide Holmes versus Mendese, Case 106.

Bail upon Affidavit.

The Defendant was arrested, and held to Bail, upon Affidavit made by a third Person, and not by the Plaintiff himself, of a Note which he had seen in the Hands of a Notary Publick at Hamborough, whereby the Defendant promised, &c., to pay the Plaintiff, &c. Mr. F. moved to discharge the Defendant upon common Bail, because the Affidavit was not sufficient to ascertain the Cause of Action.

Mr. S. Counsel opposed the Motion, and offered to supply this Defect by a supplemental Affidavit. To which it was answered, that 12 Geo. 1, intitled an Act to prevent frivolous and vexatious Arrests, makes it necessary for the Affidavit to be previous to the Arrest, and so are the express Words of the Act ; but in this Case it is admitted, that the Affidavit upon which the Arrest was made is insufficient ; it must therefore be thrown out of the Question, and then how will the Matter stand ; it will stand thus, that the Defendant was arrested without any Affidavit at all, which is illegal, and contrary to the Act of Parliament, which enacts, that no Person whatsoever shall be arrested and held to special Bail, unless Affidavit be made by the Plaintiff, that his Debt is upwards of £10, and except the Sum sworn to be indorsed on the Back of the Writ. On the other Side it was said that the Plaintiff in this Case had in every Respect complied with the Terms of the Act of Parliament ; for in the first place, here is an Affidavit of the Debt made before the proper Officer, and the Sum sworn to is indorsed on the Back of the Writ ; by which it sufficiently appears, that the Cause of Action is such as will hold the Defendant to special Bail ; and tho' it is not entered so regularly as perhaps it might have been, yet certainly the Plaintiff is now at Liberty to supply the Defect by a more perfect Affidavit, and in this last Affidavit, the Cause of Action is sworn to, and the Defendant's Acknowledgment of the Debt ; and the Case of Hobhouse and Hansell, Pasch. 4 Geo. 2, which [115] was to this Effect ; Plaintiff made Affidavit before the proper Officer, that the Defendant was indebted to him in the Sum of £40, but did not swear to the Cause of Action at that Time, but afterwards, before the Purchasing the Writ, he made a fresh Affidavit of the Cause of Action ; which was held good, because both Affidavits were before the Issuing of the Process. In the original Case the Court being divided, adjournatur.

66.—GAMBIER ver. WRIGHT. Pasch. 6 Geo. II. [1733]. B. R.

Vide post, Case.

Error.—Escape.

Writ of Error out of the Common Pleas in an Action of Debt upon an Escape ; the Case was this : J. S. was taken upon a Latitat issuing out of this Court at the Suit of Wright, and committed to the Custody of the Marshal of the Court of King's Bench, and was afterwards brought by Habeas Corpus before Denton J. of the Common Pleas, who committed him to the Custody of the Warden of the Fleet, from whence he made his Escape ; whereupon Wright brought his Action against Gambier the Plaintiff

in Error, and had Judgment. H. Serjeant took two Exceptions; his first Objection was, that the Commitment to the Fleet was void; because it does not appear, that at the Time of bringing the *Habeas Corpus* there was any Process out of C. B. against J. S., and therefore the Commitment was illegal, and no Breach of Duty in the Warden to let him go at large; for the Commitment being insufficient, he was never legally in his Custody; and his being in the Warden's Custody does not make him a legal Prisoner. The Plaintiff in his Declaration sets forth, that J. S. was in Custody of the Marshal upon a Latitat issuing out of this Court; that he was removed by Habeas Corpus, and committed by Denton one of the Judges of the Common Pleas, to the Fleet; but does not alledge any Process in that Court returnable against him.

The Question therefore will be, Whether a Jurisdiction is to be intended, where nothing appears upon the Record? He said, he did not doubt but that there was Process at that Time against him (the Defendant), but the Objection is, that nothing of this appears upon Record; and therefore the Commitment must be taken to be *Coram non judice*; for the Jurisdiction of Inferior Courts is not to be intended. Whenever a Man is brought into this Court by Bill, the Plaintiff always declares in Custod' Maresch'; so if the Process be by Original, the Declaration always sets forth *quod summonitus fuit ad respondendum*. In like Manner, where an Attorney [116] sues out a Writ of Privilege, it always appears upon the Process that he is an Attorney; and this is the constant Method of proceeding in C. B. If the Defendant was committed in C. B. without any Process, the Commitment is void. 1 Rol. Rep. 217, *Hildersham's Case*. Cro. El. 223, pl. 4; Lutw. 1468; Moore, 274; 2 Leon. 84; 2 Bulst. 62; Cro. El. 877; Cro. Jac. 394; 1 Rol. Rep. 276. So where the Process is out of Court, an Action of Escape will not lie. Salk. 273, 700, *Shirly and Wright*; and in 4 & 5 W. & M. c. 21, it is said, if any Defendant be charged in Custody by Virtue of any Writ or Writs; but in this Case it does not appear there was any Writ depending; it is only said, he was imprisoned *virtute commissionis prædict*; which is not sufficient without Process against him out of that Court. His second Objection was, That this Commitment is void in Point of Form; for the Commitment is not as usual to the Prison of the Fleet, but to the Custody of the Warden of the Fleet, which is ill; for the Commitments in C. B. are not personal to the Warden, but local, Prisonæ of the Fleet; and the Form of every Court is the Law of that Court, and must be followed.

To these Objections Mr. D. answered, That by the *Habeas Corpus Act* every Judge hath the same Jurisdiction as the Court itself; it is a General Rule in Law, that all Superior Courts have an universal Jurisdiction, and the contrary shall never be presumed, unless it appears upon the Face of the Record. The Plaintiff in this Case has set forth as much as fell within his Privy; he says, J. S. was in Custody, &c., that he was removed by Habeas Corpus and committed, charged *inter alia*, &c. The Plaintiff is a stranger to his Commitment to the Fleet, and not necessary for him to set out more than his own Case; as in an Action against Assignees, he is supposed to know his own Title, but not his Adversary's. There is not so much as one single Instance produced, which shews the Form of declaring in those Cases to be in the Manner contended for, and the Truth is, there is not one Case in all our Books where any Averment is made of the Process, &c., but there are many Precedents which shew the contrary, as in Lev. Ent. 56; vide 2 Brown's Entr. 13 & 14; Rob. Entr. 307; Lil. Entr. 157, 188. As to the second Objection he said, There is no Difference between a Commitment to the Custody of the Warden of the Fleet & Prisonæ of the Fleet, they are the same Thing in Reason and common Parlance; for when a Man is committed to the Prison of the Fleet, he is committed to the Custody of the Warden of the Fleet, and so *e contra*. This Way of declaring is said to be contrary to Form, and that the Precedents are all otherwise; but if it be the same in the Substance, the Difference in Ex-[117]-pression will not vitiate it; and in Lil. Entr. 161 A Commitment is entered as this is; so in Rob. Entr. 302. A Person may be committed to the *Marshalsea* Prison, notwithstanding the usual Form of Commitments, it is to the Custody of the Marshal; and in the late Act of Parliament for Relief of insolvent Debtors, it is said, a Person committed to the Custody of the Warden, which plainly shews it to be the same Thing as a Commitment Prisonæ of the Fleet. But admitting the Form of this Commitment to be irregular, it is only erroneous, but not in itself void; for the Court had a Jurisdiction originally. 1 Salk. 272, 348; 5 Mod. 19; Carth. 148. And so concluded, that should this be taken to be a Defect in the Form of a Commitment, the Plaintiff shall not take Advantage of the Error upon an Escape, but shall be liable

notwithstanding; quod fuit concessum per Cur' to be an established Rule. And as to the Form of the Commitment the Court held it good; and tho' a Commitment to the Prison of the Fleet may in some Respects be said to be local, yet it is not so to all Intents and Purposes; for suppose a Prisoner escapes, and afterwards the Warden resigns his Office, shall the new Warden be answerable for this Escape? he certainly shall not. And the Court seemed to think it not necessary for the Plaintiff in this Action to shew there was any Writ in C. B. against J. S., for it shall not be intended to the contrary. Sed adjournatur, to be spoke to again.

97.—KING *versus* INHABITANTS OF UTOXETER. Pasch. 6 Geo. II. [1733]. B. R.

Certiorari lies not to return a Poor's Rate.

The Court after great Deliberation resolved, that a *Certiorari* did not lie to remove a Poor's Rate; that if the Rate be not a legal Rate, or if it be unequal, the Party aggrieved may there appeal to the Sessions for his Remedy upon the Distress; and so it was determined 10 Anne, in the Case of St. Mary's in Marlborough. A Rule was made to return the Poor's Rate, but was afterwards quashed.

98.—HAYS *versus* WARREN. Pasch. 6 Geo. II. [1733]. B. R.

[S. C. 2 Barn. K. B. 55, 71, 140; 2 Str. 933. See *Pillans v. Mierop*, 1765, 3 Burr. 1671.]

Error.—Case on *Assumpsit* for Work and Labour, not laid to be done *ex Requisitione Defendantis*.

Action upon the Case upon several Promises for Work and Labour done. Judgment by Default; the Defendant brought a Writ of Error, and assigned general Errors. [118] Mr. H. Counsel objected, that the Plaintiff did not appear to have any Cause of Action. This is an Action for Work and Labour done; there are several Counts in the Declaration, and it is not alledged in any one of them that this work was done *ex Requisitione of the Defendant*; this Action is grounded upon a past Consideration, the Plaintiff sets forth *cumq' etiam* the Defendant in Consideration that the Plaintiff *performasset & perfecisset*, &c., he promised, &c. This is in the Preterperfect Tense, and is for a Consideration passed, and therefore ought to have been coupled with a Request. 1 Rol. Abr. This is not Want of Form only, it is a Defect in Substance, and would not have been helped by the Statute of Jeofails, if a Verdict had been given in this Case. Cro. Eliz. 442, Jeremy and Goochman. *Assumpsit*, and declares, that in Consideration quod deliberasset & dedisset to the Defendant twenty Sheep, he assumed to pay unto him £5 at the Time of his Marriage; and alledged in fact that he was married; the Issue was *Non assumpsit*, and found for the Plaintiff; and moved in Arrest of Judgment, because it was for a past Consideration; for it is in the Preter-Tense deliberasset, &c., and therefore no Cause of Action; and of that Opinion was the whole Court, and therefore Judgment staid. So Cro. Eliz. 741, Barker and Hallifax; *Assumpsit*, whereas the Defendant such a Day and Year, in Consideration that the Plaintiff by the Defendant's Appointment, and for his Debt, paulo ante tunc solvisset to R. S. £60, that the Defendant assumed to pay it upon Request, &c., the Defendant pleaded *Non assumpsit*; and it was found against him; and after Verdict, upon Motion in Arrest of Judgment, the Judgment was staid; because the Payment of the £60 being a past Consideration, was not sufficient to maintain the Action. But Note: The Court seemed to think these Cases were not Law, because here was a good Consideration, and the Defendant has reaped the Benefit of it. In 3 Leon. 91, Merry and Lewis, which Cases are cited 2 Vent. 75, in Consideration he would repair a House at the Defendant's Request, he promised to pay, and alledged that he repaired it; and this was held naught after Verdict, for not saying he repaired it at Request. And so it was adjudged Pasch. 11 Ann. Powel and Coke Infant. No *Assumpsit* will lie upon a past Consideration, unless there be a Request which couples it to the Promise, where it is laid in the Declaration that the Defendant inde stood indebted, &c. A Request may not be necessary, because it is alledged to be a Debt, and it continues to be a Debt till it is discharged. So where it is alledged, that the Defendant in Consideration

the Plaintiff had bargained and sold, &c., in this Case the Plaintiff *need not aver a Request, because a Bargain [119] and Sale implies as much*; it is *Actus contra actum*, which couples the Request to the Consideration; but an *Assumpsit* for Work and Labour done, as it is laid in this Case, *viz. quod performasset & perfecisset, cannot imply a Request, because it might be done without the Knowledge or Privity of the Defendant*; and therefore an Action will not lie, unless it be expressly averred to have been done *ex Requisitione of the Defendant*.

Mr. S. Counsel *cont'*: He agreed, that in the old Books it was held, that a Request was necessary, but that these Niceties in Pleading had introduced great Inconveniences, and for that Reason the Law was now altered. *The Cases that have been cited out of Cro. Eliz. cannot be held for Law at this Day*; in fol. 442, it is said there was no Request, but it is alledged *quod deliberasset*, which implies a Request; for he could not have delivered it to the Defendant, unless there had been an Acceptance, and that necessarily imports a Request and Privity in the Defendant; and in fol. 741, it is alledged to be at the Defendant's Appointment; which can be taken no otherwise, than at the Request of the Defendant he had done so and so. The Case in 3 Leon. 91, he agreed to be good Law, but that was for Work and Labour done *for a third Person, and therefore the Defendant could not be liable unless it was done at his Request*; but in the present Case it is said, *quod performasset & perfecisset pro eodem Carolo*, which distinguishes it from the Case in Leon., the Reason of this Case is against them. It is objected, that there does not appear any previous Request; but it appears the Defendant had the Benefit of the Work and Labour, which is the same Thing, and equal to a Request. In Raymond, 260, the Case of Church and Church, where in *Assumpsit* the Plaintiff declared, that whereas the Plaintiff had at his own Charge buried the Defendant's Child, the Defendant promised to pay him his Charges; and tho' there was no Request laid, yet Judgment was given for the Plaintiff. So in Hetl. 84, *Franklin and Bradel*; *Assumpsit*. That whereas the Plaintiff had served the Defendant & *Ux'*, the Defendant after the Death of the Wife promised to pay, &c., it was moved in Arrest of Judgment, that it was a past Consideration, and there was no Request alledged; but adjudged it was a good Consideration, and that the Service was to the Benefit of the Defendant; and therefore that in Consideration that the Plaintiff had married the Daughter of the Defendant is a good Consideration; so in Consideration that you have been my Surety, I promise to save you harmless; so in Consideration that the Plaintiff was Bail for the Defendant, he promised to give him a Horse, this is good; so in Consideration that *J. S. [120]* being a Carpenter had well built my House, I promise to give him £5. And it is not necessary in any of these Cases to alledge a Request; because the Benefit which the Defendant receives is a good Consideration, and necessarily implies a Request; and to this Purpose was cited likewise 2 Leon. 111, *Marsh and Rainsford*; and 2 Leon. 225. He further argued, that if the Court should be of Opinion that a Request was necessary, that there was sufficient Matter alledged in the Declaration to import a Request; it is said, that whereas he had done such Work that the Defendant *inde* promised to pay, &c., so that the Promise is laid to be on the same Day that the Work was performed; and therefore may be taken to be a Promise before the Consideration was past, *scil. before the Performance of the Work, for the Law makes no Fraction of Days*. Latch, 150; 1 Rol. Abr. 12, pl. 13. And if it be taken this Way, a Request is not necessary. It is likewise alledged, to be for Work done *pro eodem Carolo*, and that is as much as to say, that it was Work done at the Request of the same Charles; it is laid in the *Quantum meruit*, that he deserved so much Money from the Defendant, and he could not deserve so much, unless the Defendant lay under an Obligation to pay it. Latch, 112, 274.

Raymond, C. J. Where the Facts are so stated upon the Face of the Declaration, that it appears that the Defendant had the Benefit of them, an Action will lie, if the Consideration arises upon a mutual Agreement; as if it be alledged, that whereas the Plaintiff Vendidisset, &c., the Defendant promised; this imports a Consideration and a Request, for the Vendidisset takes in the Concurrence of both Parties: But in the Principal Case, it is neither said to be at the Request of the Defendant, nor does it appear that he reaped any Benefit by it afterwards. This Action is grounded upon a Promise made for a Past Consideration, it is alledged on such a Day he did the Work, and *postea* the Defendant promised to pay. In some Cases the Law does not allow of any Fraction of Days, in other Cases it will; but in this Case it is evident the Consideration was past. If a Man should come and say he built a House for me, and it

does not appear that I had the Advantage of it, an Action will not lie. In all those Cases where the Action is held good, notwithstanding the Omission of a previous Request, *it appears the Defendant had a benefit, which by Implication carries a Request along with it. The Statute of Jeofails does not extend to this Case; here wants Substance, and nothing is cured by those Statutes but Defects in Form only.*

P. P. and L. Justices, were all of the same Opinion, that the Judgment should be reversed; for that there appears [121] nothing thro' the whole Declaration but a bare Averment, that the Plaintiff had done so much Work, without alledging any Request previous to the Consideration, or any Benefit subsequent; and there is not one Case wherein the Action hath been held maintainable, but there is an express Request set forth in the Declaration, or something else, wherein it may be inferred the Defendant had received a Benefit. Work may be done for a Man without his Request or Privy; if a Man will enter upon my Land, will pull down my House and build up a new one, without my Consent and Approbation, the Law gives me the House; and the Plaintiff hath no Remedy for Work and Labour done; the old House might be as commodious for me to live in, as a new one; and an Action will not lie, unless the Consideration is grounded upon a precedent Request, or a subsequent Benefit and Approbation. In the Case of Bail, can a Man come afterwards and say he reapt no Advantage from it; it appears clearly he had a Benefit; so for Charges in burying another Man's Child; and in all the other Cases there is a Benefit arising to the Defendant on a Request alledged in the Declaration. The Statute of Jeofails does not extend to the present Question; and so Judgment was reversed *per totam Cur'*. Vide Hob. 105, *Lampligh and Brathwait*. Dyer, 272, *Hunt and Bates*. Dyer, 355 b, *Oneley's Case*. Cro. Eliz. 442, 59, *Marsh and Kavenford*. Cro. El. 442, *Jeremy and Goochman*, *contra*. Cro. El. 741, *Barker versus Hallifax*, *contra*.

99.—BISHOP *ver.* STRACEY. *Pasch. 6 Geo. II. [1733]. B. R.*

Action upon the Case.—Demurrer.

Action upon the Case upon several Promises; and the Plaintiff declared against the Defendant in *Custodia Domini Regis Mareschalli, &c.* The Defendant demurred specially, and assigned for Cause, that the Stile of the Court was ill set out; for as this Case stands, *it does not appear the Defendant is before the Court*. In all Cases, where the Defendant is sued by Bill in this Court, he is in the Declaration to be in *Custodia Mareschalli Mareschalsiæ Domini Regis, coram ipso Rege existen'*; this is the proper Stile, and it is this which gives the Court a Jurisdiction. The second Cause of Demurrer was, because it was said generally the Plaintiff came, &c., and it does not appear in what Manner, whether by Attorney, in proper Person, or by Guardian; and it cannot be intended he comes in *propria Persona*, because it is not said *secundum legem & privilegium hujus Cur'*; there are [122] many Instances where the Pleadings have been held ill, because the Attorney's Name has not been specially mentioned, but only said *quod venit, &c., per Attornatum suum*. 1 Rol. Abr. 796, pl. 28. So there are Cases where it has not appeared, in what Manner, or by whom the Party appears; as in 1 Rol. Abr. 794, 12, it was said *quod defendens venit & comparuit* generally, and this was held to be Error, because it did not appear by the Record, whether in proper Person or by Attorney.

Mr. D. Counsel *cont'*: There are numerous Precedents in the Books, where the Parties may both sue and defend in *propria persona*; and it being altered generally in this Court, it must be intended he came in proper Person. As to the Stile of the Court, there are a great many Acts of Parliament where the Description of the Court is set out in the same Manner, in Custody of the Marshal of the King's Bench; the Description of the Office of the Marshal of this Court is not so strictly regular as to admit of no Variation or Diminution; for in 2 Salk. 439, a *Sci' Fac'* was brought against a Bail, and the Breach assigned was, that the Defendant had not rendered himself *Prisonæ Mareschalli Mareschalsiæ Domini Regis*, omitting the Words *coram ipso Rege*; and yet this was held good, notwithstanding it was objected the King had another Marshal, and that is the Marshal of the Household; for the Marshal of the King is the Marshal of the King's Bench, and no Body else can be understood. So in 2 Salk. 602, *Sci' Fac'* on a Recognizance of Bail, assigning Breach, that the Defendant did not pay, nor render *Prisonæ Mar' Maresch' nostræ*, without saying any Thing

further, and yet it was held good and sufficient ; and in the Stat. 8 & 9 W. 3, c. 6, it is called the Marshal of the *Marshalsea* of the King, without saying *ipso Rege*.

Cur' : Both the Objections seem to be strong ones ; for altho' in Common Par- lance an Office may be so described as to be understood, yet in Pleading it must be described in that Manner in which it is taken Notice of in Law ; Acts of Parliament do not always so strictly follow the Description of Things as is necessary in Pleading. Suppose an Information in the Name of the Marshal of the King's Bench, or should an Action be brought against Mr. *Ventris*, would it be sufficient to declare against him by the Name of the *Master* of the King's Bench ? As to the other Objection, they held it was necessary to shew in what Manner the Plaintiff comes and appears, whether by Attorney, Guardian, or *in propria persona* ; and it is not sufficient to say generally he comes and appears, for that cannot be intended an Appearance in proper Person. *Sed adjournatur*.

[123] *Pasch. 8 Geo. 2, Trueby versus Baker*. Error upon a Judgment in *C. B.*, and the same Objection was taken by *Burrel*, that it did not appear in what Manner the Plaintiff sued, whether by Attorney or in proper Person.

100.—WEAL *versus* SMITH. *Pasch. 6 Geo. II. [1733]. B. R.*

Vide post, Case 111.

Judgment, and Writ of Error.

The Plaintiff had Judgment, and before Execution a Writ of Error *coram vobis*, &c., was brought, pending which the Plaintiff sued out a *Fi' Fa'* by the Name of *Neal*, by Virtue of which Writ the Defendant's Goods were taken in Execution ; but the Plaintiff afterwards finding out his Mistake, sued a second *Fi' Fa'* before the Day on which the first was returnable ; and by Virtue of this second Writ the Sheriff continued in Possession of the Defendant's Goods ; whereupon the Defendant moved to set aside Execution, and to have his Goods restored ; and took two Exceptions, 1st, *That the Plaintiff could not sue out Execution pending the Writ coram vobis* ; and 2dly, *That the first Fi' Fa' being wrong, the Sheriff could not detain the Goods in Execution*. As to the first Objection it was answered, *that Error coram vobis was no Supersedeas, unless Bail be put in* ; and in all Cases where this Writ has been allowed (for it is but a modern Innovation in the Law), Bail has been put in ; and so it was in the Case of *Jones versus Palmer*, 13 Geo. 1, before *Raymond*, C. J., it was said, there was no Cases directly in Point, tho' there are Cases which seem to intend as much ; as in 1 Vent. 207, and Lil. Pract. Reg. 1 Vol. fol. 528. And Writs of Error are not to be favoured, because in Delay of Justice, which occasioned the making the Statute of 3 Jac. 1.

Mr. F. Counsel cont' : There is a Case in 3 Bulst. 62, which is in Point ; for it is there said by *Coke*, C. J., *that in taking Bail upon a Writ of Error, this Rule is to be observed ; if the Error assigned be Matter in Law, then the Use is to take Bail of the Party ; but if the Error be upon Matter in Fact, then the Use is not to take Bail before this Matter of Fact be tried* ; and so is the Difference. This comes up exactly to the Case in Question ; for Error *coram vobis* goes to Matter of Fact only, and cannot be assigned for Matter in Law ; for the Court is supposed to have determined that upon the Record before ; a Writ of Error is a Writ of Right, and the Statute has always been construed strictly ; for it has always [124] been held not to extend to Executors or Administrators ; and yet they are within the Meaning of the Statute, tho' not within the Words of it ; and yet if Executors will come voluntarily and put in Bail, they cannot afterwards waive it ; and the Case of *Jones and Palmer* was no more, the Plaintiff went and voluntarily put in Bail.

Cur' : This Writ is discretionary, and is not a Writ of Right *ex debito Justitiæ* ; and therefore, when it is allowed by the Court, they may put what Terms they please upon it ; but doubted whether Bail was absolutely necessary.

L. J. seemed to be of Opinion, that Bail was necessary, and cited the Case of *Walker and Stoker*, Carth. 367, where it is so held ; so where a Writ of Error abates by the Death of a Party, the second Writ is no Supersedeas without Bail ; and was so held in the Case of *Butler and Lucitans*, 4 Geo. 2, which seems to be of the same Nature with Error *coram vobis* ; he cited likewise the Case of 1 Vent. 31 ; 1 Mod. 285. As

to the second Objection, Serjeant *Eyres* said there was no Pretence of any Fraud in this Case, the Judgment is legal, and for a fair and honest Debt ; the Complaint is, that there was a Mistake in the first *Fi' Fa'*, and that is admitted ; it was the Mistake of the Clerk, and as soon as the Plaintiff was aware of it, he took out a fresh *Fi' Fa'*, and it is by Virtue of this second Writ (which is a good Writ), that the Goods are held in Execution. The first *Fi' Fa'* was void, and is to be considered as if no Writ had issued at all ; and the Defendant may have his Remedy by Action against the Plaintiff for taking his Goods tortiously, but that will not make the second *Fi' Fa'* void. We are now legally in Possession of the Goods, and therefore Execution ought not to be set aside.

Mr. *F. cont'* : It is admitted that the first Execution is bad, when therefore that is set aside all subsequent Process served upon the Defendant under that Execution fails likewise. As where a Man is arrested in a wrong County, and during his Arrest is served with fresh Process, when he comes to discharge himself of the Arrest, every Thing that was served upon him under the Arrest is discharged likewise. So where Goods are taken wrongfully, they cannot afterwards be charged legally under that tortious Execution. *P. J.* The Mistake in the first *Fi' Fa'* appears to be nothing but the Misprision of the Clerk ; here is a good and legal Judgment, and the Plaintiff is intitled to his Execution ; but in taking out a *Fi' Fa'* the Clerk by Negligence has put an *N* instead of a *W*, but the Plaintiff, as soon as ever he found out his Mistake, took out a new *Fi' Fa'*, and that was before the first was returnable ; and there is no Pretence of a Fraud or Trick in the Plaintiff to charge the Defendant's Goods wrongfully. [125] *P. J.* The Execution in this Case is originally void ; and the Plaintiff cannot come and by a subsequent Act supply the Defect of that Execution ; the Goods were wrongfully taken, and therefore the Detaining them must be wrong also, and every subsequent Charge upon them is void ; and this is a constant Rule in all mesne Process, if the original Process fails, all that has been done subsequent thereupon must fail likewise. Had the Goods been once restored, the second Execution by Virtue of the last *Fi' Fa'* had undoubtedly been good ; but in this there was no Restitution, but all that was done, was during the Continuance of the first Tort. *L. J.* was of the same Opinion with *P.*, he thought there must be some Evidence of a tortious Act, before this Execution could be set aside. But the Court gave no absolute Opinion, but took Time to consider upon both Points.

101.—POULTER versus GREENHALL, High Sheriff of the County of Lancashire. *Pasch. 6 Geo. II. [1733]. C. B.*

Prisoners assignable over by Parol.

Prisoners may be assigned over by Parol to succeeding Sheriffs, notwithstanding the Writ in the Register is by Deed. Vide 2 Rol. Rep. 146, Dalton's Office of Sher. 3 Rep. 72, Westby's Case. 1 Sid. 335, Hanmer versus Winmor. But the new Sheriff may compel the old Sheriff to make an Assignment by Indenture.

102.—THE KING ver. COTTEN. *Trin. 6 Geo. II. [1733]. B. R.*

Vide antea.

Information for convicting a Man of being the reputed Father of a Bastard-Child, without Warrant or Summons.

For an Information against the Defendant, for convicting and charging a Man as the reputed Father of a Bastard-Child, without either Warrant or Summons ; and cited the Case of the King and Allington ab Venables, 12 Geo. 1. Conviction by the Mayor of Hartford, for selling Ale without a Licence, and upon Affidavit that the Defendant was convicted without any Summons, an Information was granted ; and so was the Case of the King and Heber, Pasch. 5 Geo. 2, which was a Conviction upon the Game Act ; and so in the Case of the King and Clogg, and the King and Holland, being both Orders of Bastardy, Information was granted because no Summons.

[126] *B. and C. Serjeants cont'* : They endeavoured to distinguish this Case from the Case of a Conviction ; and said this was only an Adjudication, and not an absolute

Conviction; for by 18 Eliz. the Sessions have an original Jurisdiction, and an Appeal lies. Suppose the Justices had made no Order at all, but only bound over the Party to appear at the next Sessions; this certainly would have been no Conviction; and the present Order may be considered in the same Light. *It may be compared to the Case of an Indictment, which is always found against the Defendant, without any Notice, and cited the Case of the King and Backwell, Mich. 4 Geo. 1. The Defendant moved to have a Conviction of Bastardy set aside, because it did not appear there was any Summons; but the Court denied the Motion. They then argued from the Inconvenience that would arise, should a Summons be held necessary; for by this Means the Party would have an Opportunity to run away and escape.*

The Court agreed, that to convict a Man without a Summons, or giving him an Opportunity to make his Defence, was against natural Justice. That it was an Excess of Power usurp'd by the Justices, and that by this Means the Defendant had been greatly injured; had not only been deprived of his Liberty, but that it was a great Scandal and Reflection upon him. The Words of the Act of Parliament in this Case are very strong, viz. *That the Justices upon rightly and duly examining into the Matter may, &c.* Can the Matter be said to be rightly examined into, when one Side only is heard? This is undoubtedly an irregular Proceeding in the Justices; but whether it was to be considered as such an Abuse of Power, as to draw down the Censure of this Court in so extraordinary a Manner, was the Question. There does not appear to be Prejudice or Oppression to the Defendant in this Case; and when nothing of this appears, the Court ought to be cautious in its Proceedings against Justices of the Peace, who serve their Country without Profit or Reward. The Defendant is not without Remedy; if he has received any Injury, he may have an Action of false Imprisonment; and therefore refused to grant the Information.

L. J. said, had this been a Conviction, the Summons ought to have appeared upon the Face of it, or the Court would not intend it; otherwise in the Case of an Order; for then the Court will presume a Summons till the contrary appear; he said, he was inclinable to think this was not a Conviction; and that this Distinction was taken in the Case of Bastardy afore cited. By 3 Car. 1, Sessions have an original Jurisdiction.

[127] 103.—GALE *ver.* MOTTRAM. Trin. 6 Geo. II. [1733]. B. R.

Vide antea, Case 64.

Debt upon an Arbitration Bond.

Debt upon a Bond conditioned to submit to an Award; the Defendant craved Oyer, and pleaded no Award. Plaintiff rejoins, that after the Submission both Parties entered into Articles to account; and upon an Account fairly stated, the Defendant appeared to be indebted to the Plaintiff in the Sum of £400, and therefore the Arbitrators awarded, that the Defendant should pay that Sum to the Plaintiff's Agent; and assigned for Breach that the Defendant had not paid, &c. And upon Demurrer Exception was taken to the Award, because this Money was ordered to be paid to a third Person, and not to the Plaintiff himself; and cited 1 Rol. Abr. 243, pl. 6; 247, pl. 4; Gro. Eliz. 4; Godbolt, 12; and the Case of Lane and Tanner, Pasch. 12 Anne, where it was awarded, that the Defendant should deliver to the Plaintiff certain Lands in Possession of a Third Person, &c., and it was held that the Award was ill; for the Defendant had not a Power over the Land, and consequently could not deliver it up without being a Trespasser.

Mr. F. *cont'*: This Case differs from the Cases cited; for the Person, to whom the Money was to be paid, was not a Stranger, but Agent for the Plaintiff; and it was his Duty to receive it.

To appoint Money to be paid to Trustees for the Plaintiff's Use is good, so it is to be paid to such Person as the Plaintiff should appoint to receive it; and in these Cases Tender and Refusal is a good Performance of the Award, and may be pleaded in Bar to any subsequent Action, for it is in Effect Payment to the Plaintiff himself.

Cur': The Person to whom the Money was to be paid is said to be the Plaintiff's Agent, and it is the same Thing as if it had been ordered to be paid to the Plaintiff himself; and Tender and Refusal is a good Performance: Suppose it had been ordered to be paid to the Plaintiff's Order, certainly a Tender to the Plaintiff's Order had been

good ; for *Payment to a Man's Order is Payment to himself*. The whole Court being of this Opinion, the Defendant desired Time to look into it ; and thereupon Judgment was not given.

[128] 104.—THE KING *ver.* AMES. *Trin.* 6 *Geo.* II. [1733]. *B. R.*

Order of Sessions.

To quash an Order of Sessions, which was made to discharge an Apprentice from the Defendant *Ames*, who was a Carpenter by Trade, and that the Defendant should return and pay back £5 to the Use of the Apprentice.

Mr. *S.* Counsel took four Objections. *1st*, That this was not a Trade within the Statute, and so the Justices have no Jurisdiction. *2dly*, It does not appear the Defendant received any Money from his Apprentice. *3dly*, The Sessions have no Power or Authority to order the Master to refund ; and *4thly*, It does not appear the Master was ever summoned, or had Notice of the Complaint.

To these Objections Mr. *F.* answered. And as to the fourth he said, there was no Occasion to set forth a Summons, for this comes before the Sessions as a Court of Record, and therefore not necessary to set forth more than to shew they have a Jurisdiction ; and the Statute which gives the Sessions a Jurisdiction, does not make a Summons necessary. *Vide* 5 *Eliz.* c. 2, 1. 35, which provides, "That the Master or Apprentice having Cause of Complaint shall repair to one Justice of Peace, and shall take such Order therein as the Equity of the Case shall require ; and if he cannot agree the Matter between the Parties, then he shall take Bond of the Master to appear at the next Sessions, &c." So that the Master is at his own Peril obliged to take Notice and appear, if he does not, the Sessions may discharge the Apprentice in his Absence ; and so is *Dillan's Case*, 1 *Salk.* 67, and *Ditton's Case*, 2 *Salk.* 490, for the Master shall not take Advantage of his own Obstinacy. As to the third Objection, he said, as the Justices may discharge an Apprentice, so they may also order a Restitution of the Money, within the Equity of the Statute. The Justices have a Power to raise Money in order to put out an Apprentice, by the same Reason they may have a Power to order Money to be restored ; and this is a Power consequential upon their Jurisdiction to discharge. 1 *Salk.* 67, 68 ; 2 *Salk.* 491. As to the second Objection, he admitted, that it was not said expressly that the Master had received any Money with his Apprentice, but the Words are tantamount, and as strong by Implication as possible. The Words are, "That the Master shall return and pay back," which he could not do, unless he had received. As to the first Objection, he said, that in *Gately's Case*, 2 *Salk.* 471, it was [129] held, that the Power to discharge Apprentices extends only to such Trades as are specially mentioned in the Statute ; but there are other Cases where it is said that Statute is to be taken liberally, and to extend to all Apprentices. 1 *Saund.* 313 ; 2 *Keb.* 592. But this Case does not fall within the Equity of the Statute, but within the express Words of it ; for in the 30th Section, where Mention is made what Trades may take Apprentices, the Trade of a Carpenter is expressly mentioned ; and then comes the 35th Section, which gives the Sessions a Jurisdiction, and says, "If any such Master, &c.," which is merely relative to Trades mentioned in the 30th Section.

Mr. *S.* Counsel *cont'* : It is insisted, "That if the Master does not appear, that his Non-appearance does not defeat the Jurisdiction of Sessions, but they may discharge the Apprentice in his Absence ; and in order to support this Doctrine, Recourse is had to the Statute, that Application is to be made originally to a Justice, and that if he cannot reconcile the Matter, then he is to take a Bond for the Master's Appearance at the next Sessions." And indeed, had the Circumstances of the Case been so in Fact, the Master must have appeared at his Peril ; but nothing at all of this appears, and it is well known the Sessions have an original Jurisdiction ; he admitted, that upon looking into the Act of Parliament, it looked as if a prior Application to some Justice of Peace was necessary, but it had always been determined otherwise, and the Word (*shall*) is not compulsory, but directory only ; and so is the Case of the *King* versus *Johnson*, 1 *Salk.* 68 ; 2 *Salk.* 491, *S. C.* It must therefore, as this Case stands, be now taken, that it came originally before the Sessions, and therefore Notice was necessary. The Cases cited by Mr. *F.* make for the Defendant, for by them it appears the Master was summoned ; and if after that he will make Default, the Sessions may undoubtedly proceed ; and so it was held in the Case of the *King* versus *Sympton*, which was upon a

Conviction for Deer-stealing. But the Objection in this Case is not that the Master did not appear, but that he was never summoned? It is insisted, that by a strong Implication it does appear Money was given with the Apprentice; but Things are not to be taken by Inference, for there ought to be express Words to shew they have a Jurisdiction. As to the first Objection, he waived that, because the Trade of a Carpenter was mentioned within the Statute, or else it had been a strong Objection; as was held in the Case of the *King versus Wately, Mich. 12 Geo. 1 [1725]*, which was an Order to discharge an Apprentice from his Master, who was by [130] Trade a Cutler; and the Order was quashed, because not within the Act.

Cur': It does appear that this Cause came originally before the Sessions, and therefore a Summons was necessary; the only question is, whether it be necessary to set out this Summons in the Order? it is said in the Order, that upon hearing Counsel, but does not say, upon hearing Counsel on both Sides; tho' this seems to be a reasonable Construction, the Distinction that has been taken in these Cases between Orders and Convictions, seem to make a Summons not necessary in this Case; for this which is before us at present is no more than an Order of Sessions, and so a Summons must be intended, unless the contrary appears. The Statute which gives the Sessions a Power to discharge in Consequence thereof, gives a Power to order Restitution, or otherwise the Master would be a Gainer by his own Wrong. By a necessary Intendment it appears, that the Master has received Money with his Apprentice; for the Order is, that he shall refund and pay back, which is tantamount to Words that he shall return and pay back so much Money received. But the Court did not give any absolute Opinion, but took Time to consider.

105.—MARTIN *versus* DUCKETT. *Term. Trin. 6 Geo. II. [1733]. B. R.*

Error to reverse an Outlawry.

Upon Error brought to reverse an Outlawry, Mr. D. Counsel moved to stay Proceedings till the Plaintiff in Error had put in Bail, as was directed by the Act of Parliament; and cited Carth. 459; Stat. 31 Eliz. c. 3, and 4 & 5 W. & M. c. 4. But the Motion was denied per *Cur'*; for the Plaintiff in Error is not obliged to put in Bail till the Outlawry is reversed; and the Writ of Error stays nothing before Bail is put in, but the Plaintiff may proceed to Execution. Vide Stat. 3 Jac. 1, c. 8.

[131] 106.—HOLMES *ver.* MENDESE. *Trin. 6 Geo. II. [1733]. B. R.*

Vide Case 65, Innys *versus* Sinclear.

Affidavit to hold to Bail, insufficient.

The like Motion was now made this Term, the Defendant having been arrested upon Affidavit made by a third Person, that he had seen the Defendant's Account Books, and by them it appeared the Defendant was indebted to the Plaintiff in the Sum of, &c. The Court granted the Motion, and said, this was not so strong a Case as that of Innys and Sinclear; where a third Person made Affidavit he had seen a Note of the Defendant's payable to the Plaintiff in the Hands of a Notary Publick.

107.—CLARK *versus* PAGET. *Trin. 6 Geo. II. [1733]. B. R.*

Motion to set aside Proceedings, the Notice under the Writ not being according to the Act of Parliament.

Mr. V. Counsel moved to set aside all Proceedings (*the Plaintiff having proceeded so far, that Judgment was to have been signed that Morning, upon which the Motion was made*); and his Objection was, that the Notice under the Writ was not according to Act of Parliament, which has chalked out the express Words in which Notice is to be given, and by that the Name of the Defendant is to be set out at the Head of the Notice; whereas in this Case the Defendant's Name was omitted, and only said generally, *You are served, &c.* Vide the Stat. 5 Geo. 2, to prevent frivolous and vexatious Arrests.

And upon a Rule to shew Cause, Mr. S. insisted, that the Meaning and Purport of the Statute was pursued; and that it was not necessary to include the Defendant's

Name, where he was personally served ; and it was not said that Notice should be in the Words following, 'but to the Effect following, &c.'

But the Court granted the Motion ; for the Act of Parliament is express, and the Plaintiff must either *strike the Letters A. B.* out of the Act, or insert them in his Notice.

[132] 108.—THE KING *versus* the Wife of KEAT. *Trin.* 6 *Geo. II.* [1733]. *B. R.*

Libel for Slander or Defamation in the Disjunctive.

The Defendant was libelled against in the Spiritual Court for Slander or Defamation, and a Writ *de Excommunicato Capiendo* issued against her ; which Mr. K. Counsel now moved to quash, because the Charge was in the Disjunctive, *viz.* for Slander or Defamation, and cited the Case of the *King and Smith*, which was a Libel in the Spiritual Court *pro convitio sive Defamatione* ; and the Court in that Case held the Libel naught, because uncertain and in the Disjunctive. But in this Case the Motion was denied, for Slander and Defamation have one and the same Signification ; but there is a Difference between *Convitium* and *Defamatio* ; for *Convitium* has a double Meaning, and signifies *Reproof as well as Scandal*.

109.—GREGORY *ver.* WARREN. *Trin.* 6 *Geo. II.* [1733]. *B. R.*

Proceedings against Bail stayed, a Writ of Error being allowed on the Day the last *Scire facias* was returnable.

To stay Proceedings against the Bail ; the Writ of Error in the original Judgment being put in and allowed on the same Day the last *Sci' Fa' was made returnable*. Mr. S. *cont'* : This is a stronger Case than that of *Miers and Arthur*, and in that Case the Court said they would go no further ; and yet there the Writ of Error was put in and allowed two Days before the Return of the first *Sci' Fa'*. But the Court in the original Case made a Rule to stay all Proceedings.

110.—PASCHAL *versus* TERRY. *Trin.* 6 *Geo. II.* [1733]. *B. R.*

An Award set aside, being made without giving Notice to or hearing the Defendant.

Submission to two Arbitrators, and if they cannot agree, to appoint an Umpire ; they accordingly appointed an Umpire, who made his Umpirage the Day following ; the Parties being neither summoned, nor having Notice of the Appointment. Mr. S. Counsel moved to set aside the Umpirage ; and objected, that it was unreasonable, and contrary to natural Justice, to make an Award without giving Notice to the [133] Parties to attend. This is repugnant to the Submission, and is a Misbehaviour within the Act of Parliament ; the Umpirage was made upon the Defendant's Evidence alone, *parte altera inaudita*, the Plaintiff was neither heard nor had any Opportunity given him to be heard ; and for this Reason it was set aside *per L. and P. Justices, absente P.*

111.—WEAL *versus* SMITH. 6 *Geo. II.* [1733]. *B. R.*

Vide antea, Case 100.

Error *coram vobis* no *Supersedeas* without Bail.

L. J. said, *Error coram vobis was no Supersedeas before Bail is put in* ; and cited the Case of *Merefield and Wellon*, 5 *Geo. 2* [1731–32], where it was so held expressly ; and *Raymond*, Chief Justice, at that Time said it was so determined in the Case of *Ginger and Cook*. But this Point was not determined ; for the Plaintiff in Error, seeing the Opinion of the Court, put in Bail. *Vide antea.*

112.—TWELLS *ver.* SOUTHWELL. *Trin.* 6 *Geo. II.* [1733]. *B. R.*

Judgment.

Mr. T. moved to set aside a Judgment for Irregularity ; and his Objection was, that common Bail was filed in a Term subsequent to the Writ ; this was an Action by

Latitat, returnable the first Day of *Hilary* Term, and the Bail was not filed till *Easter* Term following, at which Time the Declaration was delivered.

113.—THE KING *versus* COTTON & al'. *Trin.* 6 *Geo. II.* [1733]. *B. R.*
Information.

Upon Motion for an Information the Case appeared to be this : By a private Act of Parliament made 27 *El.* the Court-Leet for the *City and Liberty of Westminster* was confirmed, and a more extensive Jurisdiction given, &c., *Vide* the Statute. A Complaint was made in the Leet against *Edwards* (the Prosecutor) for Neglect of Duty ; he behaved himself in a very insolent Manner, and made use of very contemptuous Language ; put on his Hat in the Face of the Court, and said to the Judge, "*Jack Cotton commit me if you dare.*" Whereupon the Defendant did commit him for [134] this offensive Language and the great Contempt he shewed the Court. *Edwards* now came for an Information, suggesting that he was committed for a Neglect of Duty, notwithstanding he offered to put in Bail. But the Court, upon the Circumstances of the whole Case, refused the Motion ; and held, that had the Commitment in this Case been for a Breach of the Peace, it had not been strictly justifiable, admitting Bail was offered. But this Commitment was for the Contempt ; and tho' the usual Method of proceeding in those Cases, is in the first place to fine the Offender, and after to commit him for Non-payment, which Method was not pursued in the present Case, yet this appears rather to be a *Mistake in Judgment than any wilful Oppression ; and therefore the Information was denied.*

Note : *Edwards* was a Petit Constable of the Leet.

114.—BARKER *ver.* REYNOLDS and WESTWOOD. *Mich.* 7 *Geo. II.* [1733]. *B. R.*

Trespass and Assault, an ill Justification thereto.

Trespass and Assault ; *Reynolds* the Master pleads *Son Assault*, &c., and upon that Issue is joined. *Westwood* the Servant justifies, for that the Plaintiff having assaulted his Master, he then and there assaulted the Plaintiff in Defence of his Master ; and to this the Plaintiff demurs.

Mr. A. Counsel *pro Quer'* insisted, that the Justification was insufficiently alledged, and took two Exceptions ; 1st, Tho' a Man may justify in Defence of his Master, yet he cannot justify an Assault in Defence, &c., and cited 2 *Roll Abr.* 546. His second Objection was, that the Justification in this Case is ill pleaded ; for the Assault in the Declaration might be at a Time preceding the Assault by the Servant, as this Justification now stands. The Words are (*having assaulted*), and tho' the Court should be of Opinion that a Servant may justify an Assault, &c., in Defence of his Master, yet he cannot justify an Assault upon the Plaintiff at a Time subsequent to the Assault made upon the Master.

[135] Mr. M. Counsel *cont'* : A Servant may justify an Assault in Defence of his Master, and cited 9 *Ed.* 4, 48, 2 *Roll Abr.* 546, 1 *Salk.* 407, *Leeward & Ux' ver. Basilee*. As to the second Objection, he said the Justification was well, for that the Words must necessarily be in the Preterperfect Tense, and could not be otherwise ; for an Assault must have been committed, or it is certain the Defendant could not justify. And the Words (*then and there*) shew that the Assault mentioned in Justification was at the same Time and Place the Assault was made upon the Master.

Y. C. J. *There is no Doubt but a Servant may justify an Assault in Defence of his Master ; but the Question in this Case is, whether the Defendant by his Plea has shewn that the Assault was necessary in Defence of his Master ; for it is only said, the Plaintiff having assaulted, &c., he then and there, &c., in Defence of his Master*, which certainly is not sufficient ; but he ought to have gone further, and shewn that the Plaintiff would then and there have beat his Master, if he had not assaulted the Plaintiff in Defence, &c. The Words, as they are now pleaded (*having assaulted*), have Reference to a Time past ; whereas the Defendant should have shewn that the Assault by him was at the Time the Master was assaulted ; and the Words then and there will not confine this Assault to that Time, but may relate to the Day and Place only ; whereas the Assault by the Servant might be at a different Time of the Day to the Assault made upon the Master. P. P. and L. J. being of the same Opinion, Judgment was given for the Plaintiff.

115.—COWNE *versus* BARRY. *Mich. 7 Geo. II. [1733]. B. R.*

Debt upon Bond.—Plea of Payment at a Time before the Day in the Condition, aided by the Statute for Amendment of the Law, and a Repleader denied.

Action of Debt upon Bond conditioned to pay £100 with Interest on the 5th of *June*, &c. Defendant after Oyer pleads Payment of Principal and Interest before the Action brought, *scil.* on the 26th of *March*, which was before the Day mentioned in the Condition. Plaintiff replies, that the Money was not paid *modo & forma*, as alledged in the Defendant's Plea. Upon this Issue was joined, and Verdict for the Plaintiff. Mr. K. Counsel moved for a Repleader; for that the Defendant having pleaded Payment before the Day mentioned in the Condition, the Issue thereupon is immaterial; and so he said it had often been determined in this Court.

[136] Mr. B. Serjeant *cont'*: The Defendant's Plea is not that the Money was paid before the Day mentioned in the Condition, but the Payment was *ante impetrationem Brevis*, *scil.* 26 *March*, which Plea is now aided by the Statute for Amendment of the Laws; and the *Scil.* is immaterial. *Vide Stat. 4 & 5 Ann. c. 16, which provides, that where an Action of Debt is brought upon any Bond which has a Condition, or Defeasance, to make void the same upon Payment of a lesser Sum at a Day or Place certain, if the Obligor, his Heirs, &c., have paid the same before the Action brought, tho' such Payment was not made strictly according to the Condition, yet it may be pleaded in Bar of such Action, as if the same had been paid at the Day and Place according to the Condition.* The Court being of the same Opinion, *viz.* that the Defendant's Plea was aided, the Motion for a Repleader was denied.

116.—THOMAS *ver.* BISHOP. *Mich. 7 Geo. II. [1733]. B. R.*

Assumpsit on an Inland Bill of Exchange.

Assumpsit by Thomas Indorsee of a Bill of Exchange drawn upon the Defendant Bishop, and accepted by him, "At thirty Days Sight pray pay to Mr. Somerville the Sum of £200 and place it to the Account of the York-Buildings Company, as per Advice, Charles Mildmay." And the Bill was directed to the Defendant Bishop, Cashier of the York-Buildings Company, at their House, &c., who accepted the same. P. J. before whom this Cause was tried, directed the Jury to find for the Plaintiff, the Defendant having generally accepted the Bill in his own Name; but at the same Time gave the Defendant Leave to move for a new Trial.

Mr. K. and S. Counsel insisted, that the Defendant was not liable personally, but as Cashier of the Company; and this appears not only upon the Face of the Note, but from the Letter of Advice to which it refers, and which was given in Evidence upon the Trial. For the Note is not only directed to Bishop, Cashier of the Company, but is expressly mentioned to be placed to Account of the Company. The general Acceptance by the Defendant in this Case, can make no Alteration in the Note, so as to charge him personally; for Acceptance must be taken *secundum subjectam materiam*, as Cashier; he is not therefore bound by this Acceptance *in proprio jure*, but in Right of the Company; and this is the general Method of transacting Bills of this Kind. So is the Case of all Draughts upon the Bank, the Note is generally drawn upon the Cashier, without any Mention of the Company, [137] and yet there is no Question but the Bank is responsible. The Plaintiff is not without Remedy, the Company is bound by this Acceptance, and he has his Action against them. Whether this Bill was accepted by the Defendant in his own Right, or in Right of the Company, is a Fact proper for the Determination of a Jury; and this is the Circumstance upon which we ground our Motion. Upon the Face of the Bill there is strong Evidence in Favour of the Defendant, that his Acceptance was in Right of the Company; and this is yet much stronger, by Reference to Letter of Advice.

D. Serjeant *cont'*: Whether the Defendant accepted this Bill in his own or the Company's Right, is not now the Question. The Defendant has generally accepted it in his own Name, and that makes him liable *in proprio jure*; any Man may accept: Suppose a Bill drawn upon J. N. it may be accepted by J. S. and by this Acceptance J. S. becomes liable. The Direction to the Defendant as Cashier, &c., is only a proper

Addition and Description of his Person. It is said, he accepted it in Right of the Company, and as their Servant; but how can this be known? the Acceptance is general in his own Name. There is no Question but a Servant may have Transactions of his own, and may contract upon his own Account. *Bills of Exchange must have a Certainty, the Acceptance reduces it to a Certainty; the Bill is drawn upon Bishop, and he has accepted it in his own Name generally, and the Acceptance alone is sufficient to charge him.*

F. C. J. Bills of Exchange are Bills of a particular Nature, arising from the Contract and Transactions of Merchants; *the first Contract is by the Drawer, and by that he becomes liable; after Acceptance it is the Contract of the Drawee; and a further Contract may arise from the Person to whom the Bill is payable, by his Indorsment over. But every Writing that is drawn in Form of a Bill of Exchange may not in Fact be so; as where Money is payable out of a particular Fund; and so was the Case of Jenny and Hale, Trin. 10 Geo. 1, Plaintiff Jenny sold his Land to the Defendant, who gave him a Bill for the Price or Value thereof in these Words, directed to one Prat, Sir, you are to pay to Mr. Jenny so much, &c., out of the Money belonging to the Governors and Company of Devonshire Miners, &c., the Money not being paid, Jenny brought his Action upon this Note, supposing it a Bill of Exchange; and upon Demurrer Plaintiff had Judgment; whereupon Error was brought in this Court, and Judgment reversed; for the Court held it to be no more than a Direction and Appointment to pay Money out of a particular Fund, and was not a Bill of Exchange. Vide this Case in Mod. Ca. 266. And so was the Case of Joslyn and Lucern, [138] Trin. 13 Ann. which was to pay Money out of growing Stock; and these Notes do not make the Drawer liable in case the Stock should fail. It is a general Rule, that the Acceptor of a Bill of Exchange is personally liable; how then does this Case vary? the Directions to the Defendant as Cashier, &c., cannot vary it; that is merely a Description and Addition of his Person. The Acceptance in this Case is general (accepted June 13, 1733, and signed Bishop). In all Cases a general Acceptance is *secundum tenorem Billæ*; this Bill is drawn upon Bishop, and the subsequent Words, *viz.* "Place it to Account of the Company, as per Advice," cannot alter the Case, nor make any Difference in the Bill of Exchange; it is only the Method of accounting for the Money between the Drawer and Drawee after it is paid. As to the Letter of Advice, that is not proper Evidence; it is extrinsic of the Bill, and is always a private Transaction between the Drawer and Drawee, to which the Person to whom the Money is payable is not supposed privy; if Letters of Advice should have any Weight in these Cases, it would be of dangerous Consequence. Bills of this Kind are in their Nature negotiable; and such an Allowance must make them uncertain, and may be attended with ill Consequence in the Case of an Indorsee, who is in Nature of a Purchaser for a valuable Consideration. The Case of *Evans and Camlinton*, is stronger than this. Vide 2 Ventr. 307; Carth. 5.*

We must therefore judge of this Case as it stands upon the Face of the Bill, *which is a Bill drawn upon Bishop, and accepted by him generally, which alone is sufficient to charge the Defendant and make him personally liable.*

P. P. and L. Justices, being of the same Opinion, the Motion was denied, and Plaintiff suffered to have Judgment upon the *Postea*. Vide Yelv. 137, *Talbot versus Godbolt*; G. gave a Bill in this form, "Memorandum, that I have received of E. Talbot, to the Use of my Master Serjeant Gaudy, the Sum of £40 to be paid at Michaelmas following." It was held that G. was liable, for the *Clause of Repayment is general*, and not to be repaid by his Master Gaudy.

117.—EVANS *ver.* THRUSTOUT. Mich. 7 Geo. II. [1733]. B. R.

Variance between the Declaration and Original.

In Ejectment, Plaintiff declared upon the Demise of *John*, and in the original Writ it was said to be the Demise of *Timothy*; after Verdict for the Plaintiff, it was moved in Arrest of Judgment by Reason of this Variance; [139] and said, if in Fact there had been no Original it had been cured by the Verdict, but a bad Original is not cured.

F. C. J. The Demise cited in the Declaration is only by Way of Recital, and the

Defendant cannot take Advantage of a bad Original, *but upon Oyer or a Certiorari.* 2 Salk. 701, 658. *Bragg versus Digby*, 6 Mod. 28.

118.—THE KING *ver.* Dr. BETTESWORTH. *Mich. 7 Geo. II. [1733]. B. R.*

[S. C. 2 Str. 956 ; 2 Barnard. K. B. 334 (*Anonymous*). See *In the Goods of Ewing*, 1881, 6 P. D. 25.]

Mandamus to the Spiritual Court to grant Administration to the Residuary Legatee, on the Executor's renouncing.

Mr. *S.* moved for a *Mandamus* to be directed to the Spiritual Court, to grant Administration *cum testamento annexo* to *Kinnaston*, residuary Legatee of *K.* his Father deceased, the Executors having renounced in Favour of the residuary Legatee. We have applied to the Spiritual Court, and they refuse no Administration till such Time as they have issued out a Commission of Appraisement, and had a Return. This is contrary to 21 H. 8, which provides, *that Administration shall be granted with all convenient Speed ; and cited the King and Bettesworth*, which was in the Case of *Lord Londonderry's Will*, where Executors applied to the Spiritual Court for Probate, but the Court refused till a Commission, &c., as in this Case ; but this Court granted a *Mandamus*, and said the Spiritual Court had no Power to stay Probate.

Y. C. J. There is a great Difference between the Cases ; here the Executors have renounced, and there is no Law obliges the Spiritual Court to grant Administration to the residuary Legatee. *Shew Cause.* *Note*, That afterwards, upon shewing Cause, the *Mandamus* was denied.

119.—STEPHENS *ver.* LOSTYN. *Mich. 7 Geo. II. [1733]. B. R.*

Debt by simple Contract cannot be set off against a Debt upon Bond, by Statute 2 Geo. 2.

In Debt upon a Bond the Plaintiff declares the Defendant 30 May 1723, by his Bond obligatory, became indebted to the Plaintiff in the Sum of £76, 10s., &c. *Defendant craves Oyer of the Bond and Condition*, which was for Payment of £38, 5s. upon the first of December next ensuing the Date of the Bond, with Interest, &c., and then pleads the Stat. 2 Geo. 2, *which impowers the Defendant to set off mutual Debts in Discharge of the Action ; and avers, that the Plaintiff stood indebted to him in the Sum of £70, 8s. due upon simple [140] Contract, which is more than the Sum mentioned in the Condition.* Upon demurrer to this Plea, Judgment was for the Plaintiff in the Common Bench, whereupon the Defendant brought Error in this Court.

Mr. *D.* Counsel for the Plaintiff in Error : There are two Exceptions taken to this Plea, 1st, That by this Act of Parliament, *Debts upon simple Contract cannot be set against Debts of a superior Nature.* And 2dly, *That the Penalty of the Bond, not the Sum mentioned in the Condition, is the Debt in Law.* As to the first he said, where Debts are mutual, this Act of Parliament is to be considered in Nature of an Extinguishment, according to the Rule laid down in *Wankford's Case*, 1 Salk. 305, *where the same Hand that is to receive, and ought to pay, it is an Extinguishment.* This therefore may be compared to an Action of Debt upon Bond, where Payment before the Action brought is a good Plea in Bar, by the Statute for Amendment of the Law. It is objected, that this may be inconvenient in Cases of Executors, and work a Devastavit, but the Inconveniences on the other Hand is as great. Suppose an Executor brings Debt upon Bond due to his Testator, who at the same Time stands indebted to the Defendant in the like Sum upon simple Contract, unless the Debt can be given in Evidence in Discharge of the Bond, the Money recovered must go in Discharge of Debts of a superior Nature, and Defendant is without Remedy upon Failure of Assets. This Act of Parliament is a remedial Law, and ought to be construed liberally ; it ought to be considered in the same Light with other Acts of Parliament, where mutual Debts are to be set one against the other ; as the Bankrupts Act, 5 Geo. 2, *all Debts are included ; and there is no Distinction between Debts upon Specialties and simple Contracts.* In the Case of Retainer by Executor, he is not obliged to plead it, but may give it in Evidence upon Plene Administravit, and the Reason is because it amounts to Payment.

Mr. C. Serjeant *cont'* : The Principal Question in this Case is, whether the Penalty or the Sum mentioned in the Condition is the Debt in Law ; for if Penalty is the Debt in Law, then the Defendant's Plea is ill ; for the Sum to be set off in Discharge is not of equal Value, the Penalty is for £76, 10s., and the Debt upon simple Contract is only £70, 8s.

After Forfeiture of the Bond the Penalty is the Debt in Law, and the Condition cannot be given in Evidence. 3 Lev. 368, and so was the Case of the Bank of England and Morrice, Pasch. 6 Geo. 2 [1733].

[141] Y. G. J. The Act of Parliament in Question was made for the Benefit of the Defendant, and must be construed in his Favour, so far as is consistent with the Rules of Law. This Act cannot be construed so but Inconveniences will arise upon it either one Way or the other. It is true, in the Case of an Executor it may work a *Devastavit*, and yet on the other Hand, it is hard that an Executor should recover Debts upon Bond due to his Testator, and the Defendant not have it in his Power to set off Debts upon simple Contract, tho' of equal Value in Discharge. *The Rule that is laid down comes too general ; suppose an Action is brought for Breach of Covenant, which sounds in Damages, and the Plaintiff at the same Time stands indebted to the Defendant upon simple Contract, which sounds in Damages likewise ; it is pretty hard to say that one Debt cannot be set off to discharge the other.* It is said, this Act ought to have the same Construction put upon it with other Acts wherein mutual Debts are mentioned ; and for this Reason the Bankrupt's Act is cited ; but this Case differs ; for by the Bankrupt's Act all Debts are made equal, and therefore no Notice is taken of Priority of Debts ; besides, Commissioners of Bankrupts have an Equity in them, and in Equity all Debts are equal.

The chief Question is, whether the Penalty is the Debt forfeited by Law ? for if so, the Debt pleaded in Bar or Discharge is not equal in Value to the Debt demanded by the Bond, and consequently the Plea is bad ; *there is no Question but the Penalty is the Debt forfeited by Law, and therefore the Plaintiff must have his Judgment.*

P. and L. Justices. This Case must be determined as it stands upon Record ; and the Question is, whether this Plea is a good Bar ? Defendant has pleaded mutual Debts, &c., but the Sum to be set off by his Plea is not equal in Value to the Demand. The Penalty is the Debt forfeited by Law, and no Way to discharge it, *but by pleading Performance.* *The Statute for Amendment of the Law does not extend to this Case ; the Statute makes Payment after the Day, and before the Action brought, good Payment in Discharge of the Bond ; as Solvit ad diem was a good Bar at Common Law.*

The Defendant's Plea in this Case is not good ; and so gave Judgment for the Plaintiff, without giving any Opinion upon the first Objection. Note : *The Law in this Respect is since altered by Stat. 8 Geo. 2. c. 24.*

[142] 120.—ASHTELL versus BEAKER & al'. Mich. 7 Geo. II. [1733]. B. R.

Scire Facias against Bail.

Scire Facias against Bail. Defendants pleaded that no Ca' Sa' was prosecuted and returned ante diem emanationis originalis Brevis de Sci' Fa'.

To this the Plaintiff demurred as an immaterial Plea, for a Ca' Sa' may be returnable the same Day the Sci' Fa' issues ; and this has always been held good by the Practice of the Court.

Mr. D. Counsel compared it to the Statute of Limitations, which is always pleaded ante diem exhibitionis Billæ, or ante diem impetrationis Brevis. He likewise objected to the Sci' Fa', because it did not appear the Plaintiff had prayed Execution, and without Prayer he cannot have Execution ; and cited 1 Rol. Abr. 894 ; 3 Mod. 252.

Y. G. J. The Plea is immaterial, because the Ca' Sa' may be returnable the same Day the Sci' Fa' issues, which is agreeable to the Practice of this Court ; and therefore the Pleading must be ante emanationem Brevis, &c., the Reason for Pleading the Statute of Limitations in that Manner is, because those are the Words of the Act of Parliament.

P. P. and L. Justices, being of the same Opinion, Judgment was for the Plaintiff, unless Cause, &c.

121.—WARRENER *versus* THRUSTOUT. *Mich. 7 Geo. II. [1733]. B. R.*

Ejectment.

In Ejectment. Mr. *Common Serjeant* moved to amend a Declaration, which was for several Messuages and three Acres of Ground; the Amendment prayed was to strike out the Word (*Ground*), and instead thereof to make the Declaration for three Acres of Arable Land; and cited a Case 2 *Geo. 2*, where the Plaintiff declared *de Messuagio sive Tenemento*; and upon Motion Leave was given to strike out the Words (*sive Tenemento*); and both this and the original Case was before Appearance.

Cur': To strike out the Words (*three Acres of Ground*), and add others which are of a different Nature, is *altering the Demise*, and therefore denied the Motion; but gave Leave to strike out three Acres of Ground.

[143] 122.—WHITEHAM, *Qui tam*, and JOKEHAM. *Mich. 7 Geo. II. [1733]. B. R.*Information *Qui tam*', &c.

Information *Qui tam*, &c., for buying and selling Sheep in the same Market, contrary to 5 & 6 *Ed. 6*, c. 14. To quash this Information two Objections were taken. 1st, Because no Affidavit was made by the Person who commenced the Prosecution before the Issuing of the Information, that the Offence was committed in the same County where the Suit is commenced. *Vide* 21 *Jac. 1*, c. 4. *No Officer or Minister in any Court of Record shall receive, file or enter of Record any Information, &c., until the Informer or Relator has first taken a Corporal Oath before some of the Judges of that Court, that the Offence laid in such Information, &c., was committed within a Year, and within the same County where such Information was commenced.* The second Exception was, that the Fact was laid subsequent to the first Day of the Sessions.

Mr. L. Counsel insisted, that this Information could not be quashed upon Motion; Informations *Qui tam* are in Nature of Civil Actions, and no Instance that a Civil Action was ever quashed upon Motion. 1 *Inst.* 139. The Objection is, that no Affidavit appears upon Record; but that does not make the Information void, the Words of the Act are, *That no Information shall be received, filed or entered of Record, &c., so that altho' the Proceedings are irregular, the Information may well stand.* *Carth.* 503; *Salk.* 376. *No Information shall be received or filed before Recognizance given by the Informer to prosecute with Effect, &c., Stat. 4 & 5 W. 3*, c. 18, and that it was held upon Construction of this Act of Parliament, that in Case no Recognizance be given, the Information is not void, but Process thereon must be set aside. But in this Case the Act of Parliament has been complied with; for here Affidavit has been made by the Relator, which is agreeable to the Words of the Statute; and in this Case it is reasonable; for this is a Prosecution upon a penal Statute, and if the Informer was to make Affidavit, he could not be an Evidence to convict the Offender. But admitting the Oath in this Case not sufficient, the Court will not quash the Information, but where Exception appears upon the Face of the Record; and no Advantage can be taken of this upon Error, or Demurrer to the Declaration. 4 *Inst.* 272.

As to the second Objection, he said this Case was like the Case of all special Memorandums; for altho' all Declarations [144] are in Fiction of Law supposed to be entered on the first Day of Term, yet a special Memorandum alters the Case, and ties it down to the Day mentioned in the Declaration. Sessions commenced 11 *Jan.* but by Adjournment were continued to 12 *Feb.* on which Day the Offence was committed.

Cur': The Information cannot be quashed upon Motion, and so it is said in *Salk.* 372. There is a Difference between a Motion to quash and set aside. If an Information be filed without Affidavit, the Court may stay Proceedings, or order it to be taken off the File. The Answer which is given to the first Objection is very material; for in Prosecutions upon Penal Statutes, the Person who appears to be the Informer upon Record, cannot be a Witness; and therefore Distinction may be made in this Case between Informer and Relator; before this Act of Parliament the Informer never appeared upon Record, and so was always admitted an Evidence.

The whole Court being of this Opinion, the Rule was discharged, but principally for the first Reason, *viz.* That in Motions to quash Informations, no Advantage can be taken but where the Exception appears upon Record. Note: Proceedings are carried on in the same Manner upon 12 *Ann.* c. 16, sess. 2.

123.—SMITH *versus* BOUCHER & al'. *Mich. 7 Geo. II. [1733]. B. R.*

Assault and false Imprisonment.

Action of Assault and false Imprisonment *ad damnum* £1000. Defendants justify and say, that the Chancellor and Scholars of the University of Oxon, from the Time whereof the Memory of Man is not to the contrary, were a Body incorporate by Name, &c., and that there now is, and Time immemorial has been, a Court held before the Chancellor, his Commissary, &c., on Friday in every Week, for Determination of all personal Actions whatsoever between the Parties (one of them being a Scholar of the said University, or Person having the Privilege thereof); and that Time immemorial it has been customary on the personal Complaint before the Chancellor, his Commissary, &c., of any Person having Privilege of the said University, that he has an Action personal of Damages against any Person then being within the Precincts of the said University, such Complainant making his Corporal Oath before the Chancellor, &c., of such Damages, and that he believes that such Defendant, upon his being cited, will not appear, but rather run away out of the Precinct of the said University. For the Chancellor to de-[145]cree a Warrant to be made in Writing for the arresting and taking the Body of such Defendant and detaining him in Prison, until such Defendant should put into the said Court sufficient Security for answering the Complaint. And the Defendants further say, that by Letters Patent bearing Date 1 April, 14 H. 8, the said Customs and Privileges were confirmed, which said Letters Patent were afterwards Anno 13 Eliz. published and confirmed by Act of Parliament. And the Defendants further say, that before the Time when, &c., the said James Boucher made his Complaint before the said Deputy Commissary, that he had an Action personal of Damages against the Plaintiff, then living within the Precincts of the said University; and then and there did alledge that he was damnified in the Sum of £1000, and that he did suspect that the said Defendant would run away and not appear, if cited according to the Belief of the said James Boucher; and that then and there the said James took his Corporal Oath of the Truth of the Premises in Manner aforesaid; and the said Judge then and there decreed a Warrant to be made as was required. Whereupon the said Hugh Smith, Plaintiff in the present Action, was arrested and carried to Prison for Want of sufficient Sureties, &c., which are the same Assault and Imprisonment as is complained of, &c.

Plaintiff replies, there was no Affidavit of the Cause of Action filed as the Statute directs; and to this the Defendants demurred. Vide 12 Geo. 1, c. 29, and 5 Geo. 2, c. 27.

C. Serjeant: The Replication is bad, for the Act of Parliament does not make the Process void; but the Words are, "That the Defendant shall not be held to Bail, unless Affidavit be made that the Cause of Action is £10 or upwards"; so that want of Affidavit does not avoid the Process, but subjects the Party to an Action. In no Case the Process is in it self void, but where it is expressly provided so by Act of Parliament; as in 7 Ann. c. 12, Process against Ambassadors and their Servants for Debt is declared void.

H. Serjeant *cont'*: Jurisdiction is not to be presumed in inferior Courts, it is therefore incumbent upon them to shew they have a Jurisdiction; but does this appear in the present Case; they have set forth a Custom to hold Pleas in all personal Actions, and say, that B. made Complaint that he had a personal Action; but the Nature of that Action is no where shewn. They ought to have described the Action and Nature of it, or this Court will not intend it to fall within their Jurisdiction. *Hale's Plac. Cor.* 35, 36; *Moore*, 275.

But suppose the Description is so certain as to give a Jurisdiction, yet such a Custom as is here pleaded is a void Custom. Here is a Custom pleaded to issue Warrants to arrest [146] and detain in Prison till Security be found; but it does not appear that Process in these Cases has any Return, and so *Cap.* void, as in 23 H. 6. All Warrants of *Cap.* must have a certain Return. *Dyer*, 175, p. 23. Every *Cap.* ought to be returned the ensuing Term, for the Mischief which might otherwise befall the Prisoner to be kept always in Prison. *Gro. Eliz.* 467, *Nector* and *Sharp*. The Reason of these Resolutions is in *favorem libertatis*, which is always favoured in Law; and tho' it appears by Plea, that a Return was made, yet a Return cannot make good a void

Process. There is another Reason which makes this a void Custom ; because a *Cap.* issues in the first Instance, without any previous Summons, and so is 1 Mod. 236, *Hall ver. Booth*. It is against Law for any inferior Court to issue *Cap.* for the first Process ; for the Liberty of a Man is highly valued in Law, and no Man ought to be abridged of it, without some Default in him. It is against the Course of the Law, and all Courts. 1 Roll. Abr. 563, p. 11. *If this is a void Custom in itself, Confirmation by Charter or Act of Parliament will not avail ; for Stat. of Eliz. is only a general Confirmation, i.e. of all reasonable Customs, but does not make that of Force, which before was void in itself.* 1 Inst. 381. And so it was held, 1 Salk. 203. *That tho' the Customs of London are confirmed by Act of Parliament, yet those Acts extend only to good Customs ; and bad Customs are void, and cannot be confirmed.* Plow. 399 b ; Hob. 85, 86, 87.

C. Serjeant, in Reply, agreed, that unless it did appear that inferior Courts had a Jurisdiction, the Process was void ; but here is sufficient set forth to give a Jurisdiction. The Custom, that upon Complaint made that the Plaintiff has a Personal Action, and suspects the Defendant will run away, Warrant shall issue ; so that we have followed the Custom in our Plea. It is said that Custom is void, because contrary to Law ; so are all Customs : And, in many Cases, Customs not strictly maintainable in themselves have been supported and made effectual by Act of Parliament. *By Custom, Serjeant of the Mace in London, upon Complaint of Debt entered in any of the Counters against Defendant, may arrest him by Parol, and carry him to Prison ; and this is a good Custom, and yet much stronger than the present Case.* Cro. El. 196, *Gerard ver. Dickenson*. So in *Dyer*, 229, p. 50, *Use of a Freehold Messuage in London may pass by Bargain and Sale made by Parol only. Custom of London, that where Contract is made between Citizen and Citizen for Payment of Money, and he who made Contract dies, his Executors or Administrators shall be chargeable therewith, as if it were upon an Obligation.* Cro. Eliz. 409. *So that the Debtor may be arrested before the Debt becomes due, to compel him to give Security.* 2 H. 4, 12.

[147] Y. C. J. There are two Objections made to the Defendant's Plea ; that no Affidavit was made of the Cause of Action before Issuing the Process ; and that this is a void Custom. There are a great many Cases, where general Words of an Act of Parliament do not extend to Customs, but that is where the Words are in the Affirmative only ; as in *Magna Charta*, it is said Court-Leets shall be held but twice a Year, viz. at *Easter* and *Michaelmas* ; and yet Custom to hold at different Times is good : But, in the present Case, here are negative Words ; and it is generally held in those Cases, that Customs are included. Suppose therefore this Act of Parliament does extend to inferior Jurisdictions, and no Affidavit is made before Issuing out the Process, the Judge, the Officer, and Gaoler will not be subject to false Imprisonment. That is carrying the Construction of the Act of Parliament too far, for there are no Words to make the Process void. I don't say in this Case no Action will lie, but it must be against the Party only. Where a Court has an original Jurisdiction, tho' the Proceedings are not strictly regular in Pursuance of that Jurisdiction, yet the Judge and Officer who execute that Process are not liable. And to this Purpose, see a notable Case in 2 Lutw. 937, 1560, for the Process in those Cases is not void, but erroneous only.

It is objected, here is a Justification out of an inferior Court, by a *Capias* without Summons, which is said to be void, and that no Custom can support it ; but such Process surely is not void, but voidable only. And in *Mackally's Case*, 9 Rep. 68. This Process by Custom of London, which is confirmed by Act of Parliament, is held to be good. Vide 2 Lutw. 1565. This Construction may go a great Way in the present Case, for the Customs of the University are confirmed in Parliament. It is true, an Act of Parliament cannot confirm Customs void in themselves ; but the Parliament may confirm Customs which perhaps could not support themselves.

P. J. The Question is, Whether the Proceedings are void, or voidable ? There is no Doubt but where the Court has an original Jurisdiction, Error in Proceedings does not make the Process void, but erroneous only : As *Service of Process out of Jurisdiction, the Process is not void in that Case*. The Act of Parliament requires, that Oath shall be made of the Cause of Action, and whether this is not a Condition precedent to the Jurisdiction, requires further Consideration.

P. J. General Confirmation will not establish Customs inconsistent with natural Justice. Here the Custom is ; the Party must make Complaint of his Cause of

Action, and must verify by Oath the Certainty of Damage ; but, in the present Case, he only swears he is damaged, &c., as he believes ; which [148] is not sufficient ; but this Defect does not make the Process void : For where the Defendant is arrested upon a Process at Law, and there is a Defect in Affidavits, that does not vitiate the Process, but this Court will discharge the Defendant upon his common Appearance ; but neither Judge, nor Officer who executes the Process, are liable to an Action.

L. J. The Question in this Case is not so much to the Custom, for that does not seem unreasonable, for Process is not to issue, but upon Complaint and Oath of the Plaintiff ; but whether the Defendants had brought themselves within this Custom. A *Cap.* without a *Sum.* as this Case is pleaded, is not unreasonable, for it does not issue but upon Oath that the Defendant upon Citation will not appear, and surely a *Summons* in such Case must be needless. The Act of Parliament requires, that an oath shall be made that Cause of Action amounts to £10 or upwards ; but the Omission of such Oath does not affect the Jurisdiction. *The Doubt that I have is, whether here ever was any Jurisdiction, which extends only to personal Actions?* How does this appear to be a personal Action ? *They ought to have shewn the Nature of the Action, that this Court might judge, whether within Jurisdiction, or not?* In all cases where Persons who hold Plea, have Power and Jurisdiction, tho' the Process thereupon be erroneous, yet it is not void, but voidable. But where a Court awards Process, without having an original Jurisdiction, it is utterly void. As if Justices of Common Pleas should hold Plea upon Appeal, the Process and Proceedings are utterly void, and the Officer who executes the Process is a wrong Doer. *Vide Moore, 275.*

Y. C. J. That is because the Court has no Jurisdiction as to the Nature of the Action : But here is a Jurisdiction only irregular in executing it. The *Stat. 21 Jac. 1, c. 4*, is that, before Information filed or received, an Oath shall be made, &c., but where Information is filed without Oath, the Proceedings are not void, but voidable. *Stands over.*

124.—MIDDLETON & Ux' versus CROFTS. *Mich. 7 Geo. II. [1733]. B. R.*

[S. C. 2 Atk. 650 ; 2 Str. 1056 ; 2 Barn. K. B. 351 ; Andr. 57 ; Cunn. 35, 114 ; 4 Vin. Abr. 320, pl. 14. Distinguished, *Marshall v. Bishop of Exeter*, 1860, 7 G. B. (N. S.) 710. Confirmed, *Bishop of Exeter v. Marshall*, 1868, L. R. 3 H. L. 17. Followed, *R. v. Allen*, 1872, L. R. 8 Q. B. 75. Distinguished, *Jenkins v. Cook*, 1875, L. R. 4 Adm. & Ecc. 489. Followed, *Mackonochie v. Penzance*, 1881, 6 App. Cas. 445 ; *R. v. Archbishop of York*, 1888, 20 Q. B. D. 747.]

Libel.

Libel exhibited against the Plaintiffs in the Spiritual Court for a clandestine Marriage. Several Facts were charged in the Libel, *viz. That the Parties were married without Licence or Publication of Banns ; that the Marriage was at uncanonical Hours, between one and three o'Clock in the Morning, and in a private Dwelling-house.* Upon Motion for a Prohibition, the Plaintiffs suggested, *That they could have proved the Marriage by one competent Witness ; and that they had a regular Licence, [149] but that the Spiritual Court refused to admit the Evidence of one Witness only.* The second Suggestion was, *That by Stat. 7 & 8 W. 3, this was made a temporal Offence, with Penalty of £10 to be recovered against any Man so married without Licence or Publication of Banns.* Andrews, D. L., argued against the Prohibition ; and, in the first place, *He admitted, that where Ecclesiastical Courts have an original Jurisdiction, and an Incident happens which is of temporal Conuzance, they shall try the Incident, but shall try it as Courts of Common Law would. But where the Ecclesiastical Court proceeds in a Matter merely Spiritual, if they proceed in their own Manner, tho' contrary to the Form of Proceedings at Common Law, no Prohibition lies.* In this Case, it is not necessary for the Defendants to produce one Witness, for Proof lies on the Part of the Promoter of the Suit ; he exhibits the Libel for a clandestine Marriage, and therefore it is incumbent on him to prove the Marriage. As to the Licence, there is no Proof at all necessary, that must be under the Hand and Seal of the Ordinary ; and in those Cases *Index loquitur per Sigillum.* The single Question therefore is, whether the Ecclesiastical Jurisdiction is taken away in these Cases by *Stat. 7 & 8 W. 3.* This Act of Parliament respects the Revenue only, and Penalty therein for marrying without Licence, and is not given as a Punishment for clandestine Marriage.

but to prevent Fraud in depriving the Crown of Duties given for licensing Marriages. And therefore, in all Cases where there is a License or Publication of Banns, the Act is satisfied, tho' ever so irregularly obtained, and no temporal Punishment for Irregularity, which is an Offence in the Spiritual Court, and there only punishable. It is held in *Lindw.* That a clandestine Marriage subjects all Parties, even Witnesses themselves, who are voluntarily present, to Excommunication; which is the Reason that in Prosecutions of this Nature the Witnesses are absolved *ratione testificandi*. Vide *Construction of Archbishop Sancroft, and confirmed* 25 H. 8, c. 19, Sect. 7, Canon 101. *Marrying at uncanonical Hours prohibited.* Canon 102. *Marriage in private Dwelling-houses.* Can. 105. *No Licence to be granted where either Parties are under Age, but by Consent of Parents, &c., and every Licence otherwise granted void, and Parties punishable.* In this Act of Parliament no express Words to prohibit the Jurisdiction of the Spiritual Court, and tho' no particular Saving, yet the Jurisdiction is not destroyed but by express Words, as in Case of Tithes, 23 H. 8, c. 2. 2 & 3 Ed. 6, c. 13, because no exclusive Words, Jurisdiction remains. So 22 & 23 Car. 2, c. 10, which gives Directions concerning Distribution; *Proceedings thereon may be by Bill in Equity, and yet no Doubt but Spiritual Courts have a Jurisdiction* [150] *in those Cases.* In Case of Pluralities, where any Ecclesiastical Person holds two Benefices with Cure *simul & semel*, the Spiritual Courts have a Jurisdiction which is not taken away, by 21 H. 8, for that Statute extends only to Cures of the Value of £8 *per Ann.*, so that there may be a Plurality within the Statute, and a Plurality by the Canon Law. In the like Manner, 21 H. 8, c. 13, enjoins Residence upon Forfeiture of £10. Here is a Penalty inflicted, and no Saving to preserve the Jurisdiction of Ecclesiastical Courts; but because no negative Words to restrain the Jurisdiction, it still remains an Offence punishable by Ecclesiastical Law. The Jurisdiction of Ecclesiastical Courts in Cases of this Nature are vindicated by Reason of the Common Law, as in Cases of Nuisance indictable at Common Law, tho' a new Penalty be inflicted, yet the Punishment at Law remains. So at Common Law an Indictment lies for an Assault and Battery; and an Action will lie also for the same Assault. In all these Cases it may be objected, that the Defendant suffers twice for the same Offence, but the Punishment is *diversis rationibus*, the 9 Ed. 2, *Articuli Cleri*, gives an Action *de violenta injectione manuum in Clericum*, and yet the Ecclesiastical Courts may excommunicate the Offender. 2 Inst. 620; *Articuli Cleri*. c. 3. And the Reason is given, 2 Inst. 622, c. 6, for that the Proceedings in both Courts are *diverso intuitu*: As if one lay violent Hands on a Clerk, *pro salute animæ*, shall injoin him Penance in the Spiritual Court, and the Clerk may have his Action, and recover Damages at Common Law for the Injury. So the Case of *Slader and Smallbroke*, 1 Lev. 138. A Layman forged Orders, and obtained a Benefice, for which he was prosecuted in the Ecclesiastical Court, and Order for Deprivation; and he prayed Prohibition, because Forgery is triable at Common Law: But Prohibition was denied, for the Forgery was touching an Ecclesiastical Matter, and he is sueable there for it, in order to his Deprivation only. *Hil.* 16 Car. 2, *Kerby and Savile.* Prosecution in the Spiritual Court for calling the Defendant Bawd; R. moved for a Prohibition, suggesting that K. had brought his Action at Common Law, and recovered; but the Prohibition was denied, because the Proceedings are *diversis rationibus*, the one for Damages, and the other *pro Salute animæ*, & *pro reformatione morum*. The present Case comes within the Reason of all these Cases. The Prosecution upon Stat. 7 & 8 W. is for defrauding the King of his Stamp-Duty, but in Ecclesiastical Courts the Proceedings are *pro Salute animæ*, both Courts proceed *diverso intuitu*, and therefore a Prohibition ought not to be granted. 5 Rep. 5 b, *de jure Regis Eccles.*

[151] Mr. S. Counsel on the same Side. This is a Prosecution for a clandestine Marriage, and the Charge consists of four Particulars; That it was without Licence or Publication of Banns; was performed at uncanonical Hours, and in a private Dwelling House. The Foundation upon which a Prohibition is moved for, stands singly upon Stat. 7 & 8 W. 3. For, as to the first Suggestion, there is no Affidavit to support it, and therefore the Court can take no Notice of this Case, but as it appears upon the Face of the Libel. It is said, that Prohibition ought to go, because a Penalty being given by the Statute, this is now become a Temporal Offence, and Jurisdiction of the Spiritual Court is by this Means taken away. But supposing the Objection to have that Force which is contended for, it can extend no further than the Penalty reaches, and that is to the Husband alone: Besides, the Suggestion extends only to Part of

the Libel, for the Penalty given by Statute is for marrying without Licence only ; whereas the Prosecution in this Case is not only for marrying without Licence, but for marrying at uncanonical Hours, and in a private Dwelling-House, which are Offences not within the Act of Parliament, and the Penalty given by the Act is not proportionable to the Offence, but adequate to secure the Duty arising from the Stamp to the Crown. There are many Cases where Common and Canon Law have concurrent Jurisdictions, and it has been held, even in the Case of a Custom, that Suit may be in the Spiritual Court, as in 1 Sid. 146 ; 1 Vent. 3 ; *Fitz. Nat. Brev.* 51. *If Pension is due by Prescription, it is at the Election of the Party either to sue at Common Law or in the Spiritual Court, contrary to the Opinion of Lord Coke, 2 Inst. 491. So a Man may have an Action pro bonis asportatis cum uxore, and at the same Time the Defendant may be libelled in the Spiritual Court for Adultery, because the Proceedings are diverso intuitu. So in the Case of Townsend versus Thorp, Hil. 12 Geo. 1 [1726]. The Plaintiff was indicted at Common Law for Drunkenness, & alia enormia crimina, and at the same Time libelled against in the Spiritual Court, in Order to Deprivation ; and tho' in that Case the Court did stay Proceedings upon the Libel, pending the Indictment, yet afterwards Consultation was granted.*

C. and G. Counsel e cont'. We have no Affidavit to verify the first Suggestion, and therefore that must be given up : But, as to the second, they insisted, that this was not an Offence punishable in the Spiritual Court. *It may be an Offence in the Parson who marries, but can be none in the Parties married. As to the Canons of 1603, they do not bind the Laity, for they have neither been read in Courts of Common Law, nor confirmed by Act of Parliament. Vide Gibson's Co-[152]-dex, 2 Salk. 672, 412. But supposing Spiritual Courts had a Jurisdiction in these Cases, that Jurisdiction is now taken away by Stat. 7 & 8 W. 3, which has made this a temporal Offence, and inflicted a Penalty upon the Party offending. This Statute gives the Sum of £10 to be recovered against the Man marrying without Licence, and so far at least the Ecclesiastical Jurisdiction is gone, and tho' this Penalty does not reach all the Facts charged in the Libel, yet their Jurisdiction being gone, as to Part, the Prohibition must go to the Whole, as in Hob. 192, Berrie's Case. In this Act of Parliament here is no particular Saving of the Jurisdiction of Spiritual Courts ; and in all Cases where the Common Law or Statute gives a Remedy in foro seculari, whether the Matter be Temporal or Spiritual, the Continuance of that Matter belongs to the King's Temporal Courts only, unless the Jurisdiction of the Spiritual Courts be saved by that Statute which gives the Penalty. 2 Salk. 673. And for this Reason, 10 Ann', c. 19, in a Clause to prevent clandestine Marriages, the Jurisdiction of Spiritual Courts is particularly saved : So in 1 Jac. 1, c. 11. To prevent Persons from marrying during the Life of the first Husband or Wife. 1 Eliz. c. 2, Act of Uniformity. 13 Eliz. c. 5, Of Usury. 31 Eliz. c. 6, Of Simony. 4 Jac. 1, c. 5, Of Drunkenness. And in many Cases where Acts of Parliament have imposed further Penalties in Ecclesiastical Offences, there is a Saving added for Jurisdiction of Ecclesiastical Courts. 2 Salk. 672. It is said, where Spiritual Courts proceed diverso intuitu, the Jurisdiction remains : But why ? Because in these Cases the Common Law gives no Remedy. As in 1 Lev. 138, where a Layman forges Orders, the Spiritual Court may proceed to Deprivation ; so in the Case of Townsend versus Thorp, for Deprivation cannot be in those Cases by the Common Law. Libel in Spiritual Court for Adultery ; and in that Case no Prohibition lies, because no Punishment at Common Law for Adultery. 2 Inst. 488. These are called mere Spiritualia. Where a Libel is in Spiritual Court for calling the Prosecutor Bawd, no Prohibition, because not actionable at Common Law. But in all Cases where there is a Remedy given by Common or Statute Law, and no Saving of the Ecclesiastical Jurisdiction, the Continuance of that Cause belongs to the King's Temporal Courts only. Vide 1 Inst. 96, Sir Tho. Jones, 131.*

Y. C. J. The Libel in Question consists of several distinct Facts. It is for a clandestine Marriage, without Licence, at uncanonical Hours, and in a private Dwelling-House. These are not Circumstances merely descriptive of a clandestine Marriage, and constituting one and the same Offence, but a distinct Judgment may separately be given upon each. To marry [153] under all these Circumstances was no Offence at Common Law, and are only made so by the Canons of 1603. But these Canons have neither been confirmed by Parliament, nor allowed in Courts of Common Law ; and Canons oblige not the Laity, without Consent of Civil Legislative Power. There are two Questions ; 1st, Whether Bishop Sancroft's Constitution, which condemns clandestine Marriages, be

confirmed in Parliament? And, 2dly, If the Jurisdiction of the Spiritual Court is not taken away by 7 & 8 W. 3? *It is a general Rule, that where a Remedy is given by Common or Statute Law in the King's Temporal Courts, whether the Matter be Temporal or Spiritual, the Ecclesiastical Courts have no Jurisdiction, except there be a Particular Saving in the Statute for that Purpose.* But this Rule is not to be taken in an unlimited Sense; for where the Proceedings are *diverso intuitu*, the Ecclesiastical Court shall not be prohibited. The 7 & 8 W. 3, seems to be made with a particular Regard to the Revenue only, and the Words of the Act are very strong; "*For the better Ascertaining, Levying and Collecting the said Duties on Marriages and Licences, be it enacted,*" &c. And then follows the Penalty for a Marriage without Licence, or Publication of Banns, but no Mention of a clandestine Marriage. *This is a Matter of great Consequence*, and ought to be well considered before we give Judgment. *It is therefore proper to grant a Prohibition to declare upon, in Order to bring this Point before the Court by Way of Demurrer.* Vide *Carthew*. Prohibition to stay a Suit in the Spiritual Court against a Schoolmaster for keeping a School without Licence pursuant to the Statute, upon a Suggestion that the said Statute gives a Penalty of 40s. *per diem* against every such Schoolmaster; and that by Law *nemo puniri debet bis pro uno delicto*; & *per Cur'*. A Prohibition was granted. *Carth. 464.* Upon the like Motion it was held, that the Spiritual Court might proceed to punish, but not for the Penalty. Adjournatur.

125.—CAREY versus HINTON. Mich. 7 Geo. II. [1733]. B. R.

Trespass *Quare clausum fregit*. Replication by the Plaintiff, that the *Locus in quo* was his Estate of Inheritance; not sufficient to maintain the Action.

Trespass Quare Clausum fregit. Defendant, as to the Force and Arms, pleads *Not guilty*; and as to the rest of the Trespass he justifies, and says, *That the Locus in quo, &c., was his own proper Lands, and that he entered into them as such.* Plaintiff replies, *That Locus in quo was his Estate of Inheritance, and his own proper Lands, and so [154] concludes to the Country.* Mr. K. moved in Arrest of Judgment, because the Issue was immaterial. The Replication is, that the *Locus, &c., was the Estate of Inheritance of the Plaintiff*; but that is not sufficient to intitle him to this Action: The Plaintiff may have an Estate of Inheritance in the Lands; he may have a Remainder or Reversion in him; but to intitle him to this Action, he must have a possessory Property. Mr. D. contr': The Issue is not immaterial but informal, which is aided by the Statute of Jeofails, as 5 Rep. 43, *Nicholls' Case*; 2 Bulst. 41; Moore, 464; 1 Sid. 289.

Y. C. J. *If this Issue should be aided by the Verdict, it will overturn all Certainty in Pleading.* The Replication is, that this is the Estate of Inheritance of the Plaintiff, which may be true, and yet the Plaintiff not intitled to this Action: He may have the Reversion or Remainder in him, which is not such an Estate as will support this Action. The Replication indeed does go something further; and avers these to be the proper Lands of the Plaintiff, but that imports no more than a Property in Lands, not a possessory Property to intitle him to this Action, but may be a Property in Remainder or Reversion.

P. J. *The Issue is immaterial; he has not pleaded it as his Freehold and Inheritance, but that the Locus in quo, &c., is his Estate of Inheritance. He ought to have pleaded liberum Tenementum; but that cannot be supplied and aided by Verdict.*

L. J. *Liberum Tenementum means a Right of Entry, and may be given in Evidence upon Not guilty.* If the Words in the Replication would amount to the same Construction as *liberum Tenementum*, there is no Question but it had been good; but the Words import no more than a Property in the Lands, which may be in Reversion; but does not go so far as to shew Possession, or Right of Entry in the Plaintiff.

P. J. *Dissentient'*, Adjournatur.

126.—SHARK versus DILKS. Mich. 7 Geo. II. [1733]. B. R.

No Rule to plead necessary, where the Defendant has Time given him to plead by Rule or Order.

Mr. M. Counsel moved to set aside Judgment for Irregularity; and the Objection was, *That the Plaintiff had signed Judgment without giving a Rule to plead.* The

Defendant had applied for further Time to plead, and by Consent had further Time given. The Defendant did not put in his Plea at the time agreed, and thereupon the Plaintiff signed Judgment; et per Cur. Where further Time is given, a Rule to plead not necessary; and so denied the Motion.

[155] 127.—BOUCHER *ver.* LAWSON. *Mich. 7 Geo. II. [1733]. B. R.*

Owner of a Ship held to Bail for the Default of the Master, on an Affidavit in the Disjunctive.

The Defendant was arrested at the Suit of the Plaintiff in the Sum of £363. Mr. B. moved to discharge him upon common Bail; and upon Affidavits the Case appeared to be this: The Plaintiff's Correspondent at Lisbon, 5th Nov. Inst. shipp'd on Board the Ship Little Job, John Fletcher Master (whereof the Defendant then was and now is sole Owner), Goods to the Value of £363, being Moidores, which the said Master undertook to deliver to the Plaintiff, &c. But the Defendant says, he gave no Authority to receive the same, for that the Goods being contraband Goods, his Ship was liable to be forfeited. John Fletcher did not deliver the Goods according to Promise; whereupon the Plaintiff brought his Action against the Defendant, Owner of the Ship, supposing him answerable for the Undertaking of his Servant. Mr. B. insisted upon 12 Geo. 1, That Oath to be taken of the Cause of Action must be positive; whereas, in the present Case, the Plaintiff had only sworn that John Fletcher Master, or Defendant the Owner, were indebted to him in the Sum of £363, which is in the Disjunctive and uncertain. That Moidores being contraband Goods, it was unlawful in his Servant to receive them, and therefore the Master not liable.

That no Action will lie in this Case, but Trover, or a special Action on the Case for not delivering Goods according to Agreement, and in both these Cases the Writ must be mark'd, or the Defendant cannot be held to special Bail; and compared it to the Case of Hughes versus Strout, which was adjudged this Term. This was an Action for Breach of Covenant, and £100 Damages laid. The Defendant moved to be discharged upon common Bail, and so ruled by the Court, because no Allowance by a Judge to have the Writ mark'd.

Mr. S. Counsel cont': We have not declared yet, so the Defendant cannot say what Action may be brought. We may bring Assumpsit, and in that Case the Defendant must find special Bail. Vide 2 Salk. 440, Boson versus Sandford. Assumpsit lies against the Master for the Undertaking of his Servant. In the principal Case the Motion was denied, and the Defendant ordered to find special Bail.

Pasch. 8 Geo. 1, Laws versus Colton. In Trover the Defendant was held to special Bail. W. mov'd to discharge him upon filing common Bail, because the Writ was not mark'd. The Motion was opposed. Sed per Cur. He must be discharged upon common Bail.

[156] 128.—THE KING *ver.* DR. BETTESWORTH. *Mich. 7 Geo. II. [1733]. B. R.*

Mandamus to grant Administration on the Widow's Renouncing.

Earl of Suffolk died intestate, leaving his Wife the Countess, and a Son, the present Earl of Suffolk. The Countess renounced Administration in scriptis by Proxy, and thereupon the Earl applied to the Spiritual Court for Administration, but was refused till such Time as the Countess had exhibited an Inventory of all the goods belonging to the deceased Earl in her Possession, whereupon the present Earl applied to this Court for a Mandamus.

Dr. J. In Opposition to the Motion, insisted the Renunciation of the Countess was enter'd by Surprise; for before the Renunciation, a Caveat had been entered by the Creditors; and it is a Rule in Ecclesiastical Courts, that after a Caveat no Act can be done, neither in Granting or Renouncing Administration before the Caveat be withdrawn. So that in this Case the Renunciation is admitted, yet being by Surprise, and not de jure, no Reason to compel the Spiritual Court to grant Administration to the Son. What is insisted upon in the Prerogative Court is only according to the Practice of that Court; a Renunciation in Person is never admitted, but upon Oath that the Person renouncing has not imbezzled the Effects of the Intestate. And this is in Favour of Creditors. The

Spiritual Court has not absolutely refused Administration, but only till the Countess brings in an Inventory.

Mr. M. Counsel on the same Side, The Renunciation was admitted by Surprise, without Notice to the Creditors. The Manner of admitting Renunciation in that Court is, upon Oath that the Person renouncing has not diminished the Goods of the Intestate, and upon Consideration of exhibiting an Inventory of the Goods of the Intestates in their Hands. Mandamus's in these Cases are founded upon 21 H. 8, c. 5, which leaves a Discretion in the Spiritual Court to grant it to the Widows or next of Kin, but in no Case was Administration granted to the next of Kin, but upon Condition to bring in the Widow; and in those Cases Administration is never granted before the Widow brings in an Inventory. The Practice of every Court is the Law of every Court, and this Court will take Notice of it.

Y. C. J. *The Mandamus must go; the Act of Parliament is express, that Administration must be granted to the Widow or next of Kin: When therefore the Widow renounces, the next of Kin is intitled ex debito justitiæ.*

[157] *There is no Question but Creditors may enter Caveats, but that is only to take care that Security be given.* The Spiritual Court will grant Administration upon the Countess's Exhibiting an Inventory; but when will that be? This is not compulsory upon the Countess to exhibit. Supposing therefore she should never exhibit, it seems unaccountable that this should prevent the next of Kin from having Administration.

If the Effects of the Intestate are imbezilled, the Administrator must take Care of that; he is intitled both in Law and Equity, and the Countess is accountable to him. But it is said always to be the Practice of Ecclesiastical Courts to have an Inventory, and therefore this Court will not interpose. This Objection is over-ruled every Day. *In the Case of Lord Londonderry, the Spiritual Court denied Probate before Commission of Appraisement was returned: And it was argued that this was the constant Practice of the Court; but where the Practice is contrary to the Rules of Law, this Court pays no Regard to it.*

P. and L. Justices, being of the same Opinion, the Mandamus was granted.

129.—MASON *versus* EALL. Mich. 7 Geo. II. [1733]. B. R.

Proceedings partly in *Latin* and partly in *English*, no Error.

Assumpsit, and Verdict for the Plaintiff. Mr. P. assigned for Error, that the Proceedings being partly in *Latin*, and partly in *English*, the Judgment was erroneous, as in Comb. 50; Cro. El. 85. Declaration was in *English*; whereas, by 36 Ed. 3, c. 15, all Entries are to be in *Latin*; and altho' it was said the Custom there was so used, yet this cannot be good against a Statute.

Mr. R. *con'*: *This is aided by the late Act of Parliament, which is express that no Judgment shall be reversed, where Proceedings are Part in Latin, and Part in English. The Words of the Act are, "That it shall not be Error."*

Per Cur', Judgment must be affirmed. *Vide* Ca. 130.

130.—WILMORE *versus* HAUGHTON. Mich. 7 Geo. II. [1733]. B. R.

The Damages laid in the Declaration, and not those Damages found by the Jury, to govern on the Statute 5 Geo. 2. For Proceedings to be in *English* where the Cause of Action is under £10.

Y. C. J. *delivered the Opinion of the Court, that the Damnum in the Declaration must be the Measure of the Damages.* The Case of *Wilmore versus Haughton* was *Trespass in Assault* [158] and *Battery*, and £40 Damages laid in Declaration; the Jury found for the Plaintiff, and gave 1s. Damages. Error was brought upon this Judgment, and assigned for Error, that Damages being under £10 the Proceedings ought to have been in *English*, for that the Cause of Action was the Damage given in the Verdict. The next is the Case of *Thurston and Harris*, which was an Action of *Assumpsit*, *ad damnum* £20. There is Judgment by Default, a Writ of Inquiry executed, and £6 given in Damages. A Writ of Error is brought, and assigned, that Proceedings ought to have been in *English*. The next is the Case of *West and Nichols*, which was *Trespass in Assault, &c.*, *ad damnum* £100, there is Verdict for Plaintiff, and 40s. Damages;

Error is brought, general Errors are assigned, and insisted, that Damages being under £10 all the Proceedings ought to have been in *English*. It has been argued for the Plaintiffs, that the Finding of the Jury is the Cause of Action, and that neither Party nor Court can say otherwise. On the other Side, it is said, that Damages in the Declaration is the Cause of Action. *Vide* 5 Geo. 2, *For that in Actions which found in Damage, the Plaintiff cannot prophecy what Damage the Jury will find. Under these Circumstances the Court is of Opinion, that the Quantum in the Declaration is to be the Measure of the Damages.* This Act of Parliament is introduced with a Recital of 12 Geo. 1, intituled, *An Act to prevent frivolous and vexatious Arrests, and by that Act the Cause of Action is to be taken from the first Process served upon the Defendant.* And in the same Act of Parliament there is another Clause, which relates to the Issuing out of Special Writs; and here the Cause of Action must necessarily be understood of the Demand laid in the Process, or else the Officer may be an Offender *ex post facto*, for what he could not foresee. *In pleading the Statute of Limitations, the Averment is quod causa actionis non accrevit, &c., and Cause of Action in this Case relates to the Demand in the first Process.* Stat. Glouc. c. 8, *Courts of Westminster shall proceed in no Cause, where the Cause of Action is under 40s., but that must be taken from the Cause of Action laid in the Declaration.* 2 Inst. 311, 312. *So if Action is in an inferior Court, and the Damnum is under 40s., tho' the Jury should give upwards of 40s., yet the Plaintiff shall have his Judgment, and may release Damages above what is laid in the Declaration.* This Case would have had some Consideration, if it had depended singly upon this Act of Parliament; but it is now made clear beyond all Doubt, by an Act of Parliament passed the last Sessions, intituled, *an Act to explain* 5 Geo. 2, *and to extend it to the great Sessions of Wales.* *Vide the Act of Parliament.* By this Act the Debt [159] or Damage declared in the Process are Words synonymous to the Cause of Action mentioned in 5 Geo. 2, and therefore the Court is of Opinion, that the Judgments in these Cases in the Common Bench must be affirmed. There is another Case, which is the Case of *May versus Osborne*, that is the Reverse to these; for there the Plaintiff declares in *English*, *ad damnum* £25. There is Judgment by Default, a Writ of Inquiry executed, and £9, 10s. Damages given. Error is brought, general Errors are assigned, and objected, that the Declaration being in *English*, the Judgment was erroneous. Both these Cases cannot be aided by 5 Geo. 2, and therefore this Case must stand upon the old Law, and there is no Question, but then the Judgment is erroneous; for 36 Ed. 3, c. 15, expressly provides that all Entries shall be in *Latin*. *This Judgment therefore must be reversed.* *Vid. ante, Ca. 129*

131.—AMCOURT *ver.* ELEVER. *Mich. 7 Geo. II. [1733]. B. R.*

Assumpsit. Condition precedent.

In *Assumpsit*. The Plaintiff declares that the Defendant, in Consideration the Plaintiff had promised to assign him a Lease, he the Defendant, in Consideration thereof, promised to pay, &c. The Defendant pleaded that the Plaintiff had not assign'd, &c., and to this the Plaintiff demurs. The Question is, If the Assignment on Part of the Plaintiff is not a Condition precedent to the Payment of the Money by the Defendant. *Vide* 1 Lutw. 245, *Thorpe versus Thorpe*. 1 Roll. 415; 2 Saund. 155, *Hunlock versus Blacklowe*. Stands over.

132.—THE KING *ver.* CARTER. *Mich. 7 Geo. II. [1733]. B. R.*

Bail denied in Manslaughter found by the Coroner's Inquest.

The Defendant was found guilty of Manslaughter by the Coroner's Inquest, and being brought up by *Habeas Corpus*, moved to be bailed, having Affidavit that one of the Jury had laid several Wagers that the Coroner's Inquest would find the Defendant guilty. It appeared by the Inquisition, that Carter struck the Deceased without Provocation, which was the Occasion of his Death; and then it goes on, and finds him guilty of Manslaughter.

Cur': This is the Evidence upon which the Inquisition was taken, and by the Circumstances of the Fact the Defendant appears to be guilty of Murder. As to his Objection to the Jury, that may be a proper Defence for him upon his Trial: [160] But we cannot enter into the Merits upon Affidavits; and therefore denied him Bail.

C. v.—18

133.—GREETING *ver.* ALLCOCK. *Mich.* 7 *Geo.* II. [1733]. *B. R.**Latitat* to the Chamberlain of Chester.

The Plaintiff sued out a *Latitat*, directed to the Chamberlain of the County Palatine of Chester, which he served upon the Defendant, *without any Mandate from the Chamberlain*, which was now complained of *as irregular, and Motion made to set aside Proceedings.* Before 12 *Geo.* 1, the King's Process did not run into the Counties Palatine, and therefore was always directed to the Chancellor, who made out his Mandate directed to the Sheriff to execute the same. 4 *Inst.* 212. This Act of Parliament does not take away the Jurisdiction of Counties Palatine; but, in general, that no Arrest shall be made where Debt is under £10. In 5 *Geo.* 2, Which is made in Explanation of the former, there is a particular Clause to save the Jurisdiction of Franchises and Liberties, that in all Franchises, &c., particular Officers shall execute the Process.

Mr. F. *con'*: The Act of Parliament mentions Process only issuing out of superior and inferior Jurisdictions; but a Mandate issuing out of no Court at all, it is no more than the common Case of a Sheriff: Where Process is to be executed in a particular Franchise, the Sheriff makes out the Warrant to the particular Officer; and tho' in these Cases the Mandate is under Seal, that makes no Difference. Since the Making this Act, no Warrant is now made out by the Sheriff, but Copy of the Process is served in the first Instance. The Stat. 5 *Geo.* 2, makes no Difference, but is rather in Favour of the Plaintiff, for this Act is relative to 12 *Geo.* 1, and the Words are, "That Affidavit must be made before the Judge or Commissioners of that Court out of which such Process issues." And the Act requires Service of such Process issuing out of inferior Courts, and the Person executing such Process shall take no more than 5s. for Service of such Copy: But if a Mandate be necessary, more may be taken, for that is *casus omissus* in the Act of Parliament. Proviso in the Act of Parliament makes no Difference, but only that in particular Franchises and Jurisdictions the Process must be executed by the proper Officer. If this Clause had not been included, an Attorney, or any other Person, might have served the Copy of the Process; but to save the Profits arising to the Lords of these particular Jurisdictions, was the Reason of adding that Clause.

[161] Y. C. J. The Nature of the Process to be served runs thro' both Acts of Parliament, and the Service (of such Process) is relative to the Process which originally issues; but a Mandate is not Part of that Process issuing out of the same Court.

P. J. The Word Process in the first Act extends to the original Process out of this Court, and the Word (*such*) makes it stronger: Besides, there must be a Return of Process. What Process? That which issues out of this Court. The Proviso in the second Act of Parliament does not go so far as is contended for. It was never the Meaning of the Legislature to have Proceedings below run in the same Chancel as before the Act of Parliament. The Proviso is to preserve the Lord's Profit arising from his particular Franchise, that the Process issuing out of this Court should be served by the particular Officer of that Franchise.

P. J. Copy of Process to be served within the Meaning of both these Acts of Parliament, must be the original Process issuing out of superior Courts. The Chamberlain's Mandate is not to be looked upon as a Process, for his Office is partly Ministerial. This Act was made to prevent Charge and Expence in the Execution of the Process, that a Copy of the Process may be served without the Interposition of the Sheriff. If a Mandate should be necessary, the Act of Parliament will be of little Benefit; and as the Sheriff's Profit is taken away as to the Service of Writs, so would the Lords of particular Franchises have lost theirs, but for the Saving of the Act of Parliament.

L. J. This Case depends upon the Construction of the first Act of Parliament, and is not aided by 5 *Geo.* 2, the Clause concerning the Service of Process is relative (*such Process*) and can be no other than the original Process issuing out of this Court. Motion over-ruled by the Court.

134.—THE KING *versus* EARBURY. *Mich.* 7 *Geo.* II. [1733]. *B. R.*

Recognizance taken by a Justice of Peace to appear in this Court to answer all Matters generally, not specifying the Facts.

The Defendant was arrested by Virtue of a Warrant signed Charles Delafay, being charged as Author of a Libel, called The Royal Oak Journal, and by Recognizance

bound to appear at the King's Bench Bar the first Day of the next ensuing Term, and there to answer all such Matters as he should be charged with from the Bar. Mr. Earbury came into Court the Term following, and objected to the Legality of the Warrant, and of the Recognizance, but refused to have his Ap[pearance] recorded; notwithstanding the Clerk recorded his Appearance, being then present in Court. Mr. J. Counsel for the Defendant, insisted, That altho' Mr. Earbury did appear in Court, yet the Court could not record his Appearance against his Consent, *Golds. 118*, which was in the Case of a Prisoner; here the Defendant is not so. The Court entered the Presence of the Defendant, but would not enter his Appearance. *Essoin* does not enter Appearance, only an Excuse for not appearing. 4 *Jac. 2*, The King against the Archbishop of Canterbury. The Archbishop was committed by the Privy Council upon a Libel, called a Petition of Remonstrance to the King not to intermeddle with Church Government. And it was objected to the Commitment, That the Bishop could not be charged with an Information, unless properly and legally in Court. 47 *Ed. 3*; *Tit. Annuity*, 1 *Sid. 32*. Judgment ought not to be given because no Appearance, and the Bond is only a Promise to the Sheriff to appear, *Lutw. 951*, unless there be Process, and Party have a Day in Court, he cannot appear; and this Recognizance is no Process to bring the Party into Court. Recognizance, illegal in Form and Substance! The Condition is, if the said Mr. Earbury shall appear in B. R. to answer such Matters as shall be objected to him at the Bar, but nothing then charged upon him. This is too general, for the Recognizance should have mentioned the Facts he was obliged to answer. *Lamb. 89*; *Dalton*, *Tit. Recognizance*; and the Practice is always to express the Cause, *Godb. 147*, *Acts, c. 25, v. 7*. Festus said to Agrippa, concerning Paul, For it seems to me unreasonable to send a Prisoner, and not within to signify the Crimes laid to his Charge. Recognizance bad in Substance, for Justices of the Peace have no Power to bind any one to his Appearance into this Court. They have only an inferior Jurisdiction, and their Proceedings cannot be brought into this Court but by *Mandamus*, or other legal Process issuing out of the Court. This is a Court of the greatest Dignity, see 4 *Inst. Form of a Recognizance is to appear coram me, but does not say before whom by Name. Un' Justiciar', &c. Objection to Commitment, that it was to a Messenger's House, which is no Prison in Law, and therefore illegal. Recognizance obtained by Duress, therefore void. Cro. Eliz. 646, 745; Magna Charta, c. 29; 25 Ed. 1, c. 1 & 2. No Examination, Dalton, c. 170. No Warrant produced, Vide 1 Salk. 347. Kendal and Roe, 5 Mod. 78, same Case. Commitment for high Treason in aiding the Escape of H., committed for Treason, ought to specify the Treason for which H. was committed. 1 Leon. 70, 71. Secretaries of State may commit as Conservators of the Peace at Common Law. 1 Salk. 347. May commit to a Messenger, [163] for the Court will intend it only in Order to carry him to Gaol. 1 Salk. 347.*

135.—THE KING versus GALLARD. Mich. 7 Geo. II. [1733]. B. R.

Indictment contra bonos mores.

Indictment contra bonos mores, for running in the common Way naked down to the Waist, the Defendant being a Woman. S. moved to quash, because the Fact is not indictable. F. cont': Indictments will lie contra bonos mores, as against Curle for publishing an obscene Book. 1 Sid. 168. Sir Charles Sidney's Case. 1 Keb. 620. Quia immodeste & irreverenter behaved himself in Church. Another Indictment was for printing Rochester's Poems; sed per Cur', The Indictment must be quashed, for nothing appears immodest or unlawful.

136.—CHAPMAN versus BROWN. Mich. 7 Geo. II. [1733]. B. R.

In Assault and Battery, and Costs for not going to Trial. A fresh Action brought, and the Plaintiff gone beyond Sea; the Court refused to stay Proceedings till Costs paid.

Action of Assault and Battery, and Costs for not going on to Trial. The Plaintiff brought a fresh Action, and now Mr. S. moved to stay Proceedings till the Plaintiff had paid the Costs of the first Action, and produced an Affidavit that the Plaintiff was gone beyond Sea, so that if the Verdict should be for the Defendant, no Person to

come against for Costs. The Court said this Motion was against the general Rule; but the Plaintiff being beyond Sea, did vary the Case, and therefore ordered to search Precedents. Mr. S. then turned the Motion, that the Attorney might shew by what Authority he prosecuted this Action, contrary to the express Command of the Plaintiff; but this the Court absolutely refused. At another Day Mr. S. stirred this again, and cited the Case of a Pauper; but the Court said that did not come up to the present Case, and remembered the Case of *Knock versus Wilkins*, which was an Action of Assault and Battery, and like Motion was denied. The Attorney for the Plaintiff afterwards entered into a Rule by Consent to pay Costs, if the Plaintiff should be nonsuited, or a Verdict against him. Note: In the Case of *Jones versus Eubank*, Mich. 3 Geo. II. the like Motion was made, and granted per Cur'.

[164] 137.—MURRAY versus ANDERSON. Mich. 7 Geo. II. [1733]. B. R.

Justification in Trespass.

Trespass for entering into the Plaintiff's House and taking two Shirts; and the Defendant justifies, for that the Plaintiff was fined the Sum of 3s., and that he entered and took the Goods in order to satisfy this Fine, and thereupon the Plaintiff demurred. And it was now objected, that the Plea was uncertain; for it does not appear how this Fine was imposed, only said in general, that the Plaintiff was fined, without saying where, by whom, by what Authority, or for what Offence: All that is said is, that this Fine was allowed in the *Exchequer Chamber* upon the Sheriff's Account, to be due to the chief Bailiff of the Manor of *Stepney*; but it is not said that it was due to him as chief Bailiff.

Cur': It is said to be allowed him upon the Sheriff's Account and upon the Roll in the *Exchequer*, the Entry is always general. It appears by the Plea, that the Defendant was fined, and that the Goods were levied accordingly.

138.—BAINTON versus KING. Hil. 7 Geo. II. [1734]. B. R.

Lord Hardwicke, Chief Justice; Page, Probyn, Lee, Justices.

Debt upon Award.

Debt upon Award. The Defendant pleads *no Award*. The Plaintiff replies, and sets out an Award, that the Defendant should have all his Goods taken in Execution, except those which were already sold; that he should thereupon pay so much Money to the Plaintiff, and all Parties should execute mutual Releases. To this the Defendant demurs, and objected, that this Award was made on one Side only, for that the Defendant could have no Benefit of the Award, and cited 3 Mod. Rep. 272, *Thirsby versus Helbott*. It is uncertain what Goods the Defendant was to have again, and not in his Power to know what were sold, and what were unsold at the Time of the Award.

[165] *S. Counsel con'*: Here are mutual Releases to be executed, which makes it a good Award; for if I am to pay Money, and another is to release, this is a mutual Award. The Defendant is to have all and singular the Goods which remain unsold; and this is a sufficient Ascertaining of the Goods, by Reference to the Goods taken in Execution. It is like the Case of *Tazing Costs*, or *Awarding an Account*, for in both Cases what is due may be reduced to a Certainty.

H., C. J. Awards have of late been more favoured than formerly; and therefore, if by any favourable Construction this can be reduced to a Certainty, the Court will intend it a good and sufficient Award. Here is something awarded *extra* the mutual Releases, and if either Party cannot have the Benefit of it, it is a void Award. Here are Goods to be restored to the Defendant, except such as are sold: How does the Defendant know what Goods remain unsold? what these Goods are that were sold, and whether sold bona fide may be disputed; and so many other Objections may arise, that this Award is by no Means conclusive between the Parties. *Adjournatur*, to be spoke to again.

A Man shall not reverse a Judgment for Error, unless he shews that the Error was to his Prejudice. 5 Rep. 39 b, in *Tey's Case*.

139.—The BANK of ENGLAND *versus* MORICE, Executrix of HUMPHREY MORICE deceased.

Hil. 7 Geo. II. [1734]. B. R.

Amendment of Replication, after a Rule for a Trial *de novo*.

In *Assumpsit* against the Defendant, as Executrix of *H. M.* deceased, the Defendant pleaded several Specialties standing out against her Testator, and set out Bonds specially, and disclosed particularly what was in Reality due thereupon, and that she had not Assets *ultra*. The Plaintiffs replied Assets *ultra*; and upon this they were at Issue.

Upon the Trial a Question arose whether the Penalty in the Bonds, or so much only as was disclosed by the Defendant to be really and *bona fide* due thereon, should be allowed to cover Assets.

There was a Verdict for the Plaintiffs, &c., for £28,000 and upwards given in Damages; but *R., C. J.*, saved this Point to the Defendant, and afterwards, upon Argument, the Court being of Opinion that the Penalty was the Debt in Law, a Trial was granted *de novo*.

[166] *E. Serjeant* came this Term into Court, and prayed to amend the Replication, and that instead of replying Assets *ultra*, the Plaintiffs might reply what was really due upon the Conditions; That the Obligees were willing to accept thereof, and that the Defendant kept the Bonds on Foot *per fraudem*. Upon shewing Cause it was objected, That Courts of Law had never gone so far; that this was not to amend the Replication, but was making it an intire new Issue. *Salk. 50.*

If this Practice prevails, there will be no Occasion to discontinue or pray a Repleader.

In all Cases where Applications of this Nature have been made, it has been under this Circumstance, "If it can be no Prejudice to the Defendant." Here it may be the greatest Prejudice; for the Plaintiffs have not stirred in this Action for now almost a Year and a Half, and the Defendant has paid away Assets recovered upon Suits commenced since the Commencement of this Action; and therefore it will make a *Devastavit*, if the Plaintiffs recover in this Action, and there appears to be a Defect of Assets.

H., C. J. There is no Question, but after a Trial *de novo* is granted, an Amendment may be made which does not alter the Nature of the Issue: But here the Question is, Whether an Amendment can be made which intirely alters the Issue?

E. Serjeant e con': This Amendment makes no Alteration in the Nature of their Plea, nor in the Issue: For the Question in Substance will be, Whether she has Assets *ultra* what was really and *bona fide* due upon the Specialties?

There are several Cases where Amendments of this Nature are made after Issue joined; but the Case of *Thompson* against *Hunt*. 3 Lev. 368, is a Case in Point. 1 Leon. 24; Cro. Jac. 306; 1 Sid. 412. So is 3 Lev. 347, and 3 Lev. 440, the Case of *Stephens* versus *Cooper*; 3 Lev. 20, *Dobson* versus *Douglas*.

There was a Case lately adjudged in this Court, which seems to go further than the Case in Question, and that is the Case of the *Executors of the Duke of Marlborough* against *Wigmore*, *Hil. 4 Geo. II. [1731]*. In *Assumpsit* the Plaintiffs declared upon a Promise made to the Duke of *Marlborough* in his Life-time; the Defendant pleaded *non Assumpsit infra sex Annos*, and upon this the Parties were at Issue, and the Cause was carried down to Trial. The Plaintiffs afterwards prayed to amend, by laying the Promise to be made to the Executors themselves, and the Court upon Consideration made a Rule accordingly.

H. C. J. conceived this Amendment is not consistent with the Rules of Law, nor with the Rules of this Court. This Amendment is no Part of the Rule itself, and there is no [167] Question, when the Court made the Rule, it was in the Power of the Court to put what Terms upon it they thought proper. I am of Opinion this Motion cannot be granted, for it is not so properly a Motion to amend, as to withdraw the Replication intirely, and make a new Issue; this is indeed a common Practice in Equity, but I never knew it to prevail in a Court of Law. The Case of *Thompson* and *Hunt* does not go so far as the present Case: In that Case the Plaintiff alledged in his Replication, that there was only so much really due, but had omitted that the Obligees were willing to accept the same, and the Adding these Words did not alter the Plea: But that Case seemed to go farther than any Case he said he ever heard of, and seemed contrary to Law to grant a Repleader after Judgment in Demurrer, and questioned if that Case was not upon Consent. *Vide* 3 Rep. 52 b, in *Ridgeway's* Case, 1 Anders. 168. 1 Leon.

79, c. 102, *Zouch versus Bamfield*. Plow. 138, *Browning versus Beston*. There was a Repleader after Demurrer.

The Duke of *Marlborough's* Case does not come up to the present Question : The Amendment in that Case did not vary the Fact, nor alter the Record, but the Issue continued as it was before.

The Circumstances of this Case are very much to be considered ; this is in Case of an Executor, where *Priority of Suit prevails* ; the Plaintiffs having lain by a Year and upwards, it may reasonably be supposed, that the Defendant imagined the Cause to be intirely dropt, and that she has paid away the Assets ; it would therefore be a little hard, that the Defendant should be prejudiced by the *Laches* of the Plaintiffs, especially in this Case, where the Rules of Law seem so strongly to favour her.

P. P. and *L.* Justices being of the same Opinion, the Motion was denied.

140.—ARTHUR *versus* VANDERPLANK. *Hil. 7 Geo. II. [1734]. B. R.*

Covenant for Rent against the Executor of a Lessee, where the Lessee in his Life-time had assigned his Term, and the Lessor had accepted the Assignee for his Tenant.

Action of Covenant for Rent against the Defendant, Executor of *J. S.*, Lessee for Years. The Defendant pleads, that the Lessee in his Life-time made an Assignment of his Term, and that the Plaintiff, the Lessor, had received Rent, and accepted the Assignee for his Tenant ; and to this the Plaintiff demurs.

[168] *B.* Serjeant argued against the Plea, that it was bad. It is true, in an Action of Debt for Rent, this is a good Plea, 3 Rep. 22 *a & b*, *Walker's* Case ; but in Action of Covenant it is otherwise, Cro. Car. 188 ; 1 Jones, 183 ; Stiles, 265.

Mr. P. of Counsel with the Defendant, gave up the Point without Argument, and so Judgment was given for the Plaintiff.

Note : *Covenant lies not against Executors by Reason of the general Covenant in Law, by Virtue of the Words Demise and grant ; but it is otherwise upon an express Covenant.* Dyer, 257 ; 2 Brownl. 214.

Covenant lies against the Lessee after Assignment, although the Lessor had Notice and accepted Rent of the Assignee. 3 Lev. 233, *Edwards versus Morgan* ; but not Debt.

141.—STEPHENS *ver.* STEPHENS. *Hil. 7 Geo. II. [1734]. B. R.*

[S. C. Cas. temp. Talb. 228.]

(N.B. *This Case was sent out of Chancery, for the Opinion of the Judges of the Court of King's Bench.*)

Of executory Devises.

Sir *William Stephens* being seized in Fee of several Freehold Messuages, Lands and Tenements, devised them in the Manner following : “ I give and devise to my Grandson *William Stephens*, after the Decease of my Wife *Susanna*, all my Lands settled on my said Wife for Life ; and also all my Lands, Tenements and Hereditaments in *Deptford* in the County of *Kent*, settled upon me by Deed by my Wife, to hold to me and my Heirs for ever.

“ *Item*, I give and devise to my said Grandson *William Stephens* all my Lands and Tenements in the Parish of *St. Mary Bermondsey* in the County of *Surry*, situate and being at *Rotherith Wall, East Lane, St. Mary Magdalene Church-yard, &c.*, to hold my said Messuages, Lands, Tenements, &c., to my said Grandson *William Stephens*, his Heirs and Assigns for ever. But, in case my said Grandson *William* happen to die before he attains his Age of twenty-one Years, then I give and bequeath to my Grandson *Thomas Stephens* all my Messuages, Lands and Tenements before mentioned, as well as those in the Parishes of *St. Mary Magdalene Bermondsey*, and *St. Olive* in *Southwark*, as those in the Counties of *Essex* and *Kent*, to hold the same to my said Grandson *Thomas*, his Heirs and Assigns for ever.

[169] “ But if my said Grandson *Thomas* should happen to die before he attains the Age of twenty-one Years, then I give and bequeath all my said Lands, Tenements, &c., before-mentioned, to such other Son of my Daughter *Mary Stephens* by my Son-in-Law *Thomas Stephens*, as shall happen to attain his Age of twenty one Years, his Heirs and Assigns for ever ; the elder of such son to take Place before the younger.

"one after another, in Seniority of Birth, &c., and of the several and respective Heirs Male of such respective Bodies of all and every such Son and Sons; the elder of such Sons, and the Heirs Male of his Body lawfully issuing, to be always preferred, and to take Place before the younger of such Sons and the Heirs Male of his and their Body and Bodies issuing: And for Default of such Issue Male, then I give and devise my aforesaid Freehold Estate, &c., to all and every the Daughter and Daughters of my said Son *Thomas Stephens*. on the Body of my said Daughter *Mary* to be begotten, and to the Heirs of the Body and Bodies of all and every the said Daughter and Daughters, as Tenants in Common, and not as Joint Tenants: And for Want of such Issue, then I give and bequeath my aforesaid Freehold Estates, &c., to my Brother *Richard Stephens*, his Heirs and Assigns for ever.

"Item, All the rest and Residue of my Estate, both real and personal, Goods, Chattels, &c., whatsoever and wheresoever, not hereby before bequeathed, I give and bequeath the same to my said Son *Thomas Stephens*, his Executors, Administrators and Assigns for ever"; and made his said Son, *Thomas Stephens* his sole Executor.

15th March following the Testator died, leaving *Mary* the Wife of the said *Thomas Stephens*, his Daughter and Heir, and his two Grandsons *William* and *Thomas Stephens*, living at the Time of his Death, but no Granddaughter.

18th May 1713. *Susanna*, Daughter of the said *Thomas* and *Mary Stephens*, was born, and is still living.

24th October 1714. *Thomas Stephens* the Grandson died *sans Issue*, and under the Age of twenty-one Years.

14th September 1718. *William Stephens* the Grandson died without Issue, and under the Age of twenty-one Years.

14th March 1719. *Mary Stephens*, another Daughter of *Thomas Stephens* and *Mary* his Wife, was born, and died *sans Issue* and under Age, 26th October 1722.

13th November 1721. *Sarah*, another Daughter of *Thomas* and *Mary Stephens*, was born, and is yet living.

15th February 1722. *Mary Stephens*, another Daughter of *Thomas* and *Mary Stephens*, was born, and died without Issue and under Age, 26th April 1723.

[170] 12th January 1727. *Thomas Stephens*, one of the Parties in this Suit, Son of the said *Thomas* and *Mary Stephens*, was born, and is still living.

Richard Stephens, to whom the Testator devised the Remainder in Fee, is still living.

Thomas Stephens the elder claims Title to the said Premises, as residuary Devisee. *Mary*, his Wife, claims Title as sole Daughter and Heir to Sir *William* the Testator; and the other Parties likewise claim Title under the said Testator's Will.

Peere-Williams, Counsel for the Infant *Thomas Stephens*.

The present Question as to *Thomas* the Infant is, Whether he will not be intitled if he attains the Age of twenty-one Years? The Testator devises his Lands, &c., to his two Grandsons *William* and *Thomas*, and in case they happen to die before they attain the Age of twenty-one Years, then to such other Son and Sons of his Daughter *Mary*, &c., as shall attain the Age of twenty-one Years. The Intention of the Parties in all Cases, especially in that of Wills, is to be regarded, if not inconsistent with the Rules of Law. Hob. 277. Here the Testator's Intention appears evidently, that his Grandsons should be first successively intitled to his Estate; and that his Granddaughters should not take but upon Failure of Issue Male. The first Devise to his two Grandsons *William* and *Thomas*, is a Devise absolutely to them in Fee; but the subsequent Words restrain and reduce it to a Fee-simple determinable, viz. if they attain the Age of twenty-one Years; but if they should die before that Time, then the Testator devises it to such other Son as *Mary* should have, &c., when he shall attain his Age of twenty-one Years. These Words make a good *executory Devise* to *Thomas the Infant*, to take Effect in Possession, as soon as he comes of Age.

It cannot be thought that the Testator intended to give a less Estate to the next Son that should afterwards be born, than he gave to his two Grandsons *William* and *Thomas* then in Being.

Limitations by Way of *executory Devise* operate in the same Manner with springing Uses in Equity; and the Statute of Wills impowers the Testator to devise his Lands according to his Will and Pleasure: But this Power has always been construed so as to avoid Perpetuities, that both *executory Devises* and springing Uses must arise within a Time limited. In the Cases of *Executory Devises*, a Fee may be limited upon

a Fee, and the Testator may limit it to as many Sons, one after another successively, as *Mary* and *Thomas* shall have of their Bodies; and all this makes no Perpetuity, because confined to a Time limited, and to arise within the Compass of [171] one Life. One seized in Fee may not only devise his Estate upon a Contingency, but upon Failure of that Contingency may devise it over upon another Contingency likewise; as in the Case of a Term for Years, a Man may devise it to one for Life, Remainder to another for Life, and so on; for all being to arise within the Compass of a Life, there can be no Danger of a Perpetuity. In the present Case, the longest this Contingency can remain in Suspence is twenty-one Years. It is possible *Thomas* the Infant may die within Age, and after that another Son may be born; afterwards *Mary* may die, and so the Estate continue in Contingency till the second Son arise to twenty-one; but this is only during the Infancy of one who is to take, and is a reasonable Time for an Executory Devise to wait.

Suppose the Devise had been to the next Son which *Mary* should have, that without Doubt had been a good Executory Devise; for Executory Devises are not confined to Lives in Being; and therefore if a Term be devised to one for Life, Remainder to the first unborn Son of such Devisee, this is a good Devise. 1 Roll. Abr. 612; 1 Sid. 451. Admitted nothing vested in *Thomas* before he attained the Age of twenty-one, but this makes no Perpetuity, because it must arise within twenty-one Years, or not at all. A Perpetuity is a Limitation to Persons not *in esse*, to arise upon a future Contingency, beyond the Time circumscribed by Law, and not to be dock'd and defeated by any Act to be suffered or done by the Tenant in Possession. But the Law allows of Limitations to arise within the Compass of a Life, or Lives in Being, or within the Term of twenty or thirty Years; and therefore a Limitation to A. when he shall attain the Age of twenty-one Years, is good. So if a Man enfeoffs an Infant upon Condition that he shall not alien, this is good to restrain Alienations during his Minority. 1 Inst. 224 a. And if in such Case the Infant suffers a Recovery, he may avoid it afterwards by Virtue of the Condition: So if an Infant levies a Fine, it shall bind him, if not reversed during his Infancy; but where he is restrained by Condition, he shall avoid the Fine, after he comes of Age; and yet it cannot be pretended that the Condition in that Case tends to create a Perpetuity. This Executory Devise is to arise within the proper Time prescribed by Law. 2 Vern. 151, *Martin* versus *Long*. 2 Vern. 86, 87, *Paulet* versus *Dogget*; 3 Leon. 65. *Hind* and *Lyons*, 1 Salk. 229. 1 Vern. 304, *Massenbury* versus *Ash*. 2 Chan. Rep. 202, *in le Case*. This last is a Case in Point, and answers all Objections that can be made in the present Case; and there is no Difference, but that was in the Case of a Deed, and this here is in the Case of a Devise, which makes it [172] stronger for our Purpose. The Case of *Blue* versus *Marshall*, August 1732, goes further than the Case of *Massingbury* ver. *Ash*. *J. B.* devised his personal Estate, consisting of Leases for Years, and some Money, to his Daughter *Anne*, and after to such Children as should be born of her Body, and she should leave at the Time of her Death, when they attained the Age of twenty-one, and upon Failure of such Issue, Devises over. *King*, Chancellor, decreed this a good Devise to the Children, and that the Intention of the Testator in the Case of Wills was always to be regarded; and so long as there was such a Case as *Massingbury* versus *Ash* to favour the Devise, he could not decree against it.

This Case is stronger than the Case in Question; for there the Children could not take till after the Death of the Mother; here *Thomas* is to take as soon as he attains his Age of twenty-one, notwithstanding *Mary* his Mother should then be living. There is no Pretence to say that this Limitation shall go by Way of Remainder; for a Fee cannot be limited upon a Fee by Way of Remainder: Should this be construed to operate by Way of Remainder, it is certainly void; for a Remainder must vest during the particular Estate or eo instanti that it determines. 1 Rep. *Archer's Case*. It may be a Question, whether *Thomas*, when he comes of Age, will take a Fee, or an Estate-Tail? The first Words are, "To him and his Heirs"; but then follows the Words, "And for Want of such Issue," which may restrain the Limitation to an Estate-Tail. But, be it Fee, or be it Tail, it is a good Devise to *Thomas*, and will vest in him, when he attains the Age of twenty-one Years.

W. Serjeant, Counsel for the Daughters *Susanna* and *Sarah*: This Devise to *Thomas* the younger is void; for as an Executory Devise it cannot be good, because not to arise within the Time prescribed by Law; and as a Remainder it cannot be, because the two first Devisees, *William* and *Thomas*, dying before they came of Age,

and before the Birth of *Thomas* the younger, the Estate vested in *Susanna*, who was then living and took the Whole by Purchase, which could not afterwards be divested upon the Birth of *Thomas* the younger. It is an established Rule in Law, *That where a Devise is limited by Way of Remainder, and in Effect may operate as a Remainder, it cannot take Effect as an Executory Devise.* 2 Saund. 388; Carth. 310; Comb. 252.

The Construction of Wills is to be taken favourably according to the Intention of the Testator; and the several contingent Remainders are to be considered as having Relation one to the other, each to vest as they first come *in esse*, before the [173] *Stat. H. 8.* If one had devised his Land by Virtue of a Custom, the Common Law accepted his Intent, without requiring particular Words of Limitation; as in Cases of Conveyances at Common Law: And as it was so in Devises before the *Statute*, *a fortiori* it ought to be so in Devises since the *Statute*. 1 Salk. 237; 2 Mod. 209. The Limitations in this Case to his two Grandsons, *William* and *Thomas*, make an Estate-Tail; for the Devise to them is to be coupled with the subsequent Words, "*And for Default of such Issue*"; so that, notwithstanding by the first general Words (*to them and their Heirs for ever*) they took a Fee absolutely, yet the subsequent Words (*and for Default of such Issue*) so qualify and explain them, that they create only an Estate-Tail. If the Devise had been to *William* and his Heirs for ever, and after to *Thomas* and his Heirs for ever, and if he dies *sans* Heirs, then to such other Son of the Body of *Mary*, &c., it had been clear in that Case what Heirs the Testator meant, *viz.* the Heirs of their Bodies, and so had been an Estate-Tail only. Cro. Jac. 416; Bridg. 84; Cro. Jac. 448; 3 Lev. 70, 71; 1 Salk. 233, 234; 1 Lutw. 810, 813. These Cases shew, that dropping the Words (*when they attain the Age of twenty-one Years*) *William* and *Thomas* would have taken Estates-Tail only. Hob. 65; Cro. Car. 185; *Spalding* and *Spalding*, 9 Rep. 128, for the Whole of the Will is to be considered together, and construed according to the Intent of the Testator; and these subsequent Words, *viz.* (*if they should attain the Age of twenty-one*), make no Difference; for it cannot be presumed, that if either of them died before that Age, that their Estate should cease at all Events, but if they died before that Age without Heirs of their Bodies; as in Cro. Car. the Case of *Spalding* versus *Spalding*, Cro. Eliz. 525; Moore, 422; 2 Lev. 162, *Tilly* versus *Collier*. These Words to be rejected rather than the Devise to be construed to be void. Hob. 65; 6 Mod. 112, and in Cro. Eliz. the Case of *Soulle* and *Gerrard*. If therefore the Devise in the present Case to *William* and *Thomas* makes an Estate-Tail, then upon the Death of *William* the Estate vested in *Susan* by Purchase, and cannot after be divested, tho' *Thomas* should live to attain the Age of twenty-one Years. As to the Claim of *Richard*, the Remainder-Man, of one intire Third by the Death of *Mary* the elder, and another Third of the other two Parts by the Death of *Mary* the younger; if he has any Claim, it must be of the whole Estate; for so long as there is one of the Daughters living, or any Issue Male of their Bodies, he cannot claim a particular Part only. For it is to be observed, that upon every Limitation all his Lands are devised over, not in Part and by Fractions, but one intire Devise of his whole Estate to every [174] the Daughter and Daughters, &c., and to the Heirs of the Body and Bodies of all and every such Daughter and Daughters; and for Want of such Issue, *i.e.* by any one of them, that then all his Lands should go and remain to his Brother *Richard*: And in this Case the Daughters *Susan* and *Sarah* cannot be Tenants in common, because upon the Death of *William* the whole vested in *Susan*; and therefore *Sarah* cannot take as Tenant in common with her, but shall have one intire Remainder of the Whole; so that while there is any one Daughter, the whole cannot go over to *Richard*; for all the Daughters may take successively in Course of Remainder, as in the Case of *Tilly* versus *Collier*, 2 Lev. 162; 1 Ventr. 224; Dyer, 303 b. A Devise in such Case to the Daughters make cross Remainders, and tho' not by express Words, yet it must be by a necessary Construction in Law. An Executory Devise when executed is to be considered as an original Devise; and therefore if the Devise to *Thomas* be good, and is to vest at his Age of twenty-one, the Contingency is then at an End, and the Daughters will have Remainders expectant upon his Estate-Tail.

E. Serjeant, for *Richard* the Remainder-Man in Fee: The Devise to *William* and *Thomas* is a good Devise to them upon this Contingency when they attain the Age of twenty-one; but the Devise over to the other Son, there being no other Son at that Time in Being, is merely void, not being limited to arise within the Time appointed by Law for Executory Devises to vest in: Upon the Death therefore of *William*, the whole Estate vested in *Susan*, *sub modo*, *i.e.* until the Birth of another Daughter, and then

it was to open and let in another Daughter, and so on successively as they came in Being, and then all the Daughters became Tenants in common *in Tail general with Remainder in Fee* to Richard. *Mary*, one of the Daughters, dies, and upon her Death *Richard* becomes intitled to one Third of the Estate; afterwards *Mary* the younger is born, and then the Estate opened again to let her in for a Third of the two surviving Sisters Estate, and she dying her Share likewise is to come to *Richard* the Remainder-Man; and this he collected from the Words of the Devise. My Brother *W.* insists, That the Estate once vested in *Susan* would not open to let in Daughters born afterwards, but that they must take by Way of cross Remainders; but this is a forced Construction, for the Words of the Devise are, "*That all the Daughters should take as Tenants in common,*" and no Construction shall prevail contrary to the express Words of the Will to vest the whole Estate in *Susan*, with cross Remainders to the Daughters born afterwards; that Estates once vested may open again, is a Point well settled in Law, 11 Rep. [175] 80. *Lewis Bowles's Case*, 1 Inst. 28 a. And when this Case was heard before *Macclesfield*, Chancellor, 25 January 1722, upon a Bill for Account of the Profits of the Estate, his Lordship decreed that the Rents and Profits of the Estate should be divided equally amongst the Daughters, which shews clearly, that upon Birth of Sisters they should all take equally as Tenants in Common.

H. C. J. This is the common Case of every Marriage Settlement, where Remainders are to Daughters in Common, they are to take equally as they arise *in esse*, and become Tenants in Common, or Jointenants, with the Sisters before in Being.

E. Serjeant: They must take as Tenants in Common, for so was the Intention of the Testator; and not that they should take cross Remainders; the express Words of the Will are, "*That they shall take as Tenants in Common, and not as Jointenants*"; and nothing can more fully express the Testator's Intentions, that they shall not inherit one after another. The Heir at Law can in this Case have no Pretensions, for he is intirely cut out and disinherited by the Will; and therefore no Construction can be made in his Favour, as Heir at Law.

The Case of *Gilbert versus Witty*, Cro. Jac. 655, is stronger than the Case in Question; and yet there it was adjudged that the Brothers should not take Remainders after one another, for tho' perhaps a cross Remainder may be by Implication, where there are two Devisees only, yet there cannot be without express Limitation, where the Devise is to three or more several Persons. There are several more Cases to this Purpose, and the Case of *Megnal versus Holmes* is like the present Question. 2 Roll. Rep. 281; 1 Vent. 224; 2 Keb. 700, 756. And so concluded, that if the Devise to *Thomas* the Younger was void as an Executory Devise, then by the Death of *W.* the whole Estate vested in *Susan*, and the other Daughters, as they came *in esse*, as Tenants in Common, and as they or any of them die, *Richard* the Remainder Man becomes intitled to her Share.

Mr. *S. Counsel* for Sir *Thomas Stephens* the Residuary Legatee.

Since the Determination in *Pell and Brown's Case*, there is no Question but there may be a Limitation over upon a Fee Conditional, and therefore the Limitation over to his Grandson *Thomas* was good; but in this Case both the Contingencies have happened by the Death of *W.* and *J.* before they attained the Age of twenty-one. The next Question therefore is, whether the Limitation over to such other Son as *Mary* should have, there being no other Son at that Time [176] in Being, when he shall attain his Age of twenty-one Years, is a good Devise; and this some of the Gentlemen who spoke before have attempted to make good by way of Executory Devise.

The Rule which governs Executory Devises has been often debated in the Courts of Law; and it is agreed, that Limitations for a Life or Lives in Being, are good Executory Devises. But this Rule has never been carried further, but Executory Devises, as often as they came under the Consideration of the Law, have been discountenanced; and the Reason is, that every Executory Devise, so far as it goes, is a Perpetuity; and this was the Foundation which governs the Resolution in the Case of *Scatterwood versus Edge*, Salk. 229; 1 Sid. 37, 47; 2 Saund. 380; Carter, 53; Show. P. Cases, 137. The Case of *Massingbery versus Ash* does indeed go further, but that Case was determined in 1684, and was not in the least regarded in any of the subsequent Resolutions; and if the Reasons in that Case come to be considered, it is not so strong; for it appears that the Judges grounded their Opinion in that Case upon a Supposition, that all the Contingencies were limited and confined to fall within the Compass of Twenty-one Years; and that was in the Case of a Term in Trust only, and not any Limitations

over. 2 Chan. Rep. 282. The Devise in the present Case is not a Contingency confined to Twenty-one Years, or for Lives in Being, but is both for a Life in Being, and Twenty-one Years. In the Case of *Gore* versus *Gore* this Point bore a strong Contest, and yet the farthest that that Case could run, was only for one Life and nine Months. But should this Devise be held good as to Time, yet it is not so in Substance; for tho' a Fee in Contingency may be limited over in Case of an Executory Devise, yet a Contingency cannot be limited upon a Contingency. Ventr. 236. And this Point never was carried farther than *Pell* and *Brown's* Case.

The next Persons who claim under the Devise are the Daughters *Susan* and *Sarah*, and as to them the Devise is no more than this: Sir *William Stephens* devised to his two Grandsons in Fee, upon the Contingency of their attaining the Age of Twenty-one; after that to the first and every other Son of *Mary* and the Heirs Male of their Bodies, and upon Failure of such Issue, then to the Daughters. It is not insisted upon that the Daughters in this Case are to take by way of Executory Devise, the Limitation to them being upon Failure of Issue Male, and therefore if they can take at all, it must be by way of Remainder; but that is not possible, because a Remainder, as a Remainder, cannot be limited upon a Fee. Plowd. 29; 1 Inst. 18 a; Finch L. 112; [177] Plowd. 235 a, 239; Cro. Jac. 590. *Pell's* and *Brown's* Case. Palm. 138; Dyer, 33. Serjeant *Wright* was I suppose aware of this Objection, and therefore contends that the two Grandsons *W.* and *T.* took an Estate-tail only; but there is no Colour for such a Construction. The Devise is "To them and their Heirs for ever"; but in Case they die before they attain the Age of Twenty-one Years, &c.

If these Words do not create a Fee-simple Conditional, it is impossible any Words can. Had the Limitation been to him and his Heirs for ever, that would have been a Fee-simple absolute, and the subsequent Words, viz. "And if he die before Twenty-one," make it Conditional. When the Testator intends to create an Estate-tail, he does it by Words proper to create such an Estate, viz. "And for Default of such Issue Male," which limited the preceding general Words, and shew what Heirs he meant, viz. Heirs of his Body. We are to take the Devise itself from the Words of the Will, which are upon his dying before Twenty-one, and not upon his dying without Heirs Male under Twenty-one. This plainly shews the Testator's Intentions, that the Estate of his two Grandsons *W.* and *T.* was to cease at all Events upon their Decease before Twenty-one. This therefore reduces the Devise to the Daughters to the first Question, viz. That, if they have any Claim, it is by way of Remainder, and by Remainder they cannot take, because limited upon a Fee. There is the same Objection to the Claim of *Richard* the Remainder-Man in Fee, and the Devise to him is void for the same Reasons. The next Person who stands upon the Will is Sir *Thomas Stephens* the Residuary Devisee, and all the Testator's Estate must go to him, or to the Heir at Law; it is pretty clear the Heir at Law can have no Claim, for she is mentioned several Times in the Will, and the whole Estate is devised away from her. The only Question therefore that remains is, whether there are sufficient Words in the Devise to carry the Estate to the Residuary Devisee. Vide Allen, 28; Salk. 239; 2 Ventr. 285; 3 Mod. 229; 1 Lev. 212; 1 Saund. 180; 1 Leon. 251. The Testator having devised all his Estate whatsoever and wheresoever, before undevised to the Residuary Devisee, by these Words, which are as general as Words can be, he becomes intitled to the Lands in Question; for all the preceding Limitations being void, the Estate in Question remained undevised.

F. Counsel for the Heir at Law. He agreed with *S.* that all the Limitations in this Will were void, for they must take Effect either as Remainders, or Executory Devises. As to the first, they could not vest, because limited after a Fee. 1 Rep. 81; Popham, 34. And so it was held in *Pell's* and [178] *Brown's* Case. As to the second, this Devise goes further than any Case, except that of *Massingbery* versus *Ash*, which cannot have its full Weight in this Case, because there the Determination of the Judges went upon one single Point only; and in all Cases ever since the first Introduction of Executory Devises, the Judges have discouraged the Extent of them, because tending to establish Perpetuities. *Parl. Cases*, the Duke of *Norfolk's* Case. The Question therefore is reduced to this, Whether the Residuary Legatee, or the Heir at Law is intitled? The Testator by the Devise to his two Grandsons *W.* and *T.* disposed of his whole Estate, and had nothing left but a bare Possibility. It cannot be intended that the Testator imagined that the Limitations over to the Sons and Daughters of *Mary* were void, or that he intended that the Residuary Devisee should take any of the Lands mentioned in the Will, for the Devise to him is by express Words, of all his Estate not before devised.

The Case of *Wright and Wall, Michaelmas 1725, in Com. Banc.*, comes up pretty near to the present Question : That was a Devise to *Carter* and his Heirs, and the Testator afterwards by the same Will devises all his Estate before undevised over to another Person ; *Carter* died in the Life-time of the Testator ; adjudged that the Estates mentioned in the Devise should go to the Heir of the Testator, and not to the Residuary Devisee ; and so concluded, that since *Thomas* the Infant could not take by way of Executory Devise, nor the Daughters, nor *Richard*, by way of Remainder, the Heir at Law has a good Title. *Adjournatur* for a second Argument.

142.—THE KING *against* KINASTON. *Hil. 7 Geo. II. [1734]. B. R.*

On a Rule to shew Cause against an Information, no supplemental Affidavits introductive of new Matter to be read but in Confirmation only.

Information was moved for, and a Rule to shew Cause : At the Day fresh Affidavits were produced, Part in Confirmation, and Part introductory of new Matter ; and the Question was, Whether the Affidavits could be read according to the Course of the Court, it being objected, that no supplemental Affidavits could be made but in Confirmation only.

Cur' : Where Affidavits are produced, Part in Confirmation, and Part introductory of new Matter, it is not a general Rule that they shall be absolutely rejected ; but the Court will be pretty nice in distinguishing what is new Matter, and what is in Confirmation of the old.

[179] In Affidavits upon which the Rule was made, the Complaint was, that *A.* and *B.* and several other Persons, &c., but no Person particularly charged ; these Affidavits were not produced, in order to fix the Charge upon particular Persons.

The Affidavits now offered are intirely introductive of new Matter ; for the Charge in the first Affidavits being general, a general Answer would have been sufficient ; but this is reducing it to a particular Charge, and therefore makes a particular Answer necessary.

143.—THE KING *against* the COMMISSIONERS of SEWERS for the COUNTY of LINCOLN. *Hil. 7 Geo. II. [1734]. B. R.*

Certiorari to remove Proceedings of Commissioners of Sewers after Fine estreated.

Presentment, that the House of *J. S.* standing upon the River *B.* in the County of *Lincoln*, was ruinous, and that the Water had sap'd the Foundation, by which the Lands adjoining were in Danger of being overflowed, and was become a Nuisance to the Inhabitants thereabouts. The Defendant was convicted, and the Fine estreated into the Exchequer. Defendant mov'd for a *Certiorari* to remove all Proceedings.

Mr. *A.* objected, that the Fine being estreated, it was now too late.

Cur' : There does not appear to be any general Inconveniency in this Case, neither in Prejudice of Navigation, or from the Danger of an Inundation over the County, which are the Principal Reasons to induce this Court not to refuse a *Certiorari* ; this is only the Case of a common Nuisance, and therefore proper to remove it by *Certiorari* ; it being estreated makes no Difference.

144.—FATHERS *versus* CALCOT. *Hil. 7 Geo. II. [1734]. B. R.*

Where an *Indebitatus Assumpsit* lies for Rent.

Indebitatus Assumpsit in Consideration the Plaintiff permitted the Defendant to kill Sheep in his Passage, he promised to pay 30*s.* per Ann. Verdict for the Plaintiff, and Error brought. It was objected, that this being for Rent upon Lease, an *Indebitatus Assumpsit* would not lie, but a *Quantum meruit*. *Parker cont'* : It has been held that an *Indebitatus* [180] *Assumpsit* does not lie for Rent *secundum ratam*. 4 *Mod.* 78. But where it is upon an express Promise for an Easement, &c., *Indebitatus Assumpsit* is the proper Action. *Hard.* 366 ; 3 *Mod.* 240.

Cur' : This is not a Lease which passes any Interest or Property in the Soil, but is grounded upon an express Promise for an Easement, and *Indebitatus Assumpsit* is a proper Action in such Cases. Judgment affirmed.

145.—SPENCER *ver.* DONALLY. *Hil.* 7 *Geo.* II. [1734]. *B. R.*

Variance between the Recognizance and Bail-piece.

Action against *John Donally*, Esq.; and in the Bail-piece named *John Donally*, Gent., but Recognizance was taken by the Name of *John Donally*, Esq.; and so a Variance from the Bail-piece. *Scire facias* against the Bail upon this Recognizance, and the Master entred a *Protulit Recordum*. *Kettleby* mov'd to make the Record agreeable to the Bail-piece, and the Court gave him leave to do it, tho' it made a Variance between the Recognizance and the Original Action; for *per Cur'* the Plaintiff should have taken Advantage of it before, for there was no Bail to the Action, as this Bail-piece is taken; you cannot enter a Recognizance different from the Bail-piece, and there being no *final Judgment on the Nul tiel Record*, the Entry of the *Protulit Recordum* must be set aside.

146.—WELLS *ver.* KITCHINSON. *Hil.* 7 *Geo.* II. [1734]. *B. R.*Mistake in the *Teste* of a *Scire facias*.

Second *Scire facias* upon a Judgment *teste Philip Lord Hardwicke*, 21 November, &c., returnable the first Day of this Term. The Plaintiff prayed to amend by striking out the Words *Philip Lord Hardwicke*, and inserting the Words *Sir Philip York, Knt.* [Note: the Lord Chief Justice's Patent of Peerage was dated 23 November 1733.] There was cited *Blackmore's Case*, 8 Rep. 156; *Cro. Eliz.* 183, 203; *Tho. Jones*, 41. *Pasch.* 1 *Geo.* 2, *Gilely versus Costen*. *Ca. Sa.* taken out upon Affirmance of a Judgment tested 13 February, but upon Motion the *Teste* was amended and made 12. So *Mich.* 12 *Geo.* 1, *Hughes versus Alvarez*, Motion to amend a Writ of Enquiry after executed; this was an Action of *Assumpsit* upon two Promises, the Inquest gave Damages upon the first Promise only, and the Entry was *occasione præmissor'*, which [181] Words were struck out, and Entry was *occasione primæ promissionis*. *Cro. Car.* 147; 2 *Buls.* 35; 1 *Roll. Abr.* 201; *Mod. Cas.* 263, 310; 1 *Salk.* 52, 49; *Cro. Jac.* 372. This is a judicial Writ, and under the Controul of the Court; *sed adjournatur*, Mr. S. desiring Time to look into Cases.

147.—DESBORDES *ver.* HORSEY. *Hil.* 7 *Geo.* II. [1734]. *B. R.*

Writ of Error on a Judgment upon a Bond for Payment of Money only,
is no *Supersedeas*, unless Bail be put in.

Debt upon Bond conditioned to pay so much Money as was mentioned to be due in such a particular Deed; after Judgment the Defendant brought Error, but no Bail was entred according to the Statute 3 *Jac.* 1, c. 8.

Afterwards the Plaintiff sued out a *Ca. Sa.* by Virtue whereof he took the Defendant in Execution, who now mov'd to be discharged, having brought Error before the *Ca. Sa.* was sued out.

S. Counsel econ. A Writ of Error is no *Supersedeas* to a Judgment in Debt upon a Bond for Payment of Money only, as in the present Case, except Bail be put in; and of this Opinion was the Court, and so the Motion was denied.

148.—LAW *versus* LAW. *Hil.* 7 *Geo.* II. [1734]. *B. R.*

[*S. C. Cas. temp. Talb.* 140.]

Motion to waive Plea of *Solvit ad diem* to a Bond, and plead the Stat. 5 & 6 *Edw.* 6.

In Debt upon Bond the Defendant pleaded *Solvit ad diem*. Mr. F. Counsel, mov'd to withdraw this Plea, and plead the 5 & 6 *Edw.* 6, c. 16, concerning the Sale of Offices.

The Court inclined strongly against the Motion, but at last he cited the Case of *Meard versus Philips*, *Trin.* 5 *Geo.* 2, where the Defendant pleaded *Nil debet* to a Bond, and after Special Demurrer, and Joinder in Demurrer, the Court gave leave to withdraw the Plea, and plead two Special Matters in Bar; and the Reason upon

which the Motion was founded was, that the Judges were gone out of Town, it being in *Whitsun Holydays*; and therefore the Defendant was obliged to join in Demurrer.

This is a stronger Case than the Case at Bar, being after Joinder in Demurrer, and here all is in the Paper, and the Plaintiff has not replied. *Rule to shew Cause.*

[182] 149.—CROMPTON *versus* DEEN. *Hil. 7 Geo. II. [1734]. B. R.*

A Debtor taking Benefit of Stat. 2 *Geo. 2*, for Relief of Insolvent Debtors, obliged to give Notice to Creditors residing within ten Miles, &c.

Action by Indorsee of a Bill of Exchange; the Defendant pleads the Statute 2 *Geo. 2*, "*Intituled an Act for Relief of Insolvent Debtors*," and that he was legally discharged at the Sessions.

The Plaintiff replies he is a Creditor, and had no Notice *secundum formam Stat'*; the Defendant rejoins that he had no Notice of the Indorsement; and upon Demurrer the Question was, whether the Defendant was obliged to give Notice.

Mr. B. for the Plaintiff cited 4 *Rep.* 82 *b*; 8 *Rep.* 92; 1 *Roll. Abr.* 469; *D. p.* 1.

A. *econ'* cited *Hob.* 51, *Holmes versus Twist.* *Hob.* 68, *Richards versus Carvammell.* *Cro. Car.* 571. *Cro. Jac.* 493. 1 *Leon.* 105. *Salk.* 457.

H. C. J. This Question arises upon a Construction of the Act of Parliament, and does not fall within the Rules of Law; and there is no Question but at Law he who is to take Benefit of a Condition, and is privy, must give Notice.

It appears evidently, that the Plaintiff is a Creditor, and he has replied Specially according to the Act, that he is residing within ten Miles, and had no Notice.

As to the Defendant's Notice of the Indorsement, it is not material, for he has taken upon himself to be responsible to the Indorsee at all Events; and the Words of the Act of Parliament are express, *that he shall give Notice to all his Creditors.*

What is said by the Defendant in this Case might be said in all other Cases; suppose a Creditor dies, is it sufficient for the Defendant to say he did not know, or had no Notice, who was his Executor or Administrator?

Not necessary to give any Opinion as to the Form of Pleading, for Rejoinder is perfectly immaterial.

P. J. The Defendant has made himself responsible to the Drawee or Order, and therefore 'tis at his own Peril to take Notice of the Indorsement; he is to have the Benefit of the Act of Parliament, and ought to comply with the Terms; this is stronger than the Case of a Bond, and yet in that Case the Obligor is at his Peril to give Notice.

P. and L. Justices, to the same Effect. *Judgment for the Plaintiff.*

[183] 150.—HOARE *versus* GATES. *Hil. 7 Geo. II. [1734]. B. R.*

Vide ante, Case 32, 39.

Rejoinder, Averring the Bill of *Middlesex* issued in the Vacation.

In *Assumpsit* the Defendant pleads *Non Assumpsit infra sex Annos*. The Plaintiff replies, that he took out a Bill of *Middlesex* in such a Term, and avers *quod causa Actionis accrevit infra sex Annos ante prosecutionem Billæ prædictæ*. To this the Defendant rejoins, that the Bill of *Middlesex* issued *post clausum Terminum*, and altho' Bills issuing out in Vacation are entred as of the last Day of the Term preceding, yet *de facto*, and *in rei veritate*, the Bill of *Middlesex* issued *post clausum Terminum*, viz. on such a Day; and concludes, *Quod causa Actionis non accrevit, &c.*

To this the Plaintiff demurred, for that an Averment in those Cases was not to be allowed, and cited *Latch* 233. *T. Jones* 149. 1 *Lev.* 214. 1 *Sid.* 53, 60. 1 *Roll. Abr.* 893, *p.* 4. 1 *Mod.* 188. *Cro. E.* 181. *Stiles*, 156. *Carth.* 232. *Show.* 253. 4 *Mod.* 129. 3 *Lev.* 28. *Carth.* 227. *Hob.* 156, 297. *Pasch.* 5 *Geo. 2*, *Jones versus Bennet.* *Assumpsit* upon a promissory Note by Indorsee; the Defendant pleaded he was attached the 12th of *February*, and that the Note was not indorsed till after that Day. The Plaintiff replies, that *de facto*, and *in rei veritate*, the Attachment issued the 25th of *March* following, and that before that Time the Note was indorsed; and upon Demurrer the Averment was over-ruled.

So *Pasch.* 2 *Geo.* 2, *Eastwick* versus *Coke*, upon Demurrer Averment was held naught. *Michaelmas* 4 *Geo.* 2. *Fuller* versus *Joslyn*, Lady *Twisden* gave a Warrant of Attorney to confess Judgment, but died in *Easter Term*, before Judgment was entred on the Roll. Judgment was afterwards entred up in the same Term, and was held good, because the whole Term is but one Day in Law, and so the Entry was previous to her Death.

On the other Side it was argued, that this Relation was a meer Fiction in Law, and would admit of an Averment. 2 *Keb.* 173, 198. 3 *Keb.* 213, 214. *Cro. Jac.* 561. *Cro. Car.* 264. 1 *Roll. Abr.* 258, p. 4. That this Fiction was contrary to the express Words of an Act of Parliament, and therefore an Averment might be made.

W. Serjeant, argued for the Demurrer. It is admitted that by the Course of the Court, and in Point of Law, a Bill of *Middlesex* sued out in Vacation, is a Writ of the preceding Term; but the Objection is, that this is a meer Fic-[184]-tion, and must give way to the Averment. How does it appear to be a Fiction? It does not appear upon the Record to be a Fiction, and a Record is of so high a Nature, and imports in itself such an Absolute Truth, as to admit of no Averment to the contrary. 1 *Inst.* 117 b, 268.

This Averment is destructive of the Record, for if it should be made to issue out of Term, the Writ is void. *Salk.* 700; *Carth.* 70. The Averment therefore is contrary to the Bill itself, and shall not be admitted as in 2 *Rep.* 4. *Goddard's Case*, he is stopt to make Averment against what is exprest in the Record. *Skin.* 32. And the Reason is, because it tends to falsify the Record; *a fortiori*, where it tends to destroy the Record, as in the present Case. The Reason why a Bill of *Middlesex* has no *Teste* is, because it is the Act of the Court *sedente Curia*, and the whole Term in Judgment of Law is but one Day, and was once thought so considerable that it could not be divided. *Yelv.* 35. It is now indeed otherwise, for the Plaintiff may by a special Memorandum shew the particular Day when the Bill issued; but this is not repugnant to the Record, for it is still a Bill of that Term. And in *Fuller* and *Joslyn's Case* it was held, that a Judgment entered at any Time in Term is a Judgment of the first Day of that Term; and this Fiction is so well established, it will admit of no Averment to the contrary. 1 *Salk.* 401; *T. Jones*, 150. The Statute of Limitations can make no Difference, that Act has been made ever since 21 *Jac.* 1, and no one Precedent that an Averment of this kind was ever admitted, & *quod in facto est inusitatum, in jure reprobatum*. There was a Case argued in the Exchequer, the Case of *King* versus *Man*, which comes up pretty near to the Point in Question. The 5th of *October*, 7 *Geo.* 1, Baron *Price* granted his *Fiat* during the Vacation for an Extent, which was had accordingly, tested the last Day of the preceding Term. Upon this Extent the Defendant's Goods were taken in Execution; the Defendant craved *Oyer* of the Extent, and pleaded that the *Fiat* was obtained the 5th of *October*, and that the Extent, *de facto & in rei veritate*, issued on that Day; but the Court was of Opinion that the *Teste* was binding. There another Question arose indeed as to the Regularity of issuing *Fiat*s in Vacation; and upon Motion as to that Point, the Court held it irregular. But as to the *Teste*, this is a Case in Point, and shews that an Averment contrary to the Record cannot be made.

D. con. This Averment makes no Inconsistency, the Statute of Limitations has always been considered as a beneficial Law, and the Words are, "That Process shall be commenced and sued"; which last Words mean not only *Ema*-[185]-*natio brevis*, but an Act to be done by the Party upon that Writ. It is clear, that at the Time of issuing the Bill of *Middlesex* the Statute was a Bar, it was his own Fault he did not commence his Action sooner; and he shall not come afterwards, and by a meer Fiction take Advantage of his own Laches, contrary to the express Words of an Act of Parliament. The Cause of Action which the Plaintiff had was barred by the Statute, and the Issuing out of the Bill of *Middlesex* afterwards could not give him new Cause of Action by Relation.

If an Averment cannot be made, because in Fiction of Law a Bill sued out in Vacation is a Bill of the preceding Term, it is impossible to plead a Tender. 1 *Ventr.* 28; *Cro. Jac.* 561; 1 *Ventr.* 362. A *Latitat* may bear *Teste* before the Cause of Action commenced, and the Plaintiff may aver, that in Fact the *Latitat* issued in Vacation; by the same Reason the Defendant may aver the precise Time that in Fact the Bill of *Middlesex* issued. 2 *Keb.* 173, 175; 3 *Keb.* 212, 213. The Time when a *Latitat* issued out is traversable, and may be averred. *Cro. Car.* 264; *Roll. Abr.* 538. The Averment does not destroy the Record, it only goes to the Time in which it issued,

but does not deny that there was such Process. The Case in Lutw. 329, is not like the present Case, that was concerning a Judicial Writ, which has a *Teste*, but a Bill of *Middlesex* has no *Teste*, and the Averment is to meer Matter of Fact only, and Issue may be taken upon it.

H. C. J. If in Point of Law such an Averment can be made, it is pretty extraordinary this Case has not come in Question before. In the Case of Original Writs out of Chancery, the *Teste* is often preceding the Time that in Fact they are sued out upon, and so are allow'd by Course of the Court. There is no great Difference between an Original and a Bill of *Middlesex*, in Point of Law; the Original has a *Teste*, and the particular Day on which it issues appears; and so it is in Fact in the Case of a Bill of *Middlesex*, for the Term in which it issues appears, and in Judgment of Law the whole Term is but one Day; this Fiction does not support a Wrong, but rather goes in Aid of the Party to recover his just Debt. Consider the Case of a Judgment, the Fiction in Law was in that Case so strong even in Case of Purchasers *bona fide*, that there was forced to be an Act of Parliament to restrain it. There can be no great Inconveniency if the Averment in the present Case be disallowed, the most it can extend to is the Statute of Limitations, which in this Case is only for a Vacation, and that seems a less Inconvenience than to overturn a settled Rule of Law.

[186] P. J. He cited Maynard, 134; 3 Keb. 213, *Chancy and Rutter*. If Averments cannot be made, it will introduce many Inconveniences; as in Case of a Tender, where a Man is justly indebted, and tenders the Money at the Day, and the Party refuses; can he afterwards have his Action, and by a Fiction in Law avoid the Tender? Where indeed an Action is brought against an Officer, he shall take Benefit of the Fiction, but that is to avoid a Wrong.

P. J. A Bill of *Middlesex* cannot issue but in Term, and therefore when it is taken out in Vacation, it must of Necessity have Relation to the preceding Term, or it is void; and this in Effect is the Substance of the Averment, for if the Averment stands, it destroys the Writ.

L. J. In Raym. 161, *Bilton versus Johnson*, which was an Action of false Imprisonment, the same Objections were made as in this Case; but it was held, that altho' the *Teste* of the Writ was upon Record, and the Plaintiff cannot aver against it, yet there would be great Inconveniences if the Plaintiff cannot set forth the very Time of the Purchase of the Writ, and the Relation of the *Teste* is only to prevent Fraud, and not justify a Tort. This comes up to the present Question, where the Defendant's Defence arises from the Statute of Limitations, whether we are to suffer the Statute to be eluded by supporting this Fiction; and if the Act of Parliament is considered, the Sense of it seems to be not where a Man sues out Process only, which is the Precept of the Court, but where he sues it with Effect. *Adjournatur* to be spoke to again. *Vide* 4 Rep. 71 a, b, *Hind's Case*. 2 Salk. 650, *Lazier versus Dyer*.

STOREY *ver.* GARDNER. *Hil.* 7 *Geo.* II. [1734]. B. R.

Verdict finding only Part of the Issue.

Trespass for entring and carrying away his Cattle; the Defendant, as to Part of the Cattle, pleads Not guilty; and as to breaking and entring his Close, and carrying away the Rest of the Cattle, he justifies for Distress of Rent in Arrear. The Plaintiff replies, *de injuria sua propria*, and Verdict for the Plaintiff.

Taylor mov'd in Arrest of Judgment, that the Verdict was imperfect, for here are two Issues, and the Jury have only found, that the Defendant did of his own Wrong enter and carry away the Cattle mentioned in the Justification *inter alia Averia*, but as to Part of the Cattle mentioned in the Plea of Not guilty, there is no Finding at all as to that.

[187] *Parker econ.* If the Jury have given less Damages than they ought, it is to the Detriment of the Plaintiff, and the Defendant cannot take Advantage in Arrest of Judgment of a Verdict that is apparently for his Benefit; the Jury have found that he entred *de injuria sua propria*, and drove away the Cattle *inter alia averia*, which is sufficient after Verdict.

Cur': A Verdict may cure an insufficient Declaration, but it cannot help itself; the Objection is very material, for the Verdict does not determine the Matter put in Issue between the Parties: Suppose a new Action to be brought for the Cattle mentioned

in the Plea of Not guilty, what can the Defendant plead? He cannot plead this Judgment in Bar, for there is no Finding upon the Not guilty; neither is there any Action depending. And *H. C. J.* said, it was such a Verdict that the Court ought not to give Judgment upon it. The Plaintiff desired further Time to search into it, for the Record may be amended here, and the Verdict below; and *sic adjournatur*.

152.—THE KING *versus* THEEDHAM. *Hil. 7 Geo. II. [1734]. B. R.*

Costs against the Prosecutor of an Information for not going to Trial in three Years.

Information for an Assault, and the Parties at Issue; but the Prosecutor did not proceed to Trial within three Years, being the Time prescribed by Act of Parliament. *K.* now moved for Costs against the Prosecutor, but not having an Affidavit to verify the Fact, the Motion was denied.

153.—DEVENISH *ver.* BARTON. *Hil. 7 Geo. II. [1734]. B. R.*

To intitle a Justice of Peace to double Costs on an Action brought against him, it ought to be suggested on Record, that he was a Justice of Peace.

B. Serjeant, mov'd for double Costs upon Statute 7 *Jac.* 1. This was an Action against a Justice of Peace for taking away the Plaintiff's Gun.

The Plaintiff discontinued, and there was an Affidavit produced, that the Defendant was a Justice of Peace.

Cur': There ought to be a Suggestion of this Matter on the Roll; and *per Lee*, it was so determined in the Case of *Cooper versus Cathurall*, which was upon a Nonsuit. It was then pray'd that the Roll might be brought into Court, and the Suggestion entered.

[188] *H.* opposed the Motion, because it did not appear by the Affidavit, that he acted in the Affair in Capacity of Justice of Peace.

Cur': Shew Cause why the Defendant should not have Leave to enter the Suggestion upon the Roll, and have double Costs; and there was cited the Case of the *King ver. Colan*. Indictment for exercising the Trade, &c., and not having served seven Years Apprenticeship. The Defendant pleaded Not guilty, and gave in Evidence that he was a Soldier, and having served so many Years as the Act of Parliament required in those Cases, he was intitled, by Virtue thereof, to exercise any Trade without Service; and was also intitled by the same Act to double Costs, but neglected at the Trial to get the Judge's Certificate: He afterwards came and applied to this Court, and had a Rule to suggest this Matter upon the Roll, and then had double Costs allowed him. *Trin. 3 Geo. 1 [1717], King versus Colan.*

154.—CUMBER *versus* HILL. *Hil. 7 Geo. II. [1734]. B. R.*

As to cross Remainders.

In Ejectment the Jury found a Special Verdict to this Effect: "*Richard Holden* the Grandfather died seised of several Lands, Tenements, &c., in Fee, having by Will devised the same to his Grandson *Richard Holden*, and *Elizabeth* his Grandaughter, "to be equally divided amongst them, and to the Heirs of their respective Bodies; "and for Default of such Issue, the Remainder to his Grandaughter *Anne Holden* "in Fee." *Anne* marries *John Jersey*, and afterwards *Elizabeth* dies without Issue of her Body. The Question was, whether *Richard Holden* and *Elizabeth* took an Estate in common, with cross Remainders to the Heirs of their Bodies; for then the Estate could not vest in *Anne*, but upon Failure of Issue of both their Bodies. Or whether this was an Estate in common, with Remainder to the Heirs of their Bodies generally; for in that Case one Moiety of the Estate would vest in *Anne*, who had the Remainder in Fee immediately upon the Death of either of them without Issue.

B. Serjeant argued, that this was not an Estate in common, but in Special Tail, by reason of the Possibility that *R.* and *E.* might have Issue between them: For if Lands are given to a Man that has a Wife, and to a Woman that has a Husband, and the Heirs of their two Bodies, they [189] have presently an Estate-Tail, for the Possibility that they may marry. 1 *Inst.* 20 *b.* 25 *b.* But admitting in this Case that they are Tenants in Common only, yet they are Tenants in Common, with cross Remainders to the Issue of their Bodies; for the Words are, "That in Default of such Issue the

"Estate shall remain over"; and there can be no Failure of Issue so long as either of them has Issue of his Body. And it was expressly adjudged in the Case of *Holmes versus Meynel*, Raym. 452, S. C.; T. Jones, 172, S. C.; Skinner, 17, S. C. And there is no Difference between this and the present Case, except in this Case the Words (*equally to be divided*) precede the Word (*Heirs*) and in that Case they are subsequent. There is also a Case in 4 Leon. 14, c. 51, directly in Point. *Vide* this Case cited Raym. 454, in the Case of *Holmes versus Meynel*. There are two Cases in the Books which seem to impugn this Resolution, one in 2 Cro. 655, *Gilbert versus Witty*; the other in 2 Roll. Abr. 416, T. p. 3. But the first of these Cases is answered in the Case of *Holmes versus Meynel*, and the other in Roll. Abr. is expressly denied to be Law. *Vide* Raym. 455.

D. Serjeant, *econ*. There is no Case cited in Point to prove this a cross Remainder: The Case of *Holmes versus Meynel* widely differs; for the Devise there is of "All the Testator's Lands to his two Daughters, &c.," and if they happen to die without Issue, then he devises all his said Lands, &c. And the Reason of the Judgment in that Case is, because the Devise over was of (*all*) his Lands; and in Case (*they*) die without Issue, *i.e.* both of his Daughters, so likewise the Devise over in that Case was to a Stranger, but here it is to one *in æquali jure* with the first Devisees. As to the Case in *Leon*. the Devise was to his Sons in Tail, and in Case they died without Issue, that then the (*whole*) Land should remain to a Stranger in Fee; here the Remainder was to a Stranger also, and the Word (*whole*) shew, that all his Estate should pass together, and not by Parts and in Moieties; and the whole Land could not pass till all the Sons were dead without Issue. As to the other Objection, that this is an Estate in Special Tail, because there is a Possibility of their having Issue between them, the Supposition is not only absurd in itself, but likewise is too distant and remote a Possibility for the Law to expect.

H. C. J. The Construction of cross Remainders has been extended of late Years, and the Distinctions upon which they have been determined are pretty nice. There is no Doubt but if this Case cannot be distinguished from the Case of *Holmes versus Meynel*, but that Case will govern the present Question; for it was determined upon great Authority [190] and mature Consideration. The present Case is a Devise to *Richard* and *Elizabeth*, and the Heirs of their respective Bodies, which gives them an Estate in common in Tail general; and the rather by Reason of the Word (*respective*) for it is now the same as if the Devise had been of one Moiety to his Grandson *Richard* and the Heirs of his Body, and of the other Moiety to his Granddaughter *Elizabeth* and the Heirs of her Body: And then follows, "And for Default of such Issue," *i.e.* upon Failure of Issue of either of them, "the Remainder over." In the Case of *Holmes versus Meynel*, the Testator's Intentions appear to be clearly, that the Remainder-Man should not take, but upon Failure of Issue by both his Daughters, for the Words, "And in Case they," *i.e.* both his Daughters, should die without Issue, that then (*all*) his Lands should remain over, so that by express Words the Remainder was not to vest but upon Failure of Issue by both the Daughters, and in that Case all his Lands were to remain over. In all Cases where the Devise is to two and the Heirs of their respective Bodies, these Words create immediate Remainders; and the Words following, *viz.* "And in Default of such Issue"; these Words can make no Alteration, nor is there any Case where they have been construed to create cross Remainders. *Sed adjournatur* to be spoke to again.

155.—THE KING against HOOPER. *Hil. 7 Geo. II. [1734]. B. R.*

Information for Assault and Imprisonment in *Newfoundland* denied, being Local.

The Defendant, being a Captain of a Ship, carried *Wills* a Sailor into *Newfoundland*, which Country is Part of his Majesty's Dominions; and there, by the Assistance of some *Spaniards*, imprisoned and laid him in Irons, and likewise treated him in a most barbarous Manner.

Mr. H. upon these Circumstances mov'd for an Information against the Defendant.

H. C. J. Where would you try this Information? all Criminal Prosecutions are Local; you may bring your Action, but cannot try this by way of Information. There is an Act of Parliament made in King *William's* Reign, which gives an Information against Governors for Misdemeanors in foreign Plantations; but this Case is not within that Statute. *Motion denied per Cur'.*

[191] 156.—HOOKER *ver.* HOOKER. *Hil. 7 Geo. II. [1734]. B. R.*

Dower.

This Case was sent out of the Chancery for the Opinion of the Judges of this Court, and was in Effect to this Purpose.

J. B. by Lease and Release conveyed certain Lands to Trustees in Fee, to the Use of the Trustees and their Heirs during the Life of *William Hooker, Sen.* Remainder to *William Hooker* the Younger for Life, Remainder to his first and every other Son in Tail Male, Remainder to his Daughters in Tail, Remainder to the right Heirs of *William Hooker, Sen.* Upon the Death of *William Hooker* the Elder, *William Hooker* the Younger enters, and marries the Plaintiff, but died without Issue; the Question was, whether his Widow the Plaintiff was intitled to Dower? The Contingent Remainders were arising, and both the Estate for Life and Remainder in Fee vested in him at the Time of his Death.

B. Serjeant for the Plaintiff: Upon the Death of *W. H. Sen.* the Fee-simple descended to *W.* the Younger his Son and Heir, but whether the Fee comes to him by Descent, or by way of Remainder, is not material; for both Estates being vested and united in him at the same Time, was a Merger of the Estate for Life, and he died seised of the Fee-simple. Admitted that where an Estate for Life, with Remainder in Fee, are limited by one and the same Conveyance, and both consolidated, yet they may open again to let in Contingent Remainders, as in *Lewis Boules's Case*, 11 Rep. 80. But this Matter is out of the Deed, for the Fee did not come to *William Hooker* the Younger intirely by the Deed, but by the Death of *William* the Elder, he happening to be his Heir. The Limitation to the first and every other Son of *William* the Younger was a Remainder in Contingency, and he having no Issue at the Death of *William* the Elder, that Contingency was destroyed, and could never vest afterwards, but he became seised of an absolute Estate in Fee; but admitting the Contingency to subsist, yet as it never came *in esse* during the Life of *William* the Younger, he died seised in Fee, and so his Feme became intitled to Dower. Estates in Dower are much favoured in Law, and a Feme shall be indowed of a base Fee, as in *Seymour's Case*, 10 Rep. 95. So if a Disseisor die seised, his Widow shall have Dower so long as the Disseisin continues. But he insisted upon the first Point, that the Fee coming to *William* the Younger by the [192] Death of *William Hooker*, the Elder, the Contingent Remainders were destroyed, and relied upon the Case of *Kent versus Harpool*, 1 Vent. 306; *T. Jones*, 76, S. C.; 3 Keb. 380. The Father Tenant for Life, Remainder to the Son for Life, Remainder to the first Son of that Son (who was not born), Remainder to the Heirs of the Body of the Father; the Father died before the first Son was born; and held the Descent of the Intail to the Son had destroyed the Contingent Remainders.

F. econ. The Question is, whether *William Hooker* the Younger was seised of such an absolute Estate at all Events as will intitle the Feme to Dower? Here is no Estate limited to *William Hooker, Sen.* but the Remainder is to his Heirs, so that when his Heir takes, he must take by way of Purchase. *William* the Younger does not claim the Fee by Descent, but by Virtue of the Conveyance; and if it should be look'd upon as a Merger, it is defeating the Intent of the Donor; and this Distinction is made in *Wiscot's Case*, 2 Rep. 61. When an Estate for Life, and the Fee-simple is limited by the same Conveyance, both Estates may stand together; but when the Fee descends, or comes by Purchase, in either of these Cases the Estate for Life is merged. This may be compared to the Case of *Plunket and Holmes*, Raym. 28, which was a Devise to *Thomas* for Life, with a Remainder to him in Fee upon a Contingency, which likewise descended to him by the Death of the Devisor; and yet it was said, that this should not confound the Estate for Life; which shews clearly, that altho' the Estates are in some sort consolidated until the Contingency happen, yet they are not consolidated to all Manner of Purposes, and therefore the Feme not intitled to Dower. This is to be considered as two distinct Estates vested in *William Hooker* at the same Time; for if a Son be born during his Life, or after his Death, the Feme could not have Dower. If such a Construction, as is contended for, should prevail, it would introduce great Confusion; for suppose the Husband dies, and his Wife brings a Writ of Dower and recovers, afterwards a Son is born, her Estate in Dower must be defeated. The Case of *Boothby versus Vernon, Pasch.* 11 Geo. 1, is in Point, and notwithstanding the Feme

was seised in Fee all the Time of her Marriage, yet because there was an intermediate Estate which took Effect during her Life, it was held, the Husband was not intitled as Tenant by the Curtesy. 1 Roll. Abr. 676, *F. 1. B.* seised in Fee of a defeazable Estate, takes Feme and dies, afterwards the Estate is defeated, his Wife shall not be endowed. So 1 Roll. Abr. 677 *b.* Lessee for Life, Reversion to the Husband in Fee, Lessee lets the Land to [193] the Husband for Life of the Husband, afterwards the Husband dies, then the Lessee dies; the Feme shall not be endowed, because there was a Possibility of Reversion during the Coverture as to the Freehold; so in the present Case there is a Possibility that the Contingency may happen during the particular Estate, and therefore the Feme shall not be endowed. 1 Inst. 40. The Wife shall not be endowed but where the Issue by Possibility might inherit; but here the Issue could not inherit, but must take by Purchase; *Ergo* the Feme shall not be endowed.

H. C. J. The Question depends upon two Points, whether by the Death of *W. H.* the Elder, *W.* the Younger having then no Son, the Contingent Remainder was not destroyed; so that *William* the Younger was seised in Fee at all Events. And in the next Place suppose the Contingencies to subsist, whether the Possibility that they might happen (but in Effect never did so), will defeat the Wife of her Dower. As to the first, it seems to me that the Contingencies are destroy'd; where indeed an Estate is limited to *A.* for Life, Remainder to his first and every other Son, &c., Remainder to *A.* in Fee; in that Case the Estate is to some Purposes consolidated, but not so as to destroy the Contingent Remainders, for *A.* claims both Estates by the same Conveyance. But there is no Case where the Fee comes *prior* to the Conveyance, that the Contingencies are not destroyed, as in the Case of *Kent* versus *Harpool*. So in 2 Saunders, 380, *Purefoy* versus *Rogers*; 2 Lev. 39, *S. C.* Feme Tenant for Life, Remainder to her first Son, she takes a Husband, and before the Birth of the Son, he in Remainder in Fee conveys the Inheritance to Baron and Feme, then she has a Son and dies; the Son cannot take; for not being *in esse* when the particular Estate was destroyed, the Contingency can never arise afterwards. This is a middle Case, for the Fee neither came by Descent, nor yet intirely by Purchase; for tho' *W. H.* the Younger claims the Fee by Virtue of the Deed, yet it is by Matter meerly intrinsical, he happening to be Heir to *W. H.* the Elder, and so falls with the Reason of *Wiscot's* Case, and the other Cases which have been cited in Support of this Matter. But suppose the Estate for Life not to be absolutely merged, but that there still remained an *Hiatus* to let in the Contingencies, as in *Lewis Bowles's* Case, it is to be considered whether this Possibility will hinder the Wife's Title of Dower when the Contingency never happens. What do the Books say? that the Estates are consolidated, and that the Husband and Wife in such Case are Tenants in Special Tail. *Cordale's* Case in Cro. Eliz. 316, is the only Case which contradicts these Resolutions: And in [194] the Case of *Purefoy* versus *Rogers*, this Case was denied by *Holt* to be Law; and *H. C. J.* said he had seen a Manuscript Note of that Case, and there it was said, that *Bridgman, C. J.*, denied *Cordale's* Case likewise. 3 Lev. 437, *Duncombe* versus *Duncombe*, in that Case a *Quære* is added by the Reporter, but it seems to be good Law, because there was an intermediate Estate limited to *J. S.*, which hinders the Estates from joining? There is another Case to this Purpose, 15 *Ed.* 3, 4 & 5. And so concluded upon the whole, that *W. H.* the Elder dying before the Birth of a Son, the Contingency was destroyed; and in the next Place, if the Contingency was not destroyed, yet it never happening, the Feme was intitled to Dower. The Case of *Boothby* versus *Vernon* does not in the least impeach this Resolution; for in that Case *Anne* was only Tenant for Life, no Estate of Inheritance in her either absolute or liable to be divested.

P. P. and *L. Justices*, of the same Opinion.

157.—*KENT* *ver.* *KENT* & al'. *Hil.* 7 *Geo. II.* [1734]. *B. R.*

Dower. Error brought by the Surviving Tenant, and the Heir of the other Tenant, whether Costs on Affirmance ought to be given against the Surviving Tenant only.

In Dower, *unde nihil habet*, in *Ireland*, the Plaintiff had Judgment to recover a third Part of the Land, &c., and Damages, to the Time of Judgment. *May*, one of the Defendants, dies, and his Heir and the Surviving Tenant brought Error in *B. R.* there, where Judgment was affirmed, and Costs and Damages for the mean Seisin given against *Kent* only, whereupon *Kent* and *May's* Heir brought Error in this Court; and the Question was, whether the Judgment for Costs against *Kent* only was not erroneous.

C. Serjeant, for the Plaintiff in Error argued, that Damages to be recovered in Dower, by the Statute of *Merton*, are not a *Tempore Mortis* until Livery of Seisin, but from the Time of Purchasing the Writ *usque diem Judicii*, 1 Roll. Abr. 760, B. ; Carth. 133. But this Statute does not extend to *Ireland*. 1 Sid. 357. The Judgment therefore in the present Case must be founded upon 16 & 17 Car. 2, c. 8, 1, 3. And the express Words of this Act of Parliament are, "That the Plaintiff or Plaintiffs in Error shall pay such Costs and Damages as shall be awarded upon Affirmance of Judgment"; and in this Case there being two Plaintiffs in Error, it is not in the Power of the Court to give Judgment against one only; for they are to be considered in Nature of Wrongdoers, as in Trespass against two the Court cannot separate and give Costs and Damages against one only.

[195] *Cur'*: The Question is, whether the Person, for whose Favour and Benefit the Judgment is, can bring Error? 5 Rep. 39 b.

C. Serj. Where the Error is by Default of the Court, altho' it be for the Advantage of the Party, yet the Party who has Benefit by it may assign it for Error; and to this Purpose cited Yelv. 107, *Heines versus Guy*. 1 Roll. Abr. 759; 8 Rep. 59. *Beecher's Case*, 4 Leon. 61.

E. Serjeant *econ*. The Case cited out of *Siderfin* cannot be Law, for this Act of Parliament was previous to the famous Law called *Poining's Law*, which was 10 H. 7. But whether Damages are given by this Act of Parliament, or by 16 & 17 Car. 2, is not material, for the single Question is, whether Damages and Costs against *Kent* only, the surviving Tenant, makes this Judgment erroneous? And as to this Point he said, the Damages did survive, and are to be taken against *Kent* only, not by Reason of Survivorship, but because the Heir is not chargeable with Damages recovered against his Ancestor. Cro. Eliz. 558. If there be a Recovery in a real Action of the Land and Damages, the Tenant against whom the Recovery is had dies, and the Heir who ought to have the Writ of Error in respect of the Lands will Release all Writs of Error, yet the Executor may sue a Writ of Error to avoid the Judgment for Damages, for the Heir was not chargeable in Damages, but the Executor. In Actions where no Damages and Costs are recoverable, no Damages to be paid *pro dilacione* as in a Writ of *Formedon*. So Executors pay no Costs or Damages, *pro dilacione*. 1 Vent. 166; 1 Mod. 7; 1 Vent. 88; 3 Lev. 375. *Gale versus Till*, Carth. 135. The Statute 16 & 17 Car. 2, was made only to secure Costs for Delay of Execution in such Manner as they were before secured by 3 Jac. 1, c. 8, in Personal Actions; but Damages are given in Satisfaction of an Injury which are in Nature of a Trespass, and die with the Person, where the Person dies before Judgment was perfected. 3 Lev. 275. In this Case Damages for the mean Seisin are given to the Time of the Original Judgment, which was in the Life of the Ancestor, and the Heir is not answerable for Damages had against the Ancestor. The Judgment therefore against *Kent* for Damages for the mean Seisin and Costs for Delay in the Writ of Error, is a good Judgment; but if the Court is of Opinion that the Judgment is erroneous, he prayed the Court would give such Judgment as the Court in *Ireland* ought to have given. Cro. Car. 411, 442. This will alter our Security, and whereas now we have Remedy against one only, we shall in that Case have it against two. 1 Salk. 401.

[196] C. Serj. in Reply: Damages are given for a new Wrong occasioned by the bringing of the Writ of Error, and delaying the Plaintiff of his Execution, and therefore all Parties concerned in the Wrong ought to be equally included in the Judgment. As to this Court's giving such Judgment as the Court in *Ireland* ought to have given, the Statute is, "That Judgment must be given by the Court which awards Execution"; and this Court cannot award Execution for Lands in *Ireland*; but upon Affirmance of Judgment this Court writes to the Court in *Ireland*, and thereupon Execution is awarded.

H. C. J. We will consider of it whether the Judgment is to be reversed, and if a new Judgment is to be given, in what Manner it must be done. *Vide* 3 Rep. 13 b. in *Herbert's Case*. If Judgment be against two Disseisors in Assise for Land and Damages, and one Disseisor dies, Execution shall not be awarded against the surviving Disseisor only, but as well the Heir as the Surviving Disseisor shall be equally charged, but in Actions Personal it is otherwise. *Vide* 3 Lev. 55, *Graves versus Morley*. The Jury finding Part only is naught, and not cured by Verdict; and *vide* the Difference where the Whole is put in Issue, and where Part only; for in the last Case it is a Discontinuance, which is aided by Verdict. 3 Lev. 39, 40.

158.—THE KING *against* REEVES. *Hil. 7 Geo. II. [1734]. B. R.*

Prohibition on a Libel for Tithes.

Libel in the Spiritual Court for Tithes. The Plaintiff intitles himself, as Vicar, to all Tithes arising within the Vill, except Tithes of Corn growing upon particular Lands, said to be *due to him either by Endowment, Custom or Prescription* : As to Part the Defendant pleads Payment of an Annual *Easter Offering* of a Hen of the Value of 6d. and 1d. for Agistment of all unprofitable Cattle. After Sentence in the Spiritual Court, the Defendant comes and moves for a Prohibition, *suggesting, that Tithes of unprofitable Cattle were due to the Rector or Impropiator, and not to the Vicar, Curate or Sequestrator.*

L. Doctor of Laws : There is a material Difference between the Suggestion and the Pleadings below, 1 Vent. 335. Prohibition was prayed to a Suit for Tithes, upon a Suggestion that the Lands out of which they were demanded lay out of the Parish, and the Bounds of the Parish are triable at Common Law ; but the Court denied the Prohibi-[197]-tion, because it did not appear that a Plea thereof had been offered in the Ecclesiastical Court.

The Defendant likewise *suggests*, that the Plaintiff *intitles himself by Custom*, and that *all Customs are triable at Common Law only* ; but Custom is only mentioned incidently, and the Plaintiff rests himself intirely upon the Endowment ; *and when the Foundation of the Suit is Spiritual, and Temporal Matter comes incidently in Question, the Ecclesiastical Court shall try the Temporal Matter, but shall try it as Courts of Common Law would.* 2 Salk. 547, *Shotter versus Friend*. 3 Lev. 72, *Bonsey versus Lee*.

If the bare Mention of a Custom be Reason sufficient to grant a Prohibition, the Jurisdiction of the Spiritual Court will be absolutely overturned ; for wherever the Libel is for Tithes, there is no Case but the Word *Custom* is mentioned.

Offerings are due by Custom only, and yet there is no Question but the Spiritual Court has a Jurisdiction in that Case, and so is the Statute 27 H. 8, c. 20, s. 1, *de circumspete agatis* ; 32 H. 8, c. 7 ; 2 Edw. 6, 13. Personal Tithes to be paid in such Manner and Form, as have been of Right yielded and paid within forty Years next before the making this Act, or of Right or by Custom ought to have been paid ; here is a Custom to be tried, and yet there is no Question but a Suit in the Spiritual Court will lie upon this Statute.

This is after Sentence, and in that Case the Court always Judges favourably of the Proceedings in the Spiritual Court ; if the Defendant has Reason to object to the Jurisdiction, he ought to have applied to this Court before Sentence. 1 Cro. 595 ; 2 Keb. 612 ; Noy, 70.

In all Cases where this Court prohibits upon Sentence, it is where the Defect of Jurisdiction appears upon the Face of the Libel, and not by Reason of Matter suggested *dehors* the Libel ; and so it was ruled in 1723, *Wright versus Allen*, upon Motion for Prohibition to the Admiralty.

B. Sen. on the same Side : To induce the Court to grant a Prohibition, it is suggested, that Agistment of all unprofitable Cattle have Time immemorial been paid to the Rector of Bishop *Wilson*, and not to the Vicar, Curate or Sequestrator.

Taking therefore this Matter upon their own Suggestion, there is no Reason to grant a Prohibition, for notwithstanding the Right in this Case is in Question, yet where it is a Right between Spiritual Persons only, a Prohibition shall not be granted. 13 Rep. *de modo decimandi*. 2 Roll. Abr. 310, Z. 1 ; 311, pl. 6.

[198] *Cur'* : The Reason of those Cases is where the Suit depending is between Ecclesiastical Persons, but in this Case the Rector is no Party, but the Parishioners.

B. Where Right is between Spiritual Persons only, whether the Person is a Party, or not, is not material. 2 Roll. Abr. 310, pl. 6 ; God. 149 ; 2 Buls. 157, *Drayton versus Cotterill*.

In the Prohibition it is suggested, that the Tithes belong to the Rector, and not to the Vicar ; as to the Jurisdiction therefore there is no Defect, but the Suggestion is *pro defectu Triationis*. 1 Leon. 59.

The Reason of granting Prohibitions where a Custom is pleaded, or the Suit is for a Duty arising by Custom, is, because in the Spiritual Court thirty or forty Years Usage is sufficient Evidence of a Custom or Prescription ; which being contrary to the Rule of Common Law, that no Custom or Prescription can arise within Time of Memory,

therefore the Common Law prohibits the Ecclesiastical Courts, where the Question arises upon a Custom. 2 Buls. 157. But here the Suit is grounded upon the Endowment, whether by Endowment the Vicar is intitled; and the Custom only falls in as incident to the *Quantum*, how much is in Reality due for Tithes, and not whether Tithes generally is due by Custom.

Here is therefore in Nature of a common Libel for Tithes, in which Case no Prohibition goes, tho' the Plaintiff's Right to Tithes is denied. 2 Keb. 439; 1 Vent. 3, *Bishop of Lincoln versus Smith*. Libel for a Pension, to which the Plaintiff intitled himself by Prescription; and on Motion for a Prohibition, it was held by *Kelynge* and *Twisden*, that Pensions, tho' they are by Prescription, may be sued for in the Spiritual Court, for having Conuizance of the Principal, that shall draw in the Accessary, contrary to my Lord *Coke's* Opinion in 2 Inst. 491.

¶ This being after Sentence, the Defendant comes too late; here is no want of Jurisdiction appearing upon the Face of the Libel, and the Distinction that runs in these Cases, is where the Objection to the Proceedings of the Ecclesiastical Judges is not *pro defectu Jurisdictionis*, but *Triationis* and so is 1 Show. 158, *Shatter versus Friend*. Where there is want of Jurisdiction, Prohibition goes after Sentence, otherwise where the Suggestion goes to the Trial only.

F. econ. Where the Determination of the Spiritual Court extends to the Property of a Layman upon Matter not cognizable in that Court, it is not too late to come for a Prohibition altho' after Sentence.

Offerings are not due of common Right, but by Custom Time immemorial, and therefore not cognizable in the Spiritua Court, because it is admitted, that Evidence of a [199] Custom for thirty or forty Years is a good Foundation to establish a Custom in that Court; and this is the Reason of granting Prohibitions when a Custom comes in Question, that it may be tried whether this is such a Custom as is warranted by the Common Law.

In all Cases where there is want of Jurisdiction either in Right or Point of Trial, a Prohibition goes; but this does not conclude the Jurisdiction of the Spiritual Court, for if the Jury find in Favour of the Crown, a Consultation will be granted.

The Plaintiff intitles himself to Tithes either by Endowment, Custom or Prescription, which is too general, for it is not so much as suggested when this Endowment commenced, nor does it appear to be by Grant from the Rector, or with the Concurrence of the Ordinary, which is necessary to the Establishment of all Endowments, and if they go upon the Endowment in Fact, without relying upon the Custom or Prescription, they must shew it such an Endowment, as has all the Qualifications of an Endowment; all that is suggested in this Case is, that *Nich. de Ross*, Prebendary of Bishop *Wilson*, granted, &c. If the Plaintiff cannot intitle himself by Endowment, it must be by Prescription, which is triable at Common Law, and there only. 2 Salk. 548. If therefore it appears, that the Facts suggested in the Libel are cognizable only at Law, Prohibition in all Cases goes after Sentence, except where the Fact tried in the Spiritual Court did not arise within the Diocese. It is said that this is a Question of Right between Ecclesiastical Persons only, but the Fact is otherwise. It is a Suit for Tithes between the Vicar and the Parishioners, and it may prove inconvenient to carry this Rule too far, for there is no Reason why Ecclesiastical Persons should be excluded from trying their Right at Common Law; and he said the Case of *Smith* in 1 Vent. had been denied over and over again. There were several other Cases cited to shew that a Prohibition would lie. Carth. 97, *Broad versus Piper*. Prohibition after Sentence for a Mortuary. Carth. 33, *Vanacre versus Spleen*. Libel against the Defendant for not repairing Part of the Church Wall, which by Custom he was bound to do. A Prohibition was granted after Sentence, because a Custom is not triable in that Court. 1 Salk. 334. If the Custom is not denied, the Spiritual Court shall proceed, for there is no other Remedy; but if the Custom be denied, a Prohibition shall go, *Non propter defectum Jurisdictionis sed Triationis*. 3 Keb. 523, 527; 2 Lutw. 1059, *Thompson versus Davenport*. Customs triable at Common Law only. Moore, 457, *Blinco versus Marson*. A Vicar libelled against the Parson for Tithes of Glebe, the Parson [200] brought a Prohibition, and held maintainable; and if a Special Custom be after Endowment of a Vicarage, it is issuable. 2 Roll. Abr. [335, pl. 3, S. C.; Litt. Rep. 263.

H. C. J. Where there is want of Jurisdiction, Prohibition goes after Sentence; where indeed a Person is cited out of his Diocese, and pleads to the Libel, no Pro-

hibition goes, because there is no want of Jurisdiction ; but a particular Privilege by the Statute, and the Defendant waives that, and answers to the Citation, he is by that Means concluded from taking Advantage of the Statute afterwards.

Offerings are due by Custom only, and when that comes in Question, a Prohibition must go : Suppose the Case of a *Modus* pleaded in the Spiritual Court, and denied, Prohibitions are always granted.

This is a Libel for Tithes of unprofitable Cattle, and the Plaintiff intitles himself either by Endowment, Custom or Prescription. The Court below has given Sentence for the Plaintiff ; *sed non constat*, whether that Judgment was founded upon the Endowment, Custom or Prescription.

If there had been a particular Endowment alledged, and Judgment upon that, if it afterwards appears to this Court, that the Plaintiff had no Right to recover, Prohibition goes, tho' after Sentence.

This Case indeed is not so strong ; for here is no particular Endowment alledged, and therefore must be intended to be given in Evidence ; but the Objection that I have is, that it does not appear upon what Part of the Libel the Judgment is founded ; whether upon the Endowment, Custom or Prescription separately, or upon all of them put together ; and if such a general Way of Proceeding should be allowed, it would in a Manner defeat the Jurisdiction of the Common Law, as to Oblations, by suggesting generally an Endowment coupled with a Custom or Prescription ; for if we should intend the Judgment to go singly upon the Endowment (because that Word happens to be mentioned in the Libel), it must establish at all Events the Jurisdiction of the Spiritual Courts, with respect to Oblations ; and perhaps at the same Time there was not one Syllable given in Evidence to support the Endowment, but the Sentence was intirely founded upon the Custom or Prescription, which are triable at the Common Law only.

L. J. It does not appear certainly, that there is want of Jurisdiction ; for whether the Sentence is founded upon the Endowment or Custom does not appear upon the Face of the Proceedings ; so doubted whether a Prohibition should go as to that Part.

[201] But as to the Oblations, it is clear the Spiritual Court can have no Jurisdiction, for that is due only by Custom ; indeed after the Custom is once established at Common Law, the Spiritual Court may proceed, which is all that is provided by the Statute *de circumspccte agatis*.

P. and P. Justices, to the same Effect : Prohibition was granted to declare upon by Consent of the whole Court.

159.—ASHLEY *ver.* BRANWOOD. *Hil.* 7 *Geo.* II. [1734]. *B. R.*

Error in *Formedon*.

Thomas Entwisle seised in Fee devises to his eldest Son *A.* in Tail, Remainder to his second Son *T.* in Tail, Remainder to his third Son *E.* in Tail, Remainder to his own right Heirs. The Defendant pleads that *Thomas*, the Brother and Heir of *A.* made a Feoffment with Warranty, and that thereupon the Defendant entred.

The Plaintiff replies, that at the Time of the Feoffment there was a Lessee for Years in Possession ; and to this the Defendant demurred. Judgment in the Common Pleas, *quod bona & sufficiens Replicatio existit*.

W. Serjeant argued for the Plaintiffs in Error, That the Plea was ill, for that it does not appear that *A.* was dead at the Time of the Feoffment by *Thomas*, nor is Seisin alledged in *Thomas* at the Time of the Feoffment. Bro. Abr. Tit. *Formedon*, 4 : Bar, 4 ; *Pleading*, 5 ; 1 Inst. 303 *a* ; Rast. Entr. 361. But if *Thomas* was seised, yet if Seisin was not by Virtue of the Will, it will not avail. 1 Roll. Abr. 634 ; 10 Rep. 97 ; Brook's Abr. Tit. *Formedon*, 16.

Collateral Warranty, which commences by Disseisin, no Bar. 2 Salk. 686 ; 8 Rep. 53 ; 1 Inst. 352 *b* ; Cro. Car. 391. It is said tho' Seisin in *Thomas* be not expressly averred, yet it sufficiently appears from the Pleading, that *Thomas* was seised. *Thomas* is called Brother and Heir, and this is said to be sufficient, for *nemo est hæres viventis* ; but this is only a Consequence, and does not appear upon the Plea ; the Estate-Tail might have been discontinued at the Time of the Feoffment, and therefore tho' *Thomas* was Heir at the Time, yet he might not have Seisin : but the Alledging *Thomas* to be Brother and Heir is quite immaterial, for he does not claim as Heir to *A.* but *per*

formam Doni; therefore Heir, or not Heir, is totally immaterial. Coke, Sect. 73; 2 Inst. 241.

[202] *B. Sen. con.* Not necessary in *Formedon* to alledge Seisin tho' it may be in Assise. Brooke's Abr. Tit. *Titles*, 59. Admitted that it was usual in Pleading *Formedons* to alledge Seisin, and that most of the Precedents are so; but the Question is, whether this is absolutely necessary, so that the Want of it makes Error? said what was alledged in Pleading was Tantamount to an Averment of Seisin; for it is said, that *Thomas* infeoffed *B.* by virtue whereof *B.* was seised in Fee, and an Averment of a Feoffment, and that thereupon the Feoffee became seised, implies Seisin in the Feoffor. 1 Inst. 303; 18 Ed. 4, 29, pl. 27. Upon *Non Feoffavit* Coverture may be given in Evidence, to shew that it was not a corrupt Feoffment; by the same Reason Seisin may be given in Evidence. In all Cases where Feoffment is pleaded, Seisin must be proved in Evidence, or otherwise the Feoffment not effectual, and therefore the same Force as if put in Issue. It is objected, that, for any Thing that appears, Feoffment might be made in the Life-time of *A.* but it is said, *Thomas* Brother and Heir, which necessarily implies the Death of *A.* at the Time of the Feoffment. 3 Lev. 219; Hob. 51; Dyer, 340; Yelv. 27. *Existens* the same as *ad tunc existens*. 2 Mod. 129.

Objected, that if the Seisin by *Thomas* was not a rightful Seisin at the Time of the Feoffment, the Warranty works no Discontinuance; but there are many Instances where Warranty shall bind, tho' no Seisin, as Collateral Warranty. 1 Inst. 375.

Collateral Warranty will bind without Assets, and Seisin not necessary. 1 Inst. 370 a. He that was Owner, and might have inherited his Warranty, shall bind. 1 Inst. 370 a.

H. C. J. There are two Questions, whether in Pleading a *Formedon*, it is necessary to alledge Seisin; and Secondly, whether this is not sufficiently shewn upon the Pleadings: The Feoffment as pleaded, is a Feoffment with Collateral Warranty, and to make that effectual there must be an Alienation. Suppose in this Case there had been an Alienation by *A.*, and after a Warranty by *Thomas*, the Estate at that Time being turned to a Right, and Warranty descending upon *E.* and his Heirs, is a good Bar; but this is not the present Case, for there is no Seisin alledged in *Thomas* at the Time of the Feoffment, nor no Appearance of an Alienation. It is therefore a Collateral Warranty without Alienation or Disseisin, and the Reason given in 1 Inst. why Collateral Warranty bars, is, because the Estate was turned to a Right at the Time of the Warranty; Feoffment will imply only Livery and Attornment, but never intends Seisin or Title in the Feoffor; for it must be alledged upon the [203] Pleadings. 2 Vent. 208. Brother and Heir is immaterial, and cannot import such a Seisin in *Thomas*, as is necessary. In Pleading nothing is to be intended, especially in this Case, which goes in Disinheritance of the Issue in Tail. The single Question is, whether Collateral Warranty can be pleaded in Bar, where the Estate was never turned to a Right. Note: the Replication was given up without Argument; *sed Quere*, if not good. A Man makes a Lease for Years, and afterwards a Deed of Feoffment, and delivers Seisin, the Lessee being in Possession, and not assenting to the Feoffment, the Livery is void; for albeit the Feoffor has the Freehold and Inheritance in him, yet it is not sufficient; for Livery must be given of the Possession also. 1 Inst. 48 b; 2 Rep. 31, 32, *Bettisworth's Case*. Note: in *Hilary* Term following Judgment was affirmed, with further Argument upon the Reasons, *ut supra*.

160.—COCK versus VIVIAN. *Hil.* 7 *Geo.* II. [1734]. *B. R.*

Motion in Arrest of Judgment.—*Indebitatus Assumpsit* lies only for a Sum certain, *Quantum Meruit* for a Sum uncertain.

In *Assumpsit* the Plaintiff laid several Counts in his Declaration, amongst which were an *Indebitatus Assumpsit* and a *Quantum Meruit* for Pickage and Stallage, and an *Indebitatus Assumpsit* and a *Quantum Meruit* for Toll; in Consideration that the Plaintiff had permitted the Defendant to expose his Corn to sale in the Market, the Defendant promised to pay, &c. The Jury found for the plaintiff, and gave Damages upon the whole Declaration generally; it was now mov'd in Arrest of Judgment by Mr. *Hussey* and *Robinson*, that the Verdict being general, if any one of the Counts were naught, the Plaintiff cannot have Judgment.

There are two material Objections to the Declaration; First, an *Indebitatus Assumpsit* will not lie but for a Sum certain; and Secondly, a *Quantum Meruit* lies not

for a Sum certain ; these Objections go to the Declaration in general, but in particular to the four last Counts ; in the fifth and seventh the Plaintiff declares, that in Consideration the Plaintiff permitted the Defendant to *expose* his Corn to Sale, the Defendant promised to pay as much as should be due *secundum consuetudinem*. 2 Inst. 220. No Toll is due of common Right for Goods brought to a Fair or Market, unless they be sold, and then Toll to be taken of the Buyer ; but in antient Fairs and Markets Toll may be paid for the *Standing*, &c., tho' nothing be sold ; but this is not good unless by Special Custom. A Man cannot prescribe for Toll for going [204] along the Highway, for it is against Common Law and common Right. 2 Roll. Abr. 522 ; 2 Lutw. 1336.

What was due is uncertain, and therefore an *Indebitatus Assumpsit* lies not ; the common Method in those Cases is to distrain. *Indebitatus Assumpsit* never brought for a Heriot ; the common Way is to seise or distrain. So in the Case of a Miller ; the Plaintiff declares for so much Toll as was due *secundum consuetudinem*, and no Toll can be due by Custom. Custom is Local, and must always be applied to a certain Place ; whereas the Plaintiff can have no Title but by Prescription, which is Personal, i.e. that he, and all those whose Estate he has, Time out of Mind had certain Toll, &c. Vide 4 Rep. 31 b, 32 a. As to the second Objection, a *Quantum Meruit* lies not for Toll ; for Toll in its own Nature implies a Certainty. The Declaration is, *Quantum proinde rationabiliter habere meruerit*, without alledging any Custom ; this implies a Duty indeed, but what that Duty is, must be ascertained by the Jury.

C. Serjeant *econ*. The Case cited in 2 Inst. 220, and Lutw. 1336, are not in Point for them. It is there held, that Toll for exposing Goods to Sale is not to be taken unless by Special Custom ; we have here laid it specially, *secundum consuetudinem*, and so those Cases make for us.

The Case in Roll. Abr. for Toll for passing thro' the Highway, is not like the present Case ; for that is against common Right, and no Custom can establish it.

Assumpsit lies not for a Heriot, or for Toll of a Mill ; but even in those Cases, if the Plaintiff declares that in Consideration he permitted the Defendant to enjoy, &c., an *Assumpsit* lies ; so in the Case of Toll, in Consideration the Plaintiff suffered the Defendant to carry away his Toll, he promised to pay what should be due *proinde secundum consuetudinem*. In 2 Inst. 220, Toll is said to be a reasonable Sum of Money due to the Owner of the Fair or Market upon Sale of Things tollable within the Fair or Market, or for Stallage, Pickage, or the like ; so that the four last Counts are not to be confined to the Sale of Corn only, but for Stallage and Pickage also, which runs thro' the whole Declaration.

As to what is objected, that the Plaintiff cannot intitle himself to Toll by Custom, because Custom is Local. It is true in Pleading there is a Difference between Custom and Prescription. 2 Lut. 1522 ; 1 Vent. 389 ; 3 Keb. 677. But in this Case the Plaintiff does not intitle himself by Custom, but that the Defendant promised to pay what should be due *secundum consuetudinem*.

[205] It is objected, that a *Quantum Meruit* does not lie for Toll ; we have not brought it for the Toll itself, but in Consideration the Plaintiff had permitted him to expose, &c., the Defendant promised to pay *Quantum proinde habere meruit* ; and this being laid to be at the Request of the Defendant, is *Quasi ex contractu*, and in Consideration of this Enjoyment.

Where Money or any other Thing is due from one to another, it implies a Contract, *Indebitatus Assumpsit* for a Customary Fine *pro tenementis secundum consuetudinem manerii*. 1 Show. 35 ; 3 Mod. 239 ; 3 Lev. 262 ; 2 Leon. 179.

F. Counsel : *Indebitatus Assumpsit* will lie for Toll ; for where any Thing is due, the Law implies a Promise. 2 Lev. 174 ; 3 Lev. 37.

Objected, that the Consideration is not good, for that no Toll is due for exposing Goods to Sale in a Fair or Market ; if so, then the last Words are to be rejected, and it is a bare *Indebitatus Assumpsit* in Consideration the Plaintiff permitted the Defendant to enjoy the Toll, the Defendant *proinde* promised, &c., there is no Pretence to say, the *Quantum Meruit* lies not for Pickage and Stallage ; and this is carried thro' all the Counts, according to Lord Coke's Description of the Word Toll. Here is a sufficient Consideration to raise a *Quantum Meruit* ; for it is not for permitting him to expose to Sale in the Market generally, which the Defendant was intitled to of common Right, but for permitting him to expose his Goods in the Market-house, to which he had no common Right.

D. Counsel : *Tolnetum* is a general Word for Toll. 2 Lutw. 1518; Brook, Tit. Toll, 2. Toll may be paid in Specie as well as in Money; and *Quantum Meruit* lies for Pickage and Stallage, being a reasonable Satisfaction to the Lord for the Use of his Soil. 2 Lev. 252.

Action lies for Corn in Specie, as where a Man promises to deliver so many Bushels of Corn, *Assumpsit* lies for not delivering so many Bushels. Toll must be certain, but Pickage, &c., need not. It is nothing but a reasonable Satisfaction, and what is reasonable may well be put in issue. Plow. 63 b. Trespass upon the Case by the Lord of a Vill, *eo quod Tolloneum asportavit & illud solvere recusavit*. Objection was taken to the Writ, that he could not carry away the Toll, unless it was paid before; but yet the Writ was adjudged good; for altho' the first Words were void, yet the last, *viz. Et illud solvere recusavit*, are sufficient, which answers another Objection, that Toll may be paid as well by the Seller as Buyer. *Indebitatus Assumpsit* will lie in this Case, it is in Consideration of an Enjoyment, which is sufficient, [206] especially after Verdict; for then the Law intends it to be grounded upon an express Promise made between the Parties, as in *Hardress, 366, Sir John Trevor versus Roberts*. *Indebitatus Assumpsit* to pay so much Money in Consideration the Plaintiff had licenced and permitted the Defendant to enjoy such Lands; after Verdict it was objected, that the Licence and Permission amounted to a Demise, and *ergo Debt ought to have been brought, and not an Action upon the Case*; but it was held, that upon an express Promise to pay Rent, *Assumpsit* would lie; and this being after Verdict, the Court would presume an express Promise; *Assumpsit* lies for a Copyhold Fine. 3 Lev. 261, *Sutleworth versus Garnet*; and so was held by *Raymond, C. J.*, in *Capper's Case*. *Assumpsit* by the Mayor of London to have the 20th Part of the Salt of every Stranger who brought it to the Port of London; and tho' there is no Reason alledged why he should have that Part, yet the Mayor had Judgment. *Dyer, 352 b*; 4 Mod. 322, and so ruled by Baron *Comyns*, that *Indebitatus Assumpsit* would lie for so many Bushels of Salt from every Ship.

H. G. J. Here are several Counts in this Declaration, and if any one Count is bad, the Plaintiff cannot have Judgment. The first Objection is, that the Demand is general for Toll of Goods exposed to Sale; and that the Defendant promised to pay as much as should be due, *secundum consuetudinem*; whereas Toll is to be taken for Goods sold only, and then not due by Custom, but Prescription. It is admitted, that by Special Custom Toll may be taken, tho' nothing be sold; and so the Plaintiff has laid it in his Declaration *secundum consuetudinem*. The other Part of the Objection seems indeed more material, that the Plaintiff cannot intitle himself by Custom, but by Prescription, the one being Local, the other Personal; and this requires farther Consideration. The next Objection is, that the Consideration is insufficient, and *Indebitatus Assumpsit* lies not for a Demand of this Nature, for that there is nothing in certain laid to be due, and *Indebitatus Assumpsit* lies not but for a Thing certain. This might have been a good Objection at another Time; but it is now after Verdict, and we must intend an express Promise proved at the Trial, for the Jury have found the Promise. The next Objection is to the *Quantum Meruit*, that it will not lie for a Thing certain, and that the Consideration to induce the Promise is not sufficient. Here are two *Quantum Meruits*, the first is in Consideration the Plaintiff had permitted the Defendant to bring his Corn into the Market-house, he promised to pay, *Quantum proinde meruit*; It is certain this Action lies not for a Certainty, and Toll for [207] Goods sold in the Market generally must be certain; but in this Case here is something superadded to the Custom, it is not for Toll of Corn exposed to Sale in the Market generally, but for Leave to expose his Corn, &c., in the Market-house, which is extra the Custom, and may be good Consideration to raise the Promise. The most material Objection is to the last Count, which is a *Quantum Meruit* generally, *pro Tolneto pro granis illis, &c., locat' in Marketo prædict' Quantum proinde rationabiliter habere meruerit*. To answer this Objection, it is said the *Tolnetum* includes Pickage and Stallage, and that this Word runs thro' the whole Declaration; but the Question is, whether it can be taken so upon the Face of the Declaration; for here the Plaintiff has himself distinguished in the Declaration between the Duty arising from Pickage and Stallage, and what was due for Toll of Corn; and the last Count is general for Toll of Corn *locat' in Marketo prædict'*.

P. P. and *L. Justices*, to the same Effect. *Adjournatur* to be spoke to again.

[209*] ADDITIONAL CASES IN *B. R.*161.—THE KING *and* The MAYOR of LYMINGTON. *Hil. 5 Geo. 2* [1732].

Information.

Information being granted in the Nature of a *Quo Warranto*, and a Return made, the Plaintiff in order to defeat a Traverse, before the Defendant had either pleaded, demurred or traversed, moved for a Trial at Bar, notwithstanding the Defendant had then a Fortnight's Time to plead in : The Court denied the Motion, and said they could not deprive the Defendant of the Benefit which the Law gives him by obliging him to join Issue by granting a Trial at Bar. We don't know upon what Issue may be joined.—Suppose this had been upon Ejectment, did you ever know such a Motion granted ? A Trial at Bar was never moved for before Issue joined.

162.—THE KING *and* The JUSTICES of the BOROUGH of WALLINGFORD. [1732.]*Mandamus.*

Mandamus to reimburse a Surveyor of the Highway according to 3 & 4 W. & M. c. 12. It was moved to supersede the Writ before any Return was made to it. The Court denied the Motion, and said, they could not quash the *Mandamus* before a Return was made.

163.—THE KING *and* The JUSTICES of the PEACE for the COUNTY of SURRY. [1732.]

Roads.

By the Act of 4 G. 1 (Priv. Stat. 4 Geo. 1, c. 4), for amending the Roads from City of London to the Town of *East Grinstead* in *Sussex*, and to the Town of *Sutton* and *Kingston*, *Surry*, Commissioners and Trustees were appointed to mend the Roads and erect Gates and Turnpikes within such a particular Precinct ; and further enacted, that the Justices of Peace for said Counties may at their Quarter-Sessions inquire into, hear and determine the Abuses committed by the Commissioners and Trustees in Execution of [210] the Powers given them by Virtue of this Act. The Trustees erected a Turnpike in *Kingston*, which the Justices ordered to be pulled down and removed, and directed the Sheriff to put in Execution said Order.

Mr. *Fazakerly* moved to quash this Order, insisting (and agreed to by the Court) that the Justices had no Authority to remove this Turnpike. The Act of Parliament gives the Commissioners a Power to erect any Turnpike or Turnpikes, Gates, &c., within such a particular District ; if therefore this Turnpike be erected within the Place limited and prescribed by the Act, they have done no more than they are authorized to do, and consequently no Abuse of their Power. The Words of the Statute are general, and leave a discretionary Power in the Trustees to erect as many Turnpikes as they shall think convenient. But supposing this Turnpike was not erected within the Place prescribed by the Act, it is then clear that the Justices can have no Authority to take Cognizance of this Matter by Virtue of the Statute. For the Act circumscribes the Authority of the Justices to the Power given to the Trustees ; and if they have taken upon them to erect Turnpikes in Places which are not within the provision of the Act, then the Act is quite out of the Question, and the Trustees are guilty of a Nuisance, and indictable for it at Common Law ; and for that very Reason the Justices can have no Cognizance of the Matter, because the *locus in quo* is not within the Direction of the Act. There was another Objection taken to the Order, *viz.* That the Justices could not give Directions to the Sheriff to execute this Order, there being no Provision in the Act to this Purpose. But to this it was answered, that wherever an Act of Parliament gives a Power to the Sessions, &c., to hear and determine, it necessarily imports a Power of Execution, and likewise extends to all Things which are incidents to the Power. The Sheriff is the proper Officer of the Sessions, and is obliged *ex officio* to execute their Orders ; and for this Purpose was cited *The Queen and Wyatt*, Salk. 380 ; Lamb.

[* See Prefatory Note.]

Just. lib. 1, fo. 50, 372, 381; Dalt. Just. 132, 397, 398. The Court quashed the Order upon the first Objection, and gave no Opinion upon the second.

164.—THE KING v. PRICE. [1732.]

Information.

Information in the Nature of *Quo Warranto*. In the Pleadings it was set forth, that the Borough of *New Radnor* was a Corporation Time immemorial, and that it was known and called by several Names. That Queen *Elizabeth* incorporated it afterwards by Letters Patent by the Name of *New Rad[211]-nor*, and that it was provided by said Letters Patents, that no one *esset aut remaneret* a Capital Burgess who was not Resident and Commorant *infra Villam*.—There was a Replication and Rejoinder; and upon Demurrer, it was objected by Mr. *Bootle, jun.* that the Inducement to the Traverse upon the Replication was immaterial. It is set forth by way of Inducement, that the Defendant at the Time he was elected Capital Burgess, or at the Time he was sworn into his Office, was not Resident and Commorant *infra Villam prædict, absque, &c.*, and so traverses his being Resident, &c. Now the Charter in the Disqualifying Clause does not require that he shall be Resident at the Time of Election, but that he shall continue Burgess no longer than he is Resident and Commorant within the Borough, which disqualification does not extend to the Time of his Election, but to the not continuing Resident after his Election. So that what is alledged in the Inducement that he was not Resident, &c., at the Time of Election is immaterial, and therefore Judgment ought to go for the Defendant; for all Inducements to the Traverse ought to be material as well in the Case of the Crown as of the Subject; and so is 2 Leon. 32.

Mr. *Fazakerly cont'*: Tho' the Form of Pleading is not so regular as might have been, yet upon the Face of the whole Pleading there appears a sufficient Averment to disqualify the Defendant. It is expressly alledged, that he was Commorant *per totum Tempus extra Villam*; and it is no where shewn in the Defendant's Plea, that he was qualified; he only says he was elected; but it is no where alledged that he was Commorant *infra Villam*, or intitled to exercise this office; so that notwithstanding the Inducement to the Traverse, and the Traverse Itself are naught, yet there still Remains a sufficient Averment upon the Face of the Pleadings to disqualify the Defendant. By the 9th of *Anne*, twenty Informations of this Nature are put upon the same Footing as Civil Actions are, and therefore the Defect of the Inducement is now aided by the Statute of Jeofails.

The Court said, altho' the Inducement be immaterial, yet if there appears sufficient Matter in the Plea to disqualify the Defendant, that would support the Information. Statute of Jeofails will extend to this Case: The Defendant has not shewn this Defect in the Inducement for Cause upon the Demurrer, so that it is Matter of Form only which is aided by the Statute; and therefore the Objections in Support of the Demurrer were over-ruled and Judgment against Defendant. *Trin. Term, 5 & 6 G. 2, 1732.*

[212] 165.—THE KING v. BRITAIN. [1732.]

Indictment—Trade.

Indictment for exercising the Trade of a Butcher within the City of not having served an Apprenticeship *secund' formam Stat'*, and then avers, that this was a Trade at the Time of making the Statute, *Usitat' infra Regnum Angliæ*; and upon Demurrer to this Indictment, it was objected that the *infra Regnum Angliæ* was wrong, because since the Union there is no such Place, but it ought now to be *infra Regnum Magnæ Britanniaë*: and cited the Case of the *King and Wingrow, Hil. 2 G. 2.* Indictment for exercising the Trade of a Butcher *in hoc Regno Angliæ*, and quashed. *The King and Parish, Hil. and Easter, 3 G. 1. King and Hog, Trin. 9 G. 1. King and Tomson, Hil. 4 G. 2,* on Demurrer. Serjeant *Chappell* allowed the Averment to be wrong, but said it was unnecessary—in the Case of *White and England, 3 Salk. 42; 4 Mod. 145.* Debt upon the Statute for using the Trade of a Tyler; and upon Demurrer it was objected, that the Declaration was ill, because the Plaintiff did not aver that the Trade of a Tyler was an Art or Mystery used in *England* at the Time of

making the Statute. *Sed per Holt, C. J.*, The very Trade is mentioned in this Statute, and therefore it must necessarily be intended that it was used at that Time. He likewise cited 1 Lev. 243 ; Cro. Jac. 187. The Court seemed to think the Averment necessary, and so are the express Words of the Statute, *viz.* to use or exercise any Craft or Mystery now used or occupied within the Realm of England. *Vide* 5 Eliz. c. 4, 1, 31. And by the Statute of Union the Name is now changed into the Kingdom of Great Britain, and it ought to have been alledged in the Indictment, and therefore the Indictment was quashed for the Reasons above.

166.—BYRON and PHILIPS. [1732.]

Execution.

For Execution *de bonis propriis* against an Executor. Judgment being had against Testator, and a *Davastavit* found. Defendant pleaded *Plene Administravit* before the Return of the Writ, but shewed not how he had administred as he ought to have done. Cro. Eliz. 577 ; Salk. 296. *Werg. econ.* Objected to the first *Fieri Facias*, that there did not appear that there ever was a *Scire Facias* upon the Judgment.

Ch. Just. There ought to be a *Scire Facias* to make the Defendant Party to the first Judgment, and that he might have a Day to plead, for he might have a Release. This is an Execution against one not made Party to the Writ. And Judgment was given for the Plaintiff, unless Cause before the End of the Term. *Vide* Case of *Guibert* and *Jones*, *Post*.

[213] 167.—BUCKLE v. BROWN. *Pasch.* 5 Geo. 2 [1732].

Replevin.

In Replevin, the Lieutenant of Militia for the County of, &c., made a Rule by Virtue of a Power given him so to do by 13 & 14 Car. 2, c. 3, by which the Plaintiff, a sworn Attorney, was charged with the Payment of 2s., and his Landlord with Payment of 2s. 6d. more. A Distress for Default was made upon the Goods, &c. The Plaintiff replevies ; Defendant avows under the said Act, and to this Avowry, Privilege and no Notice to the Landlord of the Assessment was pleaded in Bar, after first having obtained a Rule of Court for Leave to plead it accordingly.

168.—LOFIELD v. BANCROFT. [1732.]

Action for a Libel.

Action for a Libel. There were three Counts in the Declaration, the last of which sets forth, that the Defendant *malitiose* charged the Plaintiff with Felony, *viz. Crimen Feloniæ imposuit pro procuration' in poculis, Anglice*, picking his Pockets, and *postea, scil.* he caused him to be arrested and imprisoned for said Felony. The Jury found the two first Counts for the Defendant, and the last was found for Plaintiff, and Damages accordingly. It was moved in Arrest of Judgment, that it was no where shewn in the last Count that the Libel was published and spoken of the Plaintiff ; and it is held in Cro. Jac. 126, that an innuendo in this Case would not assist the Declaration. *2dly*, It is said *pro procuration' in poculis, Anglice* picking his Pockets ; whereas *poculum* is *Latin* for a Cup, and wherever there is a proper *Latin* Word, *Anglice* will not avail, as in this Case it ought to have been *pro procuration' in Loculis*.

It was answered by the other Side, that if the Word *poculis* be rejected, it will stand thus ; *pro procuration' Anglice* picking his Pockets, or reject the *Anglice*, and then it will be for picking out of Cups, and either way it will be good. As to the first Objection, it was said that here are two distinct Counts ; that an Action will lie for publishing a Libel, and an Action will likewise lie for charging a Man with Felony ; so that the Facts being in themselves distinct and separate, the Counts must be taken to be so likewise ; and if so, the Declaration will be well enough ; for it is expressly alledged, that he caused the Plaintiff to be arrested, &c., *pro Felonia prædict'*.

Upon looking into the Record, it appeared that the Verdict was found upon the whole third Count, and Judgment was arrested by the Court for the Reason above. 2 Keb. 154 ; Yelv. 68.

[214] 169.—ROTHERFORD v. SCOT. [1732.]

Libel Admiralty Court.

The Defendant was libelled against in the Admiralty Court in £1000 Damages ; he was afterwards charged by the Plaintiff in an Action of Debt of £25 in *B. R.* and was now brought up by *Habeas Corpus* ; an Affidavit being made of the *Quantum* of the Debt. And Mr. *Hagar* moved that he might be committed to the Custody of the Marshal of the King's Bench Prison.

Mr. *Strange cont.* and said, where two Courts have several Jurisdictions, and there are several Causes of Action in each Court against the same Defendant, that Court shall have the Custody of him which first gets hold of him.

Cur' : It does not appear what the Cause of Action is ; it is only said in general *Causa damni sive spoliū Civili maritimæ* ; and it may be perhaps such a Cause of Action, as this Court will give the Plaintiff below a Remedy for. If this Practice should prevail, it will destroy the Jurisdiction of this Court ; for the Admiralty may continue on their Process *ad infinitum* without going on to Trial, and by that Means the Plaintiff in *B. R.* may be defeated of his Debt. The Court made a Rule for Defendant to be brought up the first Day of next Term, and in the Interim to give the Admiralty Notice. And *Trin.* 5 & 6 *G.* 2, the Defendant was brought up, and committed a Prisoner to the *Marshalsea* Prison. See 2 *Strange*, 936.

170.—THE KING and THOMAS. [1732.]

Highway.

Information for stopping a Highway, leading from *Molton Hindmost* in the County of *Gloucester* to *Woodstock* in *Oxfordshire*, and Verdict against Defendant. Mr. *Abney* moved for a new Trial, and objected, that the Information being laid as a Way for Waggon, Carts and other Carriages timely immemorial, it ought to have been proved that Waggon, &c., had passed timely immemorial from *Molton Hindmost* to *Woodstock* and back again, and said there was no Evidence to this Purpose. 2d Obj. That in the Information the Highway is set forth as a Road leading from *M.* to *W.*, whereas the Town does not go by that Name ; nor is there any such Place as *Woodstock*, but it is called *New Woodstock* or *Old Woodstock*, so that the Information is of itself insufficient.

Raymond, C. J. If the Place is so well known by the Name of *Woodstock*, that is well enough ; and tho' the Evidence did not go so far as to prove that they had seen Waggon, &c., go from [215] *M.* to *W.* yet if they had seen them passing and repassing that Way, he thought that was good Proof of Prescription. And Mr. *J. Page* (before whom the Cause was tried) affirming that the Evidence did prove so much, the Motion was denied *per Cur'*.

171.—BISHOP of LONDON v. MERCERS COMPANY. *Trin.* 5 & 6 *G.* 2 [1732].*Quare Impedit.*

Quare Impedit, and Judgment for Plaintiff ; a Writ of Error brought, and Judgment affirmed. Serjeant *Belfield* moved, that the Defendant in Error might have his Damages and Costs *pro dilacione executionis*, according to the Provision of 3 *H.* 7, cap. 10, by which Statute it is enacted, That if the Defendant or Tenant before Execution sue out any Writ of Error to reverse Judgment in delay of Execution, that in that Case if Judgment be affirmed, or the Plaintiff in Error nonsuited, &c., the Defendant in Error shall recover his Costs and Damages for this Delay and wrongfully Vexation at the Discretion of the Justices ; and cited a Case in *Cro. Car.* 145, 175, where Damages were given in a Writ of Error in *Quare Impedit* to the Value of the Living.

Mr. *Fazakerly cont'* : The Question in this Case arises upon the 3 *H.* 7, c. 10 ; which Statute gives Costs, &c., where none were before given by the Common Law ; and wherever a Statute is introductory of a new Law, nothing shall be construed to be within the Equity of the Act, but only what is within the express Words of it ; and said by Lord *Hobart*, that such an Act is a Negative, and excludes all other Cases than

such as are expressly mentioned in the Act itself : The Court will therefore judge whether this is such a Writ of Error as falls within the Description of the Act ; and if it does not appear to be brought to delay Execution only, and create Vexation and Trouble to the Defendant, it cannot be such a Writ as falls within the Intention of the Statute. It is in the Memory of the Court, with what Solemnity this Case was argued, and what strong Objections were made in Support of the Errors ; and tho' they were at last overruled, yet the Court took a considerable Time to consider of their Judgment. It cannot therefore be conceived that to delay Execution only, or that any other vexatious Intent could be the Inducement to the Party to bring his Writ of Error, and consequently does not come within the Description of the Act. In the Case of *Smith and Smith*, Cro. Car. 425. Error of a Judgment in *Formedon* in Remainder, and the Judgment affirmed ; and because this Writ was brought before Execution, and thereby Execution delayed, it was moved to have Costs assessed to the Defendant according to the 3 H. 7. But it was adjudged, that forasmuch as [216] there were no Costs or Damages recovered or allowed in the first Action, so that no Execution is delayed by, only for the Land, that in this Case no Costs are allowable by the said Statute. So it is plain that no Costs are to be given for the Detention of the Land, or to the Suspension of the Profits of the Living by the Writ of Error, but only for the Suspension of the Damages which are to be recovered by the Judgment ; and if they meant no more than this, we should not then have litigated the Matter with them. If the Value of the Living is to be the Measure of the Damages in this Case, the Plaintiff will have a double Satisfaction in Value. By the Stat. of H. 8, where a Sequestration is appointed, he is to account with the next Incumbent for the Reception of the Profits ; and we have an Affidavit that a Sequestration hath been appointed. I would gladly know what Damage the Patron, who is Defendant, can have sustained in this Case. Supposing there had been no Writ of Error, the Profits of the Living must have gone to the Incumbent. He is delayed indeed in his Right of Presentation, but that is not a Thing accountable for. If this Construction should prevail, it will in a Manner take away all Writs of Error ; for when so severe a Penalty attends them as the Value of the Living, it will deter all People from bringing them notwithstanding the Writ should in Truth be brought to try the Opinion of another Court. 1 Vent. 88, *Foot v. Barkley*. Judgment in Ejectment, Writ of Error brought and Judgment affirmed ; B. prays Costs for his Delay and Charges, but could not have them, for no Costs were in such Case at Common Law ; and the Stat. 3 H. 7, gives them only where Error is brought for delay of Execution ; and tho' he had not Execution of his Term, yet he had it of his Costs.

Serjeant *Belfield* and Mr. *Strange* by way of Reply—Two Points are insisted upon by Mr. *Fazakerly* ; first, that no Damages are given by the Statute in this Case. And his 2d Objection is to the Measurement of them. It is insisted, that the Statute must be construed strictly, being introductory of a new Law ; but this is a remedial Law to prevent Delays in Execution, and therefore to be explained liberally. The Court won't inquire *Quo Animo* the Writ of Error is brought, but by the Event of the Writ. As to the second Objection, the two Cases cited out of *Crooke* sufficiently prove the Value and *Quantum* of the Damages that are to be recovered by the Plaintiff in this Case, that they shall be the full Profits of the Living as found by the Jury, and no Deduction for Allowance to a Curate in the Interim for supplying the Cure. As to what is objected, that a Sequestration is appointed who must account to the next Incumbent, that is not the present Question ; it is what the Plaintiff is intitled to, and not what a third Person may be intitled to. Advowson is Assets, and to keep out the Clerk is a Damage to the Patron.

[217] Lord Chief Justice *Raymond* : This Case requires some Consideration ; the Act of Parliament that gives Damages in this Case is a remedial Law to prevent Delays in Executions, but not to be taken strictly in a limited Sense. The Court are not to determine *Quo Animo* the Writ of Error is brought, but must judge by the Event. The Statute indeed leaves it to the Discretion of the Justices, but that is only as to the *Quantum*. It does not appear what Damages can have accrued to the Patron by this Delay. To make the Plaintiff in Error answer so largely as the Value of the Living amounts to, seems to be a hard Construction. *Page* and *Probyn* of the same Opinion. *Sed adjournatur*.

And the Court afterwards gave Judgment, and resolved that the Value of the Living should not be given in Damages, but only the Interest of the £70, being the

Damages recovered in the *Quare Impedit*; for had there been no Writ of Error brought, the Clerk, and not the Patron, who is the Plaintiff, must have had the Profits of the Living, therefore the Patron has sustained no Damages upon that Account by the Delay of Execution: But the Damages intended by the Statute in this Case arise from the Delay given to the Plaintiff in preventing Execution of the Damage given upon the *Quare Impedit*. And because the Writ of Error had been depending three Years, adjudged that Interest at £5 *per Cent.* should be paid from the Time the Writ of Error was brought to the Time that Judgment was given upon it. *Vide Cro. Eliz. 659, Penruddock and Clerk.*

172.—THE KING v. INHABITANTS of ST. GILES'S PARISH. [1732.]

Order of Sessions.

Upon Motion to quash an Order of Sessions, Case was this: *Anne* the Mother having gained a Settlement in *St. Clements Danes*, marries and hath a Child; afterwards she marries a second Husband, who was settled in another Parish. By Order of two Justices the Child was sent to *St. Clements Danes*, being the last legal Settlement of *Anne* the Mother. Upon Appeal to the Sessions this Order was quashed, and the Child sent back again to the Parish where the second Husband was settled. Both these Orders being removed by *Certiorari* into *B. R.* the Order of the two Justices was confirmed, and the Order of Sessions quashed: Because if a Widow having Children marries a Man of another Parish, the Children shall not go with the Mother but for Nurture, and after they gain a competent Age, they shall be sent back to the Parish where the Mother was settled; for she cannot gain a Settlement for them in this last Parish, because under Coverture, and having a Settlement there herself as [218] Part of her Husband's Family, from whom she cannot be severed. *Vide 2 Salk. 528, Inter the Inhabitants of Cumber and Milton.*

173.—LOWET & Ux' v. BUSBY. [1732.]

Debt upon Bond.

Action of Debt upon Bond payable at a future Day. Defendant pleaded that he became a Bankrupt in *February 1728, viz.* on such a Day, and that the Cause of Action accrued before the Bankruptcy. Plaintiff prays that the Bond and Condition may be inrolled, by which it appears that the Breach of the Condition was subsequent to the Bankruptcy; and then he demurs generally, and shews for Cause that the Breach of the Condition was subsequent to the Bankruptcy, and that the Money due upon the Bond was not payable till afterwards: For altho' the Bond is *debitum in presenti*, yet it is payable only *in futuro*, and the Plaintiff could not have put it in Suit at the Time of the Bankruptcy. The Defendant in this Plea hath not pursued the Words of the Statute: By 3 G. 2, c. 29, the Party shall be discharged only from the Time he is declared a Bankrupt; and a Person may become a Bankrupt before the Time he is declared, and therefore should expressly aver in his Plea, that he was a declared Bankrupt *post causam Actionis, &c.* For whenever a Person claims the Benefit of an Act of Parliament, he must shew himself intitled to every Thing he claims by the Act; and cited the Case of *Collowell and Clutterbuck*: Action upon a promissory Note payable at a future Day; Defendant pleaded Bankruptcy in Bar; and upon Demurrer it appeared the Note became payable after the Time of Bankruptcy; and tho' it was insisted the Note created a Debt notwithstanding it was payable at a future Day, and that a Release would have extinguished it, yet it was objected that the Bankruptcy was no Bar, the Note not being payable till afterwards.

Mr. Draper cont': The Plaintiff should not have demurred. By the Statute the Defendant is obliged to tender an Issue, which he hath done in this Case, by pleading that the Cause of Action accrued before the Bankruptcy; and had Plaintiff joined Issue, he might have given all this Matter in Evidence. The Defendant's Plea is good if within any of the Acts now subsisting. And by 7 G. 1, c. 31, the Plaintiff was intitled to a rateable Part of the Bankrupt's Estate, tho' the Bond was payable *in futuro*. *Vide Case of Tully and Sparks*, where Bankruptcy was held no Bar, because the Case depended upon a Contingency, and the Plaintiff not intitled to distributive Share

upon such a Bond. The Court said there was a Difference between Debts upon Bond and promissory Notes. *Sed adjournatur.*

[219] 174.—BEACH v. BOURN. [1732.]

Libel in the Spiritual Court.

The Defendant being libelled against in the Spiritual Court for acting as a Parish Clerk, he applied to this Court for a Prohibition; and the Case having been argued several Times, it was now again spoke to by Mr. *Filmer* and *Fazakerly*. *Filmer* for the Defendant argued, that three Things were to be considered in the Determination of this Affair, *viz.* Whether the Office of a Parish Clerk was a Temporal or Spiritual Office. *2dly*, Supposing him a Spiritual Officer, whether the Ecclesiastical Court could oblige him to take out a Licence to officiate. And *3dly*, Whether or no he could appoint a Deputy. He said it was agreed upon the last Argument, that the Manner of his Election, whether by the Parson or the Parishioners, made no Difference as to the Nature of his Office; but it seems incredible, if he is a Spiritual Officer, that the Parishioners should ever have obtained a Power of electing him. In *Gibson's Codex* he is said to be a Spiritual Officer, but no Authority cited to support this Doctrine; there are a great many Cases in our Law-Books where this Office is taken Notice of, and in all of them he is held to be a Temporal Officer. 13 Rep. 70; 2 Cro. 670; Palm. 379; Keb. 289; Marsh. 101; Godb. 163; Old Bendl. 142, which Case was determined *Hil.* 22 *Jac.* 1. *Leon.* 94; Fitz. Abridg. Tit. *Annuity*, 40. *Hughes's Parson's Law*, 275, where an Annuity was granted to a Man until he was promoted to a Benefice; and in a Writ of Annuity brought by the Grantee, the Defendant alledged that the Plaintiff was made by him the Clerk of such a Parish Church; and it was ruled to be no good Plea to bar him of his Annuity, for that the Clerk of a Parish was but a Lay Officer, and removable at the Pleasure of the Parishioners; and he urged the last Case as a Case in Point. As to the second Point he said that the Clerk was not obliged to take out a Licence, let his Office be either Spiritual or Temporal. *Can.* 1603, puts the Judgment of the Clerk's Abilities in the Minister; but there is no Law or Canon that obliges him to take a Licence from the Ordinary to permit him to officiate; and this being the Foundation of the Prosecution, it is incumbent upon them to shew how the Ordinary came to have such a Jurisdiction. As to the third Point, he said that was not necessary to be determined in this Case; but there is a Difference between a Deputy and the Assignee of an Office. 9 Rep. 48. Tho' the Office is Spiritual, yet the Right is Temporal. Roll. Rep. 274; 2 Roll. Abr. 285; 2 Brown. 11.

Mr. *Fazakerly cont'*: The Case in *Fitz.* and *Hughes's P. L.* destroys itself, because he is there said to be an Officer remove-able at Pleasure of the Parishioners, whereas it has always been adjudged the contrary; for that it is an Office for Life, and thereby he gains a Freehold. *Hil.* 8 *Ann.* *Mallard* and *Smith*; where a Parish Clerk sued in Spiritual Court for a Pension, and a Prohibition being mov'd for, it was held that he was an Ecclesiastical Officer, and might sue in the Spiritual Court, &c. The Proceedings below are not against him as an Officer or Parish Clerk, but he is libelled against for taking upon himself to exercise a divine Office without any Authority. If one may intrude himself into a Church, another may; and unless the Spiritual Court have a Jurisdiction in these Matters to punish such Disturbances, who can?

By the Court. The Libel against him is not for a Disturbance, but for intruding into the Office, and performing Divine Service on *Sundays*, &c., without Licence; but no Misbehaviour is alledged.

Mr. *Fazakerly*. Where a Person intrudes, and continues to officiate, it is the Business of the Ordinary to see by what Authority he does; for barely to officiate without Authority is a Disturbance. Supposing the Spiritual Court to have a Jurisdiction, this Power is incident to it; and whether a Licence is necessary or not, is proper for the Determination of that Court; and if a Licence is not necessary, that will be a proper Defence for the Defendant in the Courts below. As this is a Prosecution for intruding into a Divine Office, it is properly cognizable in the Spiritual Court; for it is not pretended there is any Remedy against him elsewhere, which is a strong Instance that the Remedy must be in the Spiritual Court. 1 Vent. 64. And to shew the Spiritual Court had a Jurisdiction, he cited the Case of *Townshend* and *Thorp*, which was a Libel in Spiritual Court against a Parish Clerk, charging him with several Temporal Crimes.

as Swearing, Drinking, &c. This Court staid Proceedings only in that Case, until the Defendant was found guilty by Indictment for the same Crimes, and then suffered the Spiritual Court to proceed to Deprivation, which this Court would not have done supposing they had no Jurisdiction.

Mr. Filmer's Reply : It is not pretended there is any Law or Canon to force the Defendant to take out a Licence, and yet this is the Reason and Foundation of the Prosecution. Here is no Crime charged against him ; had he been guilty of Misbehaviour, the Spiritual Court might have had some Reason for this Prosecution. In the Case of *Townshend* and *Thorp*, Distinction was taken where the Clerk was elected by the Parson, and where by the Parishioners ; and it was there said the Nature of the Office followed the Manner of the Election ; and in that Case the Spiritual Court proceeded by Consent ; for upon this Court's staying Proceedings pending the Indictment, the Defendant agreed that the Spiritual Court should proceed afterwards ; but that was by [221] Permission only ; and then the Prohibition stood *quoad* the Punishment, and the *Procedendo* granted only *quoad* Deprivation.

By the Court. The single Question in this Case is, whether a Licence is necessary or not ; here is no Disturbance complained of, which would have much altered the Case ; for a Misdemeanor may be punished below let the Office be either Spiritual or Temporal. If he can't act without a Licence, this in Effect gives the Ordinary the Right of Election. In Chief Justice *Holt's* Time, a Clerk sued for his Salary in the Ecclesiastical Court, and a Prohibition was granted, for the Court held him to be a Lay Officer ; Anonymus Case cited by *Lee*, Justice : But there is no Occasion to determine that Point now. He certainly was not *inter minores Ordines* ; nor was there originally any such Officer. *Vide Institutio Juris Canonici*, 22. But there being no Case cited to prove a Licence necessary, the whole Court adjudged the Prohibition to stand.

175.—COOPER v. NORMAN. [1732.]

Writ of Error.

Judgment in *C. B.* against the Defendant, who brought a Writ of Error, pending which the Plaintiff became a Bankrupt, and an Assignee being appointed under the Commission of Bankruptcy, he brought a *Scire Facias ad assignandos Errores* by the Defendant, who now came and prayed *Oyer* of the *Scire Facias* in order to controvert the Appointment of the Plaintiff as Assignee of the Commission ; and cited *Mod. Rep.* 93.

Mr. Parker cont'. The Defendant is not intitled to have *Oyer*, nor can he controvert the Bankruptcy, as was adjudged in the Case of *Miles* and *Wilmot*, 5 *G. 2*, *Mich.* [1731].

This is no more than the common Case when Judgment is recovered by Testator, who dies pending a Writ of Error, &c. His Executor brings a *Scire Facias* to assign Errors, the Defendant in that Case cannot claim *Oyer*.

The Court refused to grant *Oyer*, and the Rule that had been obtained was discharged.

176.—THE KING and HOLLAND. [1732.]

Order of Sessions.

To quash an Order of Sessions. Two Objections were made to the Order ; 1st, That this was said to be an Order made in the City of *Worcester*, and it does not appear in what County the City of *Worcester* is ; and 2dly, It does not appear that the Party was summoned. But both these Objections were over-ruled. The City of *Worcester* is a County of itself, and the Court *ex Officio* takes Notice of all Counties ; and it is alledged [222] in the Margin to be in *Com' Vigor's*, *Pasch.* 11 *Ann.* [1712], *Queen v. Philips*, *Mich.* 4 *G. 1* [1717], *King* and *Blackwell*, both Orders of Bastardy. *Mich.* 8 *G. 1* [1721], *King* and *Clagge*. As to the second Objection, the Court had frequently over-ruled it, being contrary to common Justice to condemn a Man unheard ; and the Court won't intend this, for if the Party was not summoned, he may take Advantage of it, and the Court upon Affidavit will set aside the Order for want of it. Note : This was an Order of Bastardy ; and Mr. Parker objected, that it did not appear how old the Bastard was ; but the Order was general, and that the Defendant being the reputed Father, should maintain it as long as it became chargeable, or till further Order. *Sed non allocatur* ; for the Father is obliged to maintain him so long as he remains un-

capable of providing for himself, and the subsequent Words, until further Order, import no more than that he shall maintain him, &c., unless he should be ordered to the contrary. There was another Objection, that if the Court take Notice of the City of Worcester as a County itself, that the Order was ill, because it is made by the Justices of the County at large, and yet said to be at their Quarter-Sessions *tent' apud* the City of Worcester; so that it appears upon the Face of the Order to be out of their Jurisdiction. But this Objection was likewise over-ruled, for there is an Exception in the Act for this Purpose; and so the Order of Sessions was confirmed by *Page* and *Probyn*, *Absente Raymond*, C. J., and *Lee*.

177.—PAUL and KNIGHT. [1732.]

Policy of Insurance.

Action upon a Policy of Assurance in the Mayor's Court at *Bristol*. Defendant pleaded *Non Assumpsit*, upon which they were at Issue. A Jury was summoned regularly, but at the Trial there was a *Defectus Juratorum*, whereupon a *Tales de Circumstantibus* was awarded, and a Verdict for the Plaintiff. The Defendant brought Error, and assigned for Cause, that notwithstanding the *Tales* is said to be returned *secundum Consuetudinem Civitatis prædict'*, and *Statut' in hujusmodi Casus provis'*, yet such a Custom cannot be good, because contrary to Law; and the Statute which gives a *Tales* does not extend to inferior Jurisdictions, but only to Courts of Records.

Mr. *Draper*, who argued this Point, gave an Historical Account of Trials by *Tales*; and cited the *Stat. Westm.* 2; 42 *Ed.* 3, c. 11; and 32 *Hen.* 8. And to prove that Customs which were contrary to Common Law were not good, he cited *Cro. Car.* 259; *Roll. Abr.* 563, 564, P. 4, 5, 11, & 17; 9 *Rep.* 13, *Dowman's Case*; *Yelv.* 214; *Style's Rep.* 16; 2 *Roll. Abr.* 672.

[223] Serjeant *Eyre cont'*: The Question in the present Case is, whether Trials by a *Tales de Circumstantibus* in inferior Court *secundum Consuetudinem* be good by Custom or not. It is objected, that this Custom is not good because contrary to the Course of Common Law; but this is no Reason to destroy the Sufficiency of a Custom, for *Consuetudo vincit Communem Legem*. But the proper Question is, Whether this Custom is reasonable or not. And the Statute which has been cited by Mr. *Draper*, and which gives a *Tales*, sufficiently proves the Reasonableness of this Custom, otherwise the Act of Parliament would not have impowered any Jurisdiction to grant it. He cited several Cases to shew that Customs which have been contrary to the Proceedings at Common Law have been adjudged good. *Roll. Abr.* 564; *Cro. Eliz.* 894; 1 *Mod.* 96. And the Custom which is reported in 1 *Roll. Abr.* to be ill, because contrary to Common Law, is reported otherwise in 2 *Roll. Abr.* 672, with a *Dubitatur*, and so concluded this Point, that the Custom in this Case seemed reasonable, not only from the Nature of the Thing, because conducive to the Expedition of Justice, but also because the Legislature had thought proper to establish it.

Raymond, C. J. This is returned a Custom Time out of Mind; then the Question is, whether reasonable or not; for it being contrary to Common Law will not vitiate it: For unless it was contrary to Common Law, it would not be a Custom; and it is a strong Argument of the Reasonableness of this Custom, because the Parliament have thought proper to establish it. Before the Statute of Wills, Lands were not devisable by Common Law, and yet they were so by Custom; and the Act of Parliament is a Confirmation of the Reasonableness of it. There are several Corporate Towns which at this Day claim the same Custom; and what would be the Consequence if we should now overthrow it. *Bristol* and *Colchester* were said to have Trial by a *Tales*, and that this had prevailed Time immemorial. And this Case being argued over again at another Day, Mr. *Wright* insisted for the Plaintiff in Error, that Trials by *Tales* were not good and allowable by Custom; for Customs which are against Law, and the Reason and Policy of the Law, cannot be reasonable, and therefore are not good. A Custom is a reasonable Act that hath been continued Time out of Mind, and by constant Usage allowed or allowable by Law. But a Trial by *Tales* is not allowable by Law, and therefore unreasonable. 2 *And.* 152. A Custom against common Right is not good. 1 *Roll. Abr.* 565, p. 9. It is not a good Custom for a Court to award a *Capias* in an Action of Debt, or any such Writ, before a Summons hath been awarded, for this is against the Course of the Common Law. 1 *Roll.* 563, p. 11. No Usage or Custom

can be allowed to run against the King's Prerogative. *Da.* 36 ; 1 Roll. Abr. 566. And the Reason is [224] not because *Nullum Tempus occurrit Regi*, but because the Prerogative is Part of the Common Law, and so considerable a Branch of it, that no Custom shall be suffered to prevail against it. It is not a good Custom, that if a Man becomes Bail in *London*, and the Plaintiff recovers against the Principal, and sues out a *Capias*, whereupon the Sheriff returns a *Non est Inventus*, that immediately upon this Return without any *Scire Facias* against the Bail, the Bail may be taken in Execution upon his Recognizance ; for this is against Law and Reason, because had he sued out a *Scire Facias* against the Bail, they might have pleaded a Release or Death of the Principal. Roll. Abr. 563, p. 13. This shews that the Law will not suffer its Rules to be broke, nor Usage to prevail, against them. *Dyer*, 357 ; Roll. Abr. 553, 558, 563 ; *Palm.* 211, 212 ; *Moor*, 8 ; 2 Roll. Abr. 549 ; *Dav.* 53 ; 2 *And.* 152 ; 2 *Inst.* 46, 47. Law and Reason in respect to Custom are synonymous, and whatever is contrary to the legal Custom and Usage of the Law, must be unreasonable, because contrary to the Policy and Reason of the Law. Custom of inheriting by *Burrough English* and Gavelkind good and allowable, not only because no Prejudice can arise by such Customs, but because the Commencement of them was antient as the Law itself. *Salk.* 251. He further argued, that admitting the Custom good, yet it is ill pleaded in this Case, for it does not appear the Parties have the Benefit of Challenge. It is only said, that by Custom Stander-by may be sworn in. By Common Law, an Alien, Villain, or infamous Person, cannot be a Juror ; and in the present Case a Stander-by having all these Disabilities might be sworn in and become a Juror contrary to the Will and Intention of the Parties, for the Custom gives no Challenge ; and this Defect is not aided by the subsequent Words *Secund' formam Stat'*, for provided there be no such Statute, the Words are not available ; and if a Statute, it cannot aid in this Case ; for it is alledged to be a Custom which cannot be by Statute, for a Custom cannot commence within Memory. Custom to try in inferior Courts by six Jurors only is not good ; and so it was expressly held in Roll. Abr. 564, altho' it appeared by Certificates, that more than 20 Courts in *Cornwall* held Trial by the same Custom ; and so is *Cro. Car.* 259 ; 1 *Sid.* And the Reason is not because this way of Trial is against natural Reason, but because it is against the Reason of the Law. The Statute of 32 *H.* 8, does not commend Trials by *Tales*, but only gives a discretionary Power to the Justices to name other able Persons of the same County at the Prayer of the Party ; but being a Stander-by is no Qualification. And it is not said that by Custom the *Tales* must be *ex Civitat' prædict'*. *Communis Error facit Jus* ; but that Maxim establishes general Errors only, and not such as are local ; for should the Construction prevail, no Custom so absurd but might [225] be established by it. Those Cases that have been cited in Support of the Custom, *Cro. Eliz.* 894 ; *Mod.* 96 ; 1 Roll. Abr. 564, are only Cases varying from the common Rule of Remedy, but not varying from common Rules of Right and Justice, and so concluded that the Custom in this Case was unreasonable and void.

Mr. Serjeant Prime cont' : All Customs that are in themselves reasonable and beneficial to the Publick are good Customs. This Custom is in itself reasonable, and must now be construed so to be, because since established by the Statute. And the 5 *Eliz. cap.* 5, says, this Statute which establishes Trials by *Tales* is a good and beneficial Law ; and therefore the 5 *Eliz.* provides that it shall be extended into the Counties of *Wales* ; and this is the strongest Argument in Support of the Reasonableness of a Custom. The Reason why it is not a good Custom to arrest upon a *Capias*, &c., is, because it would be unreasonable to take a Man into Custody, and deprive him of his Liberty, without having first summoned him. So a Trial by 6 Jurors is expressly contrary to the Common Law. But where there are 12 Jurors, whether they be returned upon the Panel or supplied by a *Tales*, it is still a Trial by 12, and agreeable to Trials at Common Law. 2 Roll. Abr. 672. This is held a good Custom, and is a Determination subsequent to the Resolution in the first Part of his Abridgment ; and in a Book called *Trials per pares*, it is laid down as a stated Rule that such Trials are good. All Customs that are useful and tend to the Expedition of Justice are good ; and this is the Foundation of the Custom in the present Case.

Cur' : Whether or no such a Custom is good is not necessary to determine in the present Case ; for the Custom as alledged in the present Case is ill pleaded. It is only said *per Consuetudinem Jurati & Triati*. But it does not appear the Parties are by this Custom intitled to a Challenge. All Trials at Common Law must be *per pares* ; but

according to this Custom, as it is now pleaded, any Stander-by, notwithstanding he is otherwise disqualified, may become a Juror ; therefore such a general Custom cannot be reasonable ; and so Judgment was reversed. Note : The Words of the Entry in this Case were as follows : Seven of the impanelled Jury only appearing, *Et quia residuum ejusdem Jural' non Compar', ideo secundum Consuetudinem Civitat' prædict', alii de Circumstantibus per servientem ad Clavam Civ' prædict', ac Ministrum Cur' hic prædict', ad hoc electi ad Requisition' præfat' querent' per Mandatum Cur' hic de novo apponuntur, quorum nomina in pannello ultim' mentionat' affilentur in Cur' hic secundum formam Statut'.*

[226] 178.—READ v. CHAPMAN. [1732.]

[S. C. 2 Str. 937. See *Hanson v. Royden*, 1867, L. R. 3 C. P. 50.]

Libel in the Spiritual Court.

Libel in the Admiralty Court for Mariners Wages. Upon Motion for a Prohibition the Case was this : The Captain, who was Plaintiff, went out to Sea as Mate of the Ship ; during the Voyage the Captain died, and was succeeded by the Mate, which came home as Captain, and then sued for his whole Wages in the Admiralty, as well those accruing to him as Mate, as for those that were due to him as Captain ; and because the Captain cannot sue for his Wages in the Admiralty, being a Privilege allowed only to the Mariners, a Prohibition was moved for.

The Court said here were two distinct Causes of Action ; the one upon the special Contract that was made as Mate, the other upon the special Promise arising in Law to the Plaintiff as Captain for the Management of the Ship : And therefore they divided the Motion, and agreed that Plaintiff might sue in Admiralty for the Wages which accrued to him as Mariner ; but for what is due to him as Captain, he must sue in the Courts of Common Law ; and so granted the Prohibition as to that Part only.

179.—THRUSTOUT v. HOLDFAST. [1732.]

Ejectment.

In Ejectment. The Lessor of the Plaintiff, in order to prevent the Statute of Limitation being given in Evidence, laid back his Demise so far as to bring his Entry within the Time limited by the Statute. Mr. *Fazakerly* moved that the Demise might be altered, and laid within such a Time as the Statute might operate upon it ; for otherwise as the Demise is now laid, the Defendant will be concluded from giving it in Evidence upon the Trial ; for when he confesses Lease, Entry and Ouster, he confesses every Thing but a Fine ; and therefore the Entry being within 20 Years, as laid in the Demise, will Bar him of the Benefit of the Statute ; and mentioned a Case that was tried before Mr. Baron *Carter*, where the Demise was laid 30 Years back ; the Defendant offer'd to give the Statute in Evidence, but having confessed Lease, Entry and Ouster, he was concluded against his own Confession to say the Plaintiff had been so long out of Possession. But the Demise being laid 30 Years back, so that notwithstanding the Lease and Entry the Statute might have run ; the Judge put it upon the Plaintiff to shew he had Possession within 20 Years, which he being not able to do, was nonsuited upon his own Demise. But in the present Case there being no Affidavit to verify that the Defendant had been in Possession 20 Years, the Court did nothing in the Motion.

[227] 180.—WISH v. CHAPMAN. [1732.]

Action on the Case.

Action upon the Case in *C. B.* The Defendant pleaded that the Vice-Chancellor of the University of *Cambridge* ought to have Conusance of the Action, and no other Court. The Court over-ruled the Plea, and upon the Merits of the Cause gave Judgment against the Defendant, who brought Error, but did not make the University a Party. Mr. *Reeves* moved that the Writ might be amended, and made agreeable to the Record, by making the Chancellor, Scholars, &c., of the University a Party to it ;

and founded his Motion upon 5 G. 1, cap. 13. The University appears by Record to be a Party concerned, and the Words of the Statute are general, viz. any Defect in the Record, &c. In the Case of the *Sword Blade Company*, Mich. 4 Geo. 2 [1731], a Writ of Error was brought and alledged that the Judgment was *ad grave damnum* of *Mary Edwards*, who was not a Party to the Record, and in that Case the Writ was amended.

Mr. *Strange cont'*: Here is a Variance between the Writ and the Record, the University are not Parties to the Record, and therefore cannot now be made Parties: The Statute only enacts, that the Writ shall be made agreeable to the Record, so that it does not extend to this Case. In the Case of the *Sword Blade Company*, it was there said to be *ad grave damnum* of a third Person, who was not a Party to the original Action, and therefore it could not be *ad grave damnum* of the third Person. It does not appear the University hath sustained any Injury by this Judgment, and therefore no Occasion to make them Parties.

Raymond, C. J. Here are two distinct Judgments. The Defendant hath brought Error upon that Judgment which extends to him; and the University may have Error upon the other Judgment if they think themselves injured.

Lee, J. This is a Writ of Error brought upon a Judgment in C. B. and does not extend to the Judgment which goes in Disallowance of the Conuzance. Do you know of any Precedent where there hath been an Amendment of this Nature, where after Conuzance hath been disallowed, Judgment given upon the Merits of the Action, and afterwards Error is brought upon that Judgment? Do you know any Case where the Writ hath been amended by making a Person who is Party to the Conuzance, Party in Error to the second Judgment?

Probyn, J. The Defendant pleaded Conuzance which was disallowed, and Judgment given against him upon the Merits of the Action: The Defendant himself may be injured by this Action, but how does it appear to be *ad grave damnum* of the University?

[228] *Reeves*: The jurisdiction of the University appears upon the Record to be called in Question, and that Jurisdiction denied, so that they are both made a Party to the Record, and aggrieved by the Judgment. If they have no Right of Conuzance the Judgment is good. The Court gave Time to search Precedents; and Mr. *Strange* said, Both Parties have searched for Precedents, and we cannot find any to warrant this Amendment. The Words of the Statute are, All Writs of Error wherein there shall be any Variance from the original Record, or other Defect; which must imply such a Defect in the Writ of Error as the Court cannot proceed to give Judgment upon the Record either to affirm or reverse it: But in this Case the Record is well removed, and the Court have a good Foundation to proceed upon. The Writ answers the Description of the Parties upon Record, and so no Variance.

Cur': The Words of the Statute are, *or any other Defect*. This appears plainly to be a Defect within the Act; by pleading Conuzance the University was necessarily made a Party to the Record, and the omitting them in the Writ is a Defect within the express Words of the Act. There is no Difference where the Writ is amended by adding a Party, and where a Party is struck out. Note: There was an Affidavit read that the University claimed Conuzance of the Action, and that they had given Directions, to have a Writ of Error brought upon the principal Judgment. For these Reasons the Writ of Error was amended, and the University made Parties to it.

181.—WIGLEY v. PEACHY. [1732.]

Trespass.

Action of Trespass for taking and carrying away several Cabbages, Colliflowers, and other Greens, &c. Defendant pleads that the Soil was the Bishop of *Winchester's*, and he seized them Damage-feasant as Bailiff to the said Bishop. Plaintiff replies, that the King granted by Letters Patent to the Bishop and his Successors, a Licence for holding Fairs at such and such particular Days of the Week, and that one of those Days (setting forth the Day) he brought his Goods to the Market to be sold, and the Defendant, without any reasonable Cause, did take and carry them away. The Defendant rejoins, and demands *Oyer* of the Letters Patent, though not pleaded with a *proferi hic in Cur'*; and then goes on and says, he seized them for not paying Toll. Upon Demurrer it was objected, that the Defendant hath not shewn that any Toll was demanded, nor does it appear what the Toll was. All Markets are in their own

Nature publick and common to all the King's Subjects ; all People may come upon the Soil to sell and buy, and an Action will not lie against them, [229] nor are the Goods liable to a Distress. Cro. Eliz. 75, *The Mayor of Launceston's Case*. Trespass against him for taking a Quarter of Corn ; he justified, for that it was within the Town of L. and it was Damage-feasant in his Freehold. The Plaintiff pleads that a Market was granted by Letters Patent, and that the *Locus in quo, &c.*, was appointed for the Market Place ; and he brought his Corn on the Market Day, and set it there, and the Defendant took it. And upon Demurrer it was objected, that the Mayor could not justify the Taking it ; so in Cro. Eliz. 627, 628, *Sawyer and Wilkinson*. If the Defendant had any Right of Toll, which shall be determined by the Judges if it comes judicially before them, and if unreasonable, punishable by the Statute. 2 Inst. 222. But the chief Objection was, that no Toll should be paid *de Communi Jure* for Things brought to the Fair or Market unless they be sold, and then the Toll must be taken of the Buyer : But in antient Fairs and Markets, Toll may be paid for the Standing in the Fair and Market tho' nothing be sold. 2 Inst. 220 ; 2 Roll. Abr. 123 ; 2 Lutw. 1386, *Leigh v. Pym*. The *Six Carpenters Case* was also cited, 8 Rep. 146. But to what Purpose or how applicable to the present Case, *Quære*.

Serjeant *Belfield cont'* : It does not appear by the Plaintiff's Replication he hath any Title to the Lord's Soil. Because it was made a Fair by the King's Letters Patents, it does not follow *inde* that the Lord's Soil is given to the Publick, or that the Plaintiff may commit a Trespass thereon without making the Lord a Satisfaction. The Replication therefore is defective, for the Plaintiff is bound of common Right to pay Stallage, which must be tendered before he can set down his Goods or expose them to Sale. 2 Roll. Abr. 123. If a Man hath a Fair in a Place, they who have Houses next adjoining to the Fair cannot lawfully open their Shops to sell Commodities, but Stallage is due for it, for they cannot take the Benefit of the Fair, without paying the Duties to him who hath purchased it ; *a fortiori* where the Soil belongs to the Lord. To this it was answered, that the Stallage was not incident to the Fair, but to the Land. *Vide Moor*, 474. And a Man may have the Market that is not Owner of the Soil. 11 H. 6, 23.

Cur' : Here are two Points necessary to be considered, whether Stallage is due of common Right ; and in the next Place, whether a Tender is necessary before the Goods are exposed to Sale. There is no one Case cited to support either of these two Questions ; and the Case in Roll. Abr. seems to be a pretty extraordinary one. The Lord might as well claim Toll for the Shopkeepers looking out of their Windows. The Stallage as it is claimed by the Plea is claimed as incident to the Fair, and not as incident to the Lands. *Sed adjournatur* for a second Argument ; and afterwards the Court made a Rule for Judgment for the [230] Plaintiff, unless Cause. Note : Mr. *Draper* made use of *Carpenters Case*, to shew that a Man cannot be a Trespasser for a Non-feasance, in Objection to Plaintiff's Rejoinder, who pleaded that he seized the Goods Damage-feasant for Non-payment of Toll, whereas the Non-payment of Toll cannot make a Trespass because a Non-feasance.

182.—THE KING and INHABITANTS of LOUGHBOROUGH. [1732.]

Highways.

Indictment for not repairing the Highway. The Court was moved for a special Jury, and the Parties by Agreement entred into a Rule not to take Advantage of Errors. After a long Trial, and examining a great many Witnesses on both Sides, the Defendants were acquitted upon the Merits of the Case ; notwithstanding this the Defendants were again presented by a single Justice of a Peace for not repairing the same Highway ; and upon these Circumstances Mr. *Fazakerly* moved that all Proceedings upon the Presentment might be staid. Shew Cause.

183.—THE KING and OSBORNE. [1732.]

Information for a Libel.

Information was moved for against the Defendant for publishing a Paper intituled, A true and surprizing Relation of a Murder and Cruelty that was committed by the

Jews lately arrived from *Portugal* ; shewing how they burnt a Woman and a new born Infant the latter End of *February*, because the Infant was begotten by a Christian. And then goes on and sets forth in the Body of the Paper a particular Account of the whole Transaction ; and that the like Cruelty had often been committed by the Jews, notwithstanding an Act of Parliament made in the Reign of King *Car. 2*, to prevent Murders, &c., committed by the Jews. It was objected, that admitting that this Paper was libellous, yet the Charge was so general that no particular Persons could pretend to be injured by it.

Cur' : This is not by way of Information for a Libel that is the Foundation of this Complaint, but for a Breach of the Peace, in inciting a Mob to the Destruction of a whole Set of People ; and tho' it is too general to make it fall within the Description of a Libel, yet it will be pernicious to suffer such scandalous Reflections to go unpunished. We don't give any present Judgment in this Affair, but think this is a Fact proper to be tried. Mr. *Strange* cited the Case of the *King* and *Orme*, *Trin. 11 W.*[1700], which [231] was an Indictment for publishing a Libel reflecting scandalously upon several Ladies, but mentioned no one in particular ; and Judgment was given against the Defendant, but afterwards the Court arrested the Judgment. But in the present Case several Affidavits were made, that this Paper had so much incensed the Mob against the Jews, that they had assaulted and beat in a most outrageous Manner the Prosecutor, who was a Jew. The Court made a Rule absolute for an Information.

184.—CHAPMAN v. LAMB. [1732.]

Trespass.

Action of Trespass against the Defendant, who was a Custom-house Officer, for taking 15 Shirts, a Silk Nightgown and a Velvet Cap, the Goods of the Plaintiff. The Defendant justified that he was one of the Custom-house Officers, and that he seized the Goods, and carried them to the King's Warehouse, because the Plaintiff refused to pay Duty, &c. The Jury found that the Defendant was a Custom-house Officer, and that he had seized the Goods mentioned in the Declaration ; they likewise found that these were wearing Apparel only which the Plaintiff brought from *France* for his own private Use ; and upon the Whole they found that these Goods were not Mercantile, and therefore gave a Verdict for the Plaintiff with Damages. This Cause was tried before *Raymond*, C. J., who at the Trial reserved this Point, viz. Whether these Goods being found to be for a private Use, and not Mercantile, were liable to pay Duty or not.

Mr. *Kettleby* for Plaintiff argued, That no Goods but Mercantile Goods were liable or subject to the Payment of Duty ; and that the Statute of 13 & 14 *Car. 2*, did not extend to Goods bought for a private Use. That by the 22d Section of this Statute, it is enacted, That Vessels appointed to carry Letters, commonly called Packet Boats, may not import nor export Merchandize, upon the Penalty of the Forfeiture of £100, and that the Merchandize which shall be found aboard these Vessels shall be forfeited and lost ; now it cannot be conceived that this Clause extends to Goods which are imported for private Use, and that a Passenger that carries a few Shirts and other necessary Apparel should be subject to such severe Penalties. The Statute 12 *Car. 2*, whereby Tonnage and Poundage are granted to his Majesty, extends likewise to Mercantile Goods only ; and the Reason they cannot by Implication be extended to any wearing Apparel, is because such Goods are necessary for the Conveniency of all Travellers and Passengers ; whereas by the Construction that is contended for by the Defendant, a Man must not wear a Shirt to his Back, but if he [232] comes from beyond Sea he must pay Duty for it ; and cited *Vaugh. 165*, *Sheppard* and *Gosnold & al'*, where *Vaughan*, Ch. J., in his Exposition of 12 *Car. 2*, c. 4, says, that the Wines subject to Tonnage by the Statute must be imported as Merchandize, that is, for Sale, and to that End ; for no other Conception can be of Goods brought as Merchandize ; and in the present Case the Goods are expressly found not to be Merchandize, and are so stated upon the Point reserved.

Mr. *Reeves cont'* : Whoever imports Goods, whether he be a Merchant by Profession or not, is a Merchant within this Statute. It has been adjudged, that if a Person draws a Bill of Exchange he is a Merchant. 2 *Ventr. 295*, *Sarsfield* and

Witherly. Common Usage is always allowed a good Exposition of an Act of Parliament; and it hath been the constant Usage where wearing Apparel hath been brought from beyond Sea to pay Duty for them tho' not brought as Merchandize. If the Exposition that hath been made upon the Statute by the Plaintiff's Counsel should prevail, the Consequence would be very prejudicial to the King's Revenue, if no Goods must pay Custom but what are Merchandize. It will in a manner exempt *French Wines* from all Duty; for they are taken the same Notice of in the Act of Parliament as other Goods; and if they must pay no Duty but when they are imported as Merchandize for Sale; then when Wines are imported by private Families for their own private Use, this will evade the Duty, and the King lose his Revenue, contrary to the Intent of the Acts of Parliament. Supposing a Man should have occasion to cloath his Family, and import Bales of rich Silks (for they all fall under the same Description), must these Silks pay no Duty? This Construction would be such an Inlet into the Acts, that any private Person may import Goods without Payment of any Duty to the Crown, because they are not brought over as Traffick.

Cur': The Point in this Case will depend upon the Circumstances of it. It appears the Goods in Question were necessary Apparel, and imported for the Plaintiff's own private Use. Where Persons go to excess, and bring over any great Quantity of Goods, that will fall within another Consideration. It does not seem reasonable that Duty should be exacted for wearing Apparel that is necessary; and on the other Hand it seems as unreasonable, that People should be left at Liberty to import what Quantities they think proper under this Denomination: But that a Man should be obliged to pay Duty for every Trifle he brings over, does not seem to be reasonable. *Sed adjournatur*; the Attorney General desiring Leave to speak to it; and *Michaelmas Term*, 6 G. 2, Judgment was this Term given for the Plaintiff.

Raymond, Ch. J. The Goods in this Case are found not to be imported by way of Merchandize, but for the Plaintiff's own [233] private Use; and it is not the Intent of the Act of Parliament such Goods should pay Duty; and so Judgment for the Plaintiff *per tot' Cur'*. See 2 Stra. 493, *Same Case*.

185.—NICHOLS and SWORDFEAGER. [1732.]

Assumpsit on a promissory Note.

Assumpsit upon a promissory Note. Defendant pleaded *Non assumpsit infra sex Annos ante exhibition' Billæ prædict'*. Plaintiff replies, that he took out a Bill of *Middlesex*, Trin. 6 G. 1 [1720], which he continued down to Mich. 5 G. 2 [1731], and then avers *quod Causa actionis accrevit infra sex Annos ante prosecutionem, &c.* Defendant rejoins, that he claimed *Oyer* of the Bill of *Middlesex*, which was indorsed with certain Figures upon the Back of it, in Pursuance of an Act of Parliament *tent' apud Westm'* 9 W. 3. So goes on and sets out the Substance of the said Act; and the Indorsement bore *Teste* on such a Day; and then concludes *quod Causa actionis non accrevit, &c.* To this the Plaintiff demurred, and shewed for Cause, that the Act of Parliament in the Defendant's Rejoinder was not well set forth, for that it does not appear, whether the 9 W. was the original Sessions, or whether it was held by Adjournment only; and cited Cro. Jac. 111, *Ford* and *Hunter*: Action of Debt was brought upon *Stat. 8 Eliz.* for Costs in Ejectment, and set forth *ad Parliamentum tentum apud, &c., anno octavo Eliz.*, whereas the Parliament began *Anno Quinto*, and by Prorogation was held in *octavo Eliz.* And for this Cause after Demurrer, it was ruled to be ill. So likewise it is held in Cro. Jac. 139, *Sir William Read* and *Potter*, and Cro. Car. 232, *The King* and *Barnes*, and *Hill* and *Windsore*.

Mr. Hager cont': He insisted that the Defendant's Plea was a good Bar, for that the Bill of *Middlesex* bore *Teste* from the Time of the Indorsement, and that 6 Years was lapsed from the Time the Note bore Date *ante exhibition' Billæ*. But the Court was clearly of Opinion, that a Bill of *Middlesex* bears no *Teste*, and that the Indorsement on the Back was only to save the Penalty in the Act of Parliament. They held likewise the Act itself was ill pleaded; and agreed the Cases in Cro. to be Law. But the chief Objection with the Court was, if all this Stuff in the Rejoinder relating to the Act of Parliament was not Surplusage and immaterial: For if what is set out concerning the Act be left out and rejected, there is then a good Tender of an Issue,

for then the Case will stand simply thus : The Defendant pleads *quod actio non accrevit* ; the Plaintiff replies a Bill of *Middlesex* was sued out at such a Time, and that Continuances have since been regularly entred ; and then avers *quod actio accrevit* ; and to this the Defendant rejoins *quod actio non accrevit, &c.*, which is a good Issue.

[234] Mr. *Reeves* : If the Replication is good, our Rejoinder must in Consequence be so, for we have followed it Word for Word : Surplusage will never vitiate the Pleading when there is enough besides set forth to deny the Action, notwithstanding the Surplusage be shewn for Cause upon Demurrer. The Court was of Opinion, that the Introduction to the Replication was Surplusage and immaterial, and that it might be rejected.

186.—HIGDEN and FOSTER. *In Cam' Scac'*. [1732.]

Trespass.

Trespass for taking and carrying away the Goods of the Plaintiff. The Defendant justified that he was a Custom-house Officer, and seized them as forfeited Goods, and carried them to the King's Warehouse as such. Upon the Trial the Case appears to be this : The Plaintiff was an *East-India* Merchant, and imported Goods from *Holland*, which upon search were found to be *East-India* Goods : But it appeared upon Evidence that these Goods were first imported upon the Company's Account, who sold them to the Plaintiff, who carried them into *Holland*, and three Years afterwards imported them into *England*.

Reynolds, C. B., held that they were not forfeited by *Stat. Car. 2*, intituled, *The Navigation Act* ; and so Verdict was found for the Plaintiff with Damages.

187.—THE KING v. WALKER. *Hil. 6 G. 2* [1733].

Scire Facias.

To quash a *Scire Facias* which was brought to estreat the Defendant's Recognizance for not going to Trial. The Defendant was indicted in *Com' Ebor'* for not repairing the Highway. The Indictment was removed by *Certiorari*, and thereupon one *John Harrison* and *Robert Burnet* became bound by Recognizance in the Sum of £20, that the Defendant should go to Trial *eodem Termino, vel ad prox' Sessionem de Nisi Prius post dictum Terminum*, which is always the Form of a Recognizance upon a *Certiorari* to remove Indictments in *London* or *Middlesex*, but never in an Out-County ; for where a *Certiorari* is to remove an Indictment in an Out-County, the Condition is always to go to Trial *ad tunc prox' Assisas pro Com' præd' tenend'* : In this Case the Prosecutors have blended the Substance of these two Recognizances together ; for in the *Scire Facias* they have set out the Breach of the Condition in this Manner, *Quod Susanna Walker non comparebat in Cur' nostra coram nobis apud Westm' primo die tunc prox' Termini, nec placitavit ad Indictam' prædict', nec causavit aliquem exitum eodem Termino vel ad prox' Session' de Nisi* [235] *Prius, vel ad tunc prox' Assisas post dictum Terminum* ; which last Clause is no Part of the Condition, and therefore as the *Scire Facias* now stands, it is impossible the Defendant should know what Answer to make. Here is the Form of two different Recognizances included in this *Scire Facias*, and therefore it must be taken there are two different Indictments depending, the one in *London* or *Middlesex*, and the other in an Out-County. Supposing therefore the Defendant had gone to Trial upon the Indictment in the Out-County, and not upon that in *London* or *Middlesex* ; or if the Defendant had gone to Trial upon the Indictment in *London* or *Middlesex*, and not upon that in the Out-County, and afterwards a *Scire Facias* should have been brought for not going to Trial in the Out-County, it would be no Excuse to save the Defendant's Recognizance, to say that he went to Trial in the Out-County upon the Indictment in *London* or *Middlesex* : Therefore as this *Scire Facias* now stands, it is so general and uncertain, that it is impossible for the Defendant to know what Answer to make ; and this is so material a Variance from the Recognizance, that the Court will quash the *Scire Facias*.

Cur' : The Substance of the Recognizance is to appear and plead. It does not appear in this Case that the Defendant has done either. The Condition is rightly set out, only they have carried it too far, and have set out something more than is contained in the Condition. If the Defendant did not appear and plead, his Recognizance

is forfeited ; and so denied the Motion. *Absente Raymond*, C. J. Note : Defendant in this Case ought to plead, *Quod comparuit & placitavit secundum Conditionem*, and demur to the Rest.

188.—GRATWICK and Sir JOHN SHELLEY. [1733.]

Presentment.

The Defendant was presented for erecting a Mill and Dam, &c., which obstructed Navigation, and turned the Course of the River. All Proceedings being removed by *Certiorari* into this Court, an Issue at Law was directed to establish the Right, &c. And upon the Trial there was a great Contradiction in the Evidence, and *totidem verbis* directly opposite to each other ; but upon the Whole, the Jury (which upon this Occasion was a special one) gave a Verdict for the Defendant. Upon a Motion for a new Trial, there were several Objections taken, and particularly, that the Jury before they brought in their Verdict had eat and drank at the Defendant's Expence. This was expressly contradicted by Affidavits ; for altho' it was acknowledged that the Jury did take some Refreshment before Verdict, yet it was not at Sir *John Shelley's* Expence, but each Man contributed his Share. It was agreed, that if this had been at the Expence of the Defendant, it had been material ; but where the Jurors themselves are [236] at the Charge, tho' it be a Misdemeanor for which the Jury is fineable, yet that shall not turn to the Prejudice of the Party in whose Favour the Verdict is. 2 Salk. 645. *Vide* also Doct. & Stud. It was also proved that a Drawer had Access to the Jury, and carried them Cool Tankards ; and tho' it was insisted upon that the Jury ought to be locked up, and no Person admitted to them before they had agreed to the Verdict, because by this Means they might have fresh Evidence given them, yet the Court refused to grant a new Trial. *Vide* 2 Roll. Abr. 454.

189.—GUIBERT and JONES. [1733.]

Fieri Facias.

Fieri Facias by the Plaintiff, Executrix of *Philip Guibert*, against *Catherine Jones*, Executrix of the Earl of *Ranelagh*, upon a Judgment for £900 recovered against the said Earl. The Sheriff returned *Nulla Bona*. The Plaintiff suggesting a *Devastavit*, issues a *Scire Facias inquit*, to which the Defendant appeared, and the Sheriff returns a *Devastavit*, and thereupon the Defendant demurs.

Mr. *Filmer* took three Objections ; 1st, That there was no *Scire Facias* taken out to make the Defendant Party to the Judgment. 2dly, There is no Judgment to ground this *Scire Facias* upon : For in setting out the Judgment, it is only said *Consideratum est*, as is usual where Judgment is originally entred ; but in pleading the Judgment is always said *Consideratum fuit* ; and so is *Carthew*, 403. 3dly, It does not appear but the Inquiry was executed after the Writ was returned, for the Writ bears *Teste Quinden' Martin'*, which was 26th November, returnable *Die Jovis prox' post*, which was the last Day of the Term, and so in all Probability might be executed after the Return.

Mr. *Fazakerly cont'* : Here is sufficient set forth to intitle the Plaintiff to her Action : In all Cases where the Action is founded upon a Judgment, the Proceedings are never set out at large ; but if the Judgment is set out, every Thing antecedent thereto is omitted. As to the 2d Objection, he said *Consideratum est* was good, for it is not the present Tense, but the præterperfect, and is better Latin than *Consideratum fuit*. As to the last Objection, it appears that the Writ was executed the same Day on which it was returnable, which is good, for the Plaintiff has the whole Day to execute it in, and the Sheriff is not to return at what Time of the Day it was executed. It is as probable it was executed rightly as otherwise, and the Court will take it in the most favourable Sense.

Page, J. Execution on the same Day on which the Writ was returnable is good ; the Law makes no Fraction of Days, and it is said to be taken *Virtute Brevis*.

[237] *Probyn, J.* In Law *Consideratum est*, is always taken for the present Tense, and this is always the Method of entring Judgments ; there is no Case where a Judgment pleaded by a *Consideratum est* has been held good.

Lee, J. If it can relate to a Time past, the Court ought to support it. Judgment was given for the Plaintiff, *nisi*.

190.—The CITY of LONDON v. Sir FISHER TENCH. *Pasch. 6 Geo. 2* [1733]

Action of Covenant.

Action of Covenant against the Defendant. In the Declaration the Plaintiff set forth the *Stat. 5 & 6 W. & M. c. 10*, intituled, An Act for the Relief of the Orphans and other Creditors of the City of London, and also the Indentures whereby the Defendant and Sir Samuel Garret deceased, in Consideration of a Lease granted to them by the City, &c., had jointly covenanted for themselves, their Executors, Administrators and Assigns, to pay yearly the Sum of £400 at the Feast, &c. And there being two Years in Arrear, this Action was now brought against the Defendant, being the surviving Lessee. Defendant craved *Oyer* of the Indentures, and then demurred generally to the Declaration; and Mr. *Bootle, jun.* took several Objections to the Declaration; 1st, That there was not a sufficient Assignment of any Breach, for where a Man covenants for himself, his Executors and Assigns, it is not sufficient to alledge Non-performance in the Covenantor only, but it must go further, and shew that neither the Covenantor, his Executors and Assigns, had performed, &c. 1 Salk. 139; 5 Mod. 133; Cro. Eliz. 348, *Colt and How*. *Sed vide* Cro. Eliz. 255, *Emot and Colt*. It shall not be intended there was an Assignee unless specially shewn. 2d Objection, It is alledged that £800 became due such a Day, which said Sum of £800 ought then to have been paid, whereas the Money reserved was only £400 *per Ann.*, and consequently no more than £400 could become due on that Day. 3d Objection, The Plaintiffs have declared *pro Redditione prædict'*, and this is a Thing out of which a Rent cannot issue; as in Plow. Com. 131, *Browning's Case*. 4th Objection, Variance in the Title of the Act set out in the Indentures in the Declaration, and the Indentures set forth in the *Oyer*, for in the one it is intituled, An Act for Relief, &c., and in the other, for the Relief, &c. *Sed adjournat'*; and Mr. *Bootle, jun. Mich. 7 G. 2* [1733], moved this again, and relied only upon two Objections, *viz.* That there was a Variance between the Lease mentioned in the Declaration and the Lease set out in the *Oyer*; the Lease mentioned in Declaration being for 21 Years, and that in the *Oyer* for one and 21 Years, which is a Lease for a longer Time than is [238] impowered by the Act of Parliament. The 2d Objection was, that the Breach was insufficiently assigned, because not averred that the Money was not paid by Sir *Fisher Tench* or his Assigns; and cited the Case of *Smith and Sharp*, 1 Salk. 139, where Difference is taken between doing a Thing to a Man or his Assigns, and doing a Thing by a Man or his Assigns: For if a Thing be to be done by a Man or his Assigns, the Breach must be in the Disjunctive, that it was not done by him or his Assigns; but where a Thing is to be done to a Man or his Assigns, it is sufficient to assign for Breach, it was not done to him; and if he did assign over his Interest, that ought to be shewn on the other Side. And *Vide* Cro. Eliz. 348, the Breach assigned ought to be in Disjunctive, and not in Conjunctive.

Garret Common Serjeant cont': The Variance in this Case is not material, in Declaration the Act of Parliament is set forth, which gives Power to make Leases for 21 Years; and this is a Lease for 21 Years only, so that the Power is well pursued. As to the 2d Objection, he said, the Action was brought against Covenantee, and no Reason to suppose an Assignment; but the Declaration goes farther, and amounts to an Averment that the Lease is still in Sir *Fisher Tench*, for the Words are here *usque habuit, &c.*, which could not be, had there been an Assignment over.

Yorke, Ch. J. There are two Objections made to the Declaration, one a Variance between Lease set out in Declaration and in the *Oyer*; but the Variance is not material, it is only in Recital of an Act of Parliament set out in the *Oyer*, where it recites the Act as giving a Power to make Lease for one and twenty-one Years. But supposing the Power granted by the Act had been as set out in the *Oyer*, and City makes a Lease for 21 Years only, that is certainly good, and within the Power given by the Act. The 2d Objection is the Assignment of the Breach. This cannot properly be called a Rent, because issuing out of an incorporeal Inheritance; it must therefore be taken for a Sum in Gross. The Covenant is, that Sir *Samuel Garret* and Sir *Fisher Tench*, their Executors, Administrators and Assigns, shall yearly pay, &c., and the Breach assigned is, that Sir *Fisher* has not paid. Now the Objection is, that it is not sufficient to aver

Non-payment in Sir *Fisher* only, without adding the Words (*nor his Assigns*) ; and to support this *Salkeld* is cited. This Distinction is pretty nice, and very extraordinary for a Court to presume an Assignment ; but here is in this Declaration what amounts to an Averment, that there was no Assignment ; for it is said that Sir *Fisher hic usque habuit*, and therefore declaring against him only is sufficient.

Judgment for Plaintiffs.

[239] 191.—MACKARLEY v. BARROW. [1733.]

Motion to discharge a Bankrupt. 2 Stra. 949 ; 2 Barnard. K. B. 251, 255, S. C. S. P.

A Motion to discharge the Defendant a Bankrupt out of Custody, being taken in Execution for a Debt due to the Plaintiff before the Defendant became a Bankrupt ; and the Motion was grounded upon 6 G. 1, c. 22, which empowered any one or more of the Judges of the Court wherein Judgment has been obtained against a Bankrupt for any Debt owing before he became a Bankrupt, upon producing his Certificate allowed and confirmed as the 5 G. 1, c. 24, requires, to discharge him out of Custody. And upon a Rule to shew Cause,

Mr. *Strange* objected, That the Defendant ought not to be discharged for two Reasons ; First, because the Facts in the present Case are not within any one Act of Parliament made in Relief of Bankrupts. 2dly, That the Clause in the 6 G. 1, does not extend to the case in Question. He argued, that it did not appear when the Defendant became a Bankrupt, but taking it that he became one from the Time of the Commission only, yet he could not be discharged ; this being a Debt which accrued subsequent to the Commission, consequently could not be discharged by it. This is an Action brought by the Plaintiff upon several Bills of Exchange drawn by Defendant 13 January 1728, they were foreign Bills, and the Plaintiff sent them abroad, but Drawee refused to accept them, and so returned protested, but before they were returned the Defendant became a Bankrupt ; at which Time the Plaintiff was not intitled to his Action ; for where Bills are drawn payable at a future Day, there must be a Tender of the Bill, a Refusal by a Drawee, and a Protest for Non-acceptance, before the Drawer becomes liable, and therefore at the Time of the Commission this was not such a Debt as intitled the Plaintiff to that Recompence which the Statute gives Creditors upon these Occasions, viz. to his distributive Share of the Bankrupt's Effects, therefore in Point of Law is not to be considered as a Debt subsisting at the Time of the Bankruptcy. The Defendant should make it appear when he became a Bankrupt, for it may be, the Bills were drawn subsequent to the Bankruptcy ; for the Commission always relates to the first Act of Bankruptcy, which can never afterwards be purged : The Words of the Statute are, for any Debt owing at the Time he becomes a Bankrupt. 2dly, He said, That the defendant was not intitled to his Discharge by any Act of Parliament. As to 5 G. 1, that was only a temporary Act, and is now expired ; and 6 G. 1 cannot relate to a Thing not in Being ; so concluded that Defendant was not intitled to his Discharge, nor to Relief under any Act of Parliament.

[240] Mr. *Foulks* in Answer said, That as to the first Objection, this was a Debt subsisting at the Time of the Commission, and the Plaintiff was intitled to a ratable Part of the Bankrupt's Estate by 7 G. 1, c. 31, being therein expressly enacted, That Creditors, whose Debts are not become payable, are intitled to a distributive Share of the Bankrupt's Effects ; for the Defendant became a Bankrupt from the Time of drawing the Bills, which were *Debitum in presenti, solvendum in futuro* : And as the Statute impowers the Judges in these Cases to proceed in a summary Way, he prayed that the Defendant might be discharged.

By the Court : The Act of Parliament is clear in this Case ; the Words are, Persons that have taken Securities for Money, payable at the End of 3, 4, or 6 Months, or other future Days of Payment ; or who shall become a Bankrupt, and such Money shall not become due or payable at the Time he becomes a Bankrupt, shall be admitted however to prove their Bills, Bonds, Notes or other Securities, as if they were made payable presently and not at a future Day, and be intitled to a Part of the Bankrupt's Estate. The Judges by the 6 G. have Power to proceed in the summary Way ; and the Relation to the 5 G. is only with respect to the Allowance of the Certificate. Defendant discharged *per Cur*.

192.—ST. MARTIN'S LUDGATE v. MARTIN'S WESTMINSTER. [1733.]

Settlement.

A Prisoner in Execution in the *Fleet*, rented a Tenement within the Liberties of the Prison at £25 *per Ann.* where he lived two Years and upwards, paid all Parish Taxes, and executed several Parish Offices, but died poor and insolvent, leaving a Daughter about seven Years old. By Order of two Justices it was adjudged that the Daughter should be maintained by the Parish of *St. Martin's Ludgate*, for that the Father by renting a Tenement of £25 *per Ann. &c.*, had gained a Settlement in that Parish. Upon Appeal to Sessions this Order was reversed, and the Child sent to *St. Martin's Westminster*. Both these Orders were removed by *Certiorari* into *B. R.* The Question was, whether the Father being in Execution, and renting a Tenement within the Liberties of the Prison, &c., had gained a Settlement according to Act of Parliament. It was objected, that the Act of Parliament did not extend to Prisoners in Execution, for supposing he had rented a Tenement under £10 *per Ann.* the Parish could not have removed him. The 14 *Eliz. c. 5*, and 19 *Car. 2, c. 4*, make Provision for poor Prisoners; and as they are expressly relieved by particular Acts of Parliament, they cannot be supposed [241] to be included within the Acts of Settlement, and unless they are within the Intention of those Acts, the Court will not construe them to be within the Letter of them.

Cur': We must judge upon the Case as it stands upon the Order. It is returned that the Father rented a Tenement of £25 *per Ann.* this by express Words of the Act gains him a Settlement. There are no Exceptions in the Act, the Words are general, and we cannot construe this Case out of the Meaning of them: Because the Father is in Prison, it does not follow that he is a poor Prisoner. The Parish of *St. Martin's Ludgate* have made themselves liable (admitting him to be originally out of the Act), for they have acknowledged him to be one of their Parishioners by throwing the Parish Duties upon him. We cannot now inquire into his Circumstances; be he poor or not, is now nothing to the Purpose. The Act is indefinite, *viz.* To all Persons renting a Tenement at the yearly Rent of £10 or upwards; here the Father rented £25 *per Ann.* lived two Years within the Parish, doing all Parish Duties, and so in all Respects he hath gained a Settlement within the Act. Therefore quashed the Order of Sessions, and affirmed the original Order.

193.—Inter the PARISHES of NORTHPELTERTON and HORSINGTON. [1733.]

Order of Justices.

An Order was made by two Justices to remove *John Foen*, his Wife and Children, from the Parish of *Horsington* to the Parish of *Northpelterton*, which they adjudged to be the last legal Place of Settlement of *John Foen*. The Parish of *N.* did not appeal from this Order, which was confirmed at the next Quarter-Sessions; but afterwards upon Application to two neighbouring Justices, an Oath being made that *John Foen* at the Time of his pretended Marriage was married to another Woman who was then alive, and lived several Years after the Solemnization of his second Marriage with *Mary Hillier* (who was the Person removed under the Denomination of *John Foen's* Wife by first Order). These Justices made an Order to remove *Mary Hillier* and the Children who were Bastards back again to the Parish of *H.* being the last legal Settlement of *M. H.* and of the Birth of the Children. The Parish of *Horsington* appealed to the General Quarter-Sessions, who repealed the second Order, and alledged for a Reason upon the Face of their Order, that the first Order being unappealed from and confirmed at the next Quarter-Sessions, stood in full Force, and was conclusive to all Parties; and averred *Mary Hillier* to be the same Person that was removed by the first Order under the Denomination of *Foen's* Wife. All these [242] Orders being removed by *Certiorari* into *B. R.* it was moved to quash this last Order of Sessions; and the chief Objection was, That the Persons removed by the two several Orders of the Justices of Peace were different Persons, and not the same Parties. By the first Order *John Foen*, his Wife, &c., were removed from the Parish of *H.* to the Parish of *N.* and by the second Order *Mary Hillier* was removed from *N.* to *H.* so that the Persons removed appear to be different Parties, and therefore are not included within the general

Rule, viz. that an Order unappealed from and confirmed is conclusive to all Parties; but this Rule for any Thing that appears by the second Order stands unimpeached, *Causa qua supra*. By the second Order it appears that *H.* was the last legal Settlement of *Mary Hillier*, and the Children which were born there are Bastards, and consequently their Settlement must be there likewise; therefore the second Order ought to be confirmed, and the Order of Sessions must be quashed. To this it was answered and resolved, that the first Order was still standing in full Force, and therefore the Justices had no Authority to quash it, and remove the Parties back again. That if the Children were Bastards, and *Mary* was not the Wife of *J. F.* this would have been proper Evidence upon an Appeal from the first Order, but that there being no Appeal, and it being confirmed, was now conclusive, and must bind all Parties; and it is averred that *Mary Hillier* was the Person removed by the first Order under the Denomination of the Wife of *J. F.* and for the Reasons aforesaid the Order of Sessions was confirmed. *Vide* 2 Salk. 492, *inter the Parishes of Swanscomb and Sheffeld*, Term Trin. 5 & 6 G. 2.

194.—OSTING v. JARVISE. [1733.]

Parish Clerk.

Suit in a Spiritual Court to swear in a Parish Clerk, upon this Case. The Defendant was elected by a Majority, but upon Pretence that he had waived the Election, the Parishioners proceeded to a new Election, and then chose in the Plaintiff. Upon this Defendant entred his Caveat in the Spiritual Court, and the Plaintiff in order to discharge this Caveat commenced his Suit, as is always the Practice of that Court, who upon the Circumstances of the Case gave Judgment against the Plaintiff with Costs, and decreed that *Jarvis* should be sworn in Clerk; whereupon *Osting* now came and prayed a Prohibition, suggesting that the Spiritual Court had no Jurisdiction. It was objected, that this Suit was commenced by the Plaintiff, and prosecuted by him until Judgment; it is now therefore something extraordinary that he should object to their Jurisdiction.

[243] Mr. *Strange* for the Prohibition: The Right of Election in this Case is created by Act of Parliament, and we have suggested that *Osting* was duly elected. The Office of Parish Clerk creates a Freehold, and notwithstanding the Exercise of the Office is concerning Spiritual Matters, yet the Office itself is Temporal, and for that Reason a Prohibition shall go. 2 Roll. Abr. 285. It is a common Case for the Plaintiff below to come here himself and move for Prohibitions; the Precedents to this Point are numerous; and so was the Case of *Dr. Wilmot*, lately adjudged in this Court. But the Defendant offering to try the Right of Election upon a feigned Issue, the Court adjourned it to see if the Plaintiff would Consent.

195.—THE KING and the CORPORATION of the BOROUGH of EVESHAM. [1733.]

Mandamus.

A *Mandamus* was granted to the Corporation of *Evesham* to proceed to the Election of a Burgess in the Room of one *Stone* deceased; and Mr. *Wills* and *Fazakerly* moved to quash this *Mandamus*. This is a Corporation created by Letters Patents, and the Corporation must proceed to Election within 24 Hours after Notice given, which is so short a Time that it is almost impossible for the absent Members, whose Duty occasions their Attendance in other Places, to be present at the Election. It is therefore Reasonable that the Notice should be enlarged, and the *Mandamus* qualified with this Restriction, or otherwise not to grant the *Mandamus* at all. The Party cannot proceed to Election without a *Mandamus*, therefore when they come to ask a Favour of the Court, the Court will put such Terms upon the Party, and so far restrain the general Words of the *Mandamus*, that neither Party can receive any Prejudice thereby. What is now prayed of the Court is a Thing in itself so just and reasonable, that it is hoped we are proper in our Motion. If a farther Day be appointed no Inconvenience can arise. It is only giving all Members Opportunity to discharge their Duty to the Corporation, by giving Attendance: On the other Hand, if the *Mandamus* is granted generally, it may be of the utmost Consequence, and is in Effect to deprive the absent Members of their Right in voting at all at Elections in the Corporation; for unless further Notice

be given, it is impossible they should attend, especially as this Case stands ; for Sir John Rushworth being a Member of Parliament, is obliged to give his Attendance in the House, to which all inferior Jurisdictions ought to submit.

[244] The Motion was denied *per Cur'* : For *Mandamus's* in these Cases are only Motions of Course, and are *ex debito Justitiæ*. By the express Words of the Charter the Members are only to have 24 Hours Notice, and it is the Duty of the Corporation to hold Court according to the Charter. The *Mandamus* is only to compel them to do their Duty ; and there is no Precedent where the Court has put any Restraint upon the *Mandamus*. It seems reasonable, and a Matter of Justice, that longer Notice should be given ; but the Charter is express, and this Court have not an arbitrary Power in them to alter it. To appoint a longer Time would be in a Manner prohibiting the Corporation from acting according to their Charter. The *Mandamus* is a Writ of Right, and when the Party has sufficient Matter before the Court, he is intitled to it *ex debito Justitiæ*. As this Court has not a discretionary Power in granting *Mandamus's*, so neither can it fetter or delay them : And this is not like the Case of Attachments, which are merely in the Breast of the Court, and issue only for Contempts or Abuses of the Process of the Court ; and that is the Reason that the Court, which is the properest Judge of its own Process, may put what Terms they think proper upon them. In the same Case, a *Mandamus* was directed to the Mayor and Corporation of *Evesham*, and a Rule to return the Writ ; and now an Attachment was moved for against the Mayor, &c., for not making a Return. It was objected, that it did not appear that the *Mandamus* was served ; but an Affidavit of Service being produced, it was then objected that the Affidavit ought not to be read, because not filed. To this it was answered, That *Mandamus's* are upon the same Footing with all other Writs issuing out of the Court, and that when a *Latitat* or other Writ is directed to the Sheriff, it is the constant Practice of this Court to grant a Rule, &c., without an Affidavit being made of the Service of the Writ ; and if afterwards the Service comes to be controverted upon the Attachment, then is the proper Time to make Affidavit of it.

A Rule for the Return is always granted of Course. And for this Reason *Probyn* and *Lee* were of Opinion that the Affidavit ought to be read, but *Page* was of a different Opinion.

196.—THE KING and PINKNEY. [1733.]

Indictment for a Cheat.

The Defendant was indicted for a Cheat ; and the Indictment set forth that the Defendant sold Corn to the Prosecutor, which he falsely averred to be a full Bushel, whereas there was not a Bushel, *sed plurimum deficiebat*. This Indictment being removed by *Certiorari*, three Objections were taken : The first Objection was, that this was not a publick Cheat, but a [245] Breach only of a private Contract, and therefore was not indictable. The second Objection, that admitting this to be a Cheat, it was not an Offence at Common Law, but punishable only by *Stat. 22 Car. 2, c. 12, 8*, and the Indictment doth not conclude *contra formam, &c.* Third Objection, The Indictment is too general and uncertain ; for it is only said *plurimum deficiebat*, but it does not appear how much ; and another general Objection was made, that it being an Indictment for a Cheat, it was not proper to quash it upon Motion ; and in Support of these Objections there was cited *Mod. Cases, 42 ; Sid. 409 ; Salk. 379 ; Queen and Jones, 5 Mod. 18 ; Mod. 71, 288 ; Hil. 2 G. 1 [1716], The King and Channing*. Indictment against a Miller for a Cheat ; and sets forth that so much Corn was delivered him to grind, & *quod cepit & detinuit* so many Bushels ; and upon Motion, the Indictment was quashed. So the Case of *The King and Mar' Obryan, Pasch. 3 G. 2 [1730]*, and the Case of *The King and Nicholson, 4 G. 2 [1730–31]*, at the Sittings. Indictment for a Cheat ; and set forth, that the Defendant contracted to deliver so many Chaldron of Coals, that each Chaldron ought to contain 36 Bushels, and that when the Defendant delivered them each Chaldron contained less, &c.

And it was held by *Raymond, C. J.*, That this was only a private Contract, and not indictable. In Support of 3d Objection was cited 2 *Roll. Abr. 80, p. 13 ; Cro. Jac. 324 ; Cro. Car. 380 ; 2 Salk. 687*. And upon these Objections the Indictment was quashed. *Vide Carth. 277*. Indictment against a Pawnbroker, *Quod illicite & deceptivo* refus'd to deliver, &c.

197.—THE KING *and* CORPORATION of WALSOL. [1733.]Motion for a *Quo Warranto*.

Upon Motion for a *Quo Warranto*, this appeared to be the Case : The Corporation of *Walsol* was incorporated by Letters Patents, with Power to hold Courts, &c., but no Provision was made by the Charter, what Notice was necessary to be given previous to the holding every Court. But it had been usual for the Mayor, on the Fair Day, to give Notice at the Town Hall, where the Members were obliged by a certain By-Law to meet : And accordingly the Mayor had given Notice at one of these Meetings, that a Court would be held the same Afternoon, in order to proceed to the Election of Burgesses ; but all the Magistrates were not present when this Notice was given. A Court was accordingly held in the Afternoon, and Burgesses elected. And now an Information in the Nature of a *Quo Warranto* being moved for to shew by what Authority the new elected Members acted as Burgesses ;

[246] The Court held, that altho' there is no Notice required by the Charter, yet Notice must be given ; and notwithstanding it was said to be the usual Method of giving Notice, as in the present Case, yet the Court did not think this Notice sufficient in Law, and therefore an Information was granted.

198.—THE KING *and* JUSTICES of the CORPORATION of SHREWSBURY. [1733.]

Motion against five Justices.

Upon Motion for an Information against five Justices of the Peace, the Case was this ; The Overseers and Churchwardens of the Parish, &c., made a poor Rate, and at the Instance of the Churchwardens four Persons were rated who never before contributed to any Rate, and therefore appealed to the Justices of the next Quarter-Sessions, who finding a Rate to be wrong, sent it back again : But the Churchwardens refusing to make any Alteration, the Rate was again brought before them the same Sessions held by Adjournment ; and the Justices quashed the Poor Rate, and made a new Rate, wherein the four Appellants and ten others were omitted ; and this was complained of as an arbitrary Proceeding in the Justices ; for tho' they might strike out the four Persons appealing, yet they could not strike out the ten who had not appealed, nor complained of any Injury ; and the Reason of leaving them out, was to deprive them of their Franchises in voting for Members of Parliament ; for the Constitution of this Corporation is such, that all who pay Scot and Lot have Votes, and not otherwise ; and therefore to strike them out of the Rate is a great Oppression, and deprives them of the Benefit of their Franchise as Freemen. The *Stat. 43 Eliz.* gives the Justices Power to relieve Persons aggrieved, and to make such Order therein as to them shall seem meet ; and the Word (*therein*) is purely relative, and shews how far their Power is to extend, *viz.* to give Relief to Persons aggrieved, who bring their Cause before them upon Complaint : And they have not by this Act of Parliament a Power to strike out and put in as they think proper.

The Court denied the Motion, and held that the Sessions may make such a Rate as is most proper and necessary ; for where the Rate which is brought before them upon Appeal is unequal, the Poor are not to starve until the Overseers have made a new Rate ; but the Justices may do it themselves *ex Officio*, by Virtue of the Statute ; and the Case in *Salk. and Carthew* is good Law. And the Reason of that Case is not founded upon the particular Circumstances of our Case only, but upon the general Words of the Act of Parliament. *Vide Carth. 58, The King and Martin.* [247] Sessions confirmed a Poor Rate, but did not set forth that it came to them by Appeal ; and for this Reason the Order was quashed, because by the Statute the original Jurisdiction is given to the two next Justices, and the Sessions have no Power but upon Appeal of the Parties grieved. S. C. 2 Stra. 975.

199.—THE KING and OVERSEERS and CHURCHWARDENS of BRACKLEY PARISH
ST. PETER'S COM' SOUTHAMPTON. [1733.]

Order of Sessions.

Upon Motion to quash an Order of Sessions, the Case appeared to be this : The Churchwardens and Overseers of the Poor for the Year 1730, upon making up their Accounts, charged several Sums of Money disbursed in a Law Suit between their Parish and the Parish adjoining ; and this Account was allowed and signed by two Justices according to the Statute : But upon Appeal to the Sessions in 1732, these Disbursements were ordered to be struck out of the Account, and that the Churchwardens and Overseers should pay the same to the present Overseers. This Order being removed by *Certiorari*, Mr. Abney took several Exceptions ; 1st, This Order appears to be grounded upon an Appeal lodged at a preceding Quarter-Sessions ; and it does not appear when that Sessions was held, nor what was there done upon the Appeal, and so it is a Discontinuance. Agreed, the Parties might appeal when they thought proper, for the Statute is general, and does not confine them to the next Quarter-Sessions ; but when the Appeal is made, it must appear that the Sessions did something upon that Appeal ; and this is a general standing Rule ; for after an Appeal is once lodged, a subsequent Sessions cannot proceed upon it as upon an original Appeal.

Mr. *Fazakerly cont'* : It is said to be at the last Quarter-Sessions, which is certain enough, for it is relative, and shews when that Sessions was held ; and there is no Occasion to shew particularly what was done upon that Appeal, for Proceedings at the Sessions are not like Proceedings at this Court, when a Day is given to the Parties. For the Statute in this Case is general, and the Party grieved is at Liberty to appeal at what Time he thinks proper, and is not tied up to the next Quarter-Sessions ; and is like the Case where Motion is made in Arrest of Judgment ; the Defendant is not restrained to any particular Time, but may come at any Time before Execution, and in that Case there is no Day given. 2d Objection : It ought to be set forth specially when the Sessions was held, for the Statute confines them to particular Times, and it might be held at a Time not prescribed by [248] the Statute, and so all would be *coram non judice* ; and so it was held in the Case of *The King and Saunders*. *Vide* this Objection answered *ut supra*. 3d Objection : This is an Order to compel the Churchwardens to account, &c., and it is not said that they are Overseers of the Poor : For as Churchwardens the Sessions have no Jurisdiction over them. Supposing Poor Rates, and Matters relating to Ecclesiastical Affairs, should have been jumbled together in the same Order, that Order should not surely be good ; and it does not appear in this Case in what Capacity the Churchwardens are to act. Mr. *Fazakerly* agreed, that Disbursements of Churchwardens acting in a Spiritual Capacity, was not subject to the Jurisdiction of the Sessions ; but here it appears they are acting in another Capacity, as Overseers of the Poor : For the Order is, that the Churchwardens and Overseers of the Poor shall account so and so. 4th Objection : It does not appear that this was a regular Sessions. Answer : But the Court won't presume it irregular, and nothing appears to the Court to induce them to judge it irregular, that is incumbent on them to shew. Every Thing shall be presumed to be right till the contrary appears ; and in this Case the Court won't think it unnecessary to set forth the precise Time when the original Sessions was held, with Intent only to see if by this Means they can make the Order bad. 5th Objection : Sessions have not an original Jurisdiction ; and it does not appear that any Order was made in this Case before it came to the Sessions.

Answer : The Statute gives an Appeal to the Party aggrieved by an Act of the Churchwardens, Overseers or Justices of the Peace, so that the Act of Parliament is pursued. It comes before the Sessions by Appeal, and there was no Occasion for the Justices to make an Order if they sign the Rate. It is sufficient, *Vide* Carthew, 58, *The King and Martin*, That Sessions confirmed a Poor Rate, but did not set forth that it came to them by Appeal ; and for this Reason it was quashed. 6th Objection, Said generally to account with the Overseers, and does not mention them Parishioners by Name. Answer : It is the best way to name them generally ; it is said, to the present Churchwardens and Overseers, and that is sufficient. 7th Objection : The Sessions in this Case ought to have made a new Order, and not have ordered these several Sums to be struck out of the old Rate. Answer : The Statute which gives the Sessions a Jurisdiction in this Case, impowers them to proceed as they think fit. They are of Opinion

that these Sums ought not to stand in the Rate, and therefore have ordered them to be struck out.

The Court did not give any Opinion, but took Time to consider.

[249] 200.—PATTEN v. SMITH. *Mich. 6 G. 2* [1732].

Trespass.

Action of Trespass upon the Case for executing a Warrant directed to the Sheriff within the City and Liberty of *Westminster* to the Damage of the Plaintiff £100. The Plaintiff set forth in his Declaration a Grant from the Crown to the Dean and Chapter of *Westminster* to execute all Writs, Process, &c., in the same Manner as they used to be executed by the King and his Predecessors: He then goes on, and sets forth a Grant from the Dean and Chapter to himself for Life, with the same Power of executing all Writs, &c., *Virtute cujus inde possessionatus existit*; and then shews, that contrary to this Grant the Defendant had executed a Warrant *infra Libertatem prædict' ad damnum, &c.* To this the Defendant demurred; and assigned for Error, that the Plaintiff had set forth a Grant for Life, *Virtute cujus possessionat', &c.*

Serjeant *Hawkins* argued for Defendant, That the Plaintiff having set forth in his Declaration a Grant for Life, the *Virtute cujus possessionat'* was ill; for that *possessionat'* was capable only to a Term for Years, and that wherever a Freehold was alledged, it was pleadable only by the Word *Seisitus*, which is a Term of Art, and therefore cannot be supplied by any other Word; and for this he cited *Lill. 1, 324*; *1 Inst. 200 b, 201 a.* Every Man's Deed must be taken most strongly against himself; and therefore when he sets forth a Grant for Life, and then goes on and says *Virtute cujus possessionat'*, it must be taken there was a Defect in the Grant, and that he was possess only of a Chattel. He likewise further objected, that the Declaration was too general, for it is not said what Process it was the Defendant had executed: It is only generally alledged that the Defendant executed a Warrant directed to the Sheriff; and perhaps it might be such a Writ as might be executed within this Liberty by a Sheriff's Officer; for Writs of Waste, Disseisin, &c., are not included within the Jurisdiction of the Dean and Chapter. All Pleadings ought to be certain, and therefore this general way of declaring is not good. He further objected that the Declaration was ill; for that it sets forth a Grant to execute all Writs *infra Civitatem Westmonaster'*; and then alledges that the Defendant had executed a Writ *infra Libertatem prædict'*, whereas the Word *Libertatem* was not used before in any Part of the Declaration; and cited *1 Vent. 402, 406*, where it is said by *Hale*, Chief Justice, that Liberties are pernicious to the common Justice of the Kingdom. It was likewise held in *C. B.* in the latter Part of Queen *Anne's* Reign, *inter Wannisford and Ford*, which was upon a Plea in Abatement, where it was alledged that the Party lived *infra Libertatem*; and it was held that a Liberty was an uncertain Place, and not sufficient.

[250] Mr. *Wynne cont'*: *Virtute cujus possessionat'* is sufficient, and is of the same Force and Effect in Parlane as the Word *Seisitus*, and may be used as well to express a Freehold as a Term for Years. *1 Inst. 17, 153.* And my Lord *Coke* says, a Disseisin is a putting out of Possession. *Virtute cujus, &c.*, is not traversable, and at the most is but an Impropriety: But supposing there was a Difference, yet as the Defendant is a Wrong-doer, it is not so material as to overturn the Declaration. This Action is of the same Nature as an Action of Trespass, and therefore good upon the Possession only, and that the Words sufficiently prove. *Carth. 85.* But it is farther objected, that it does not appear what Sort of Warrant it was that was executed: And it is impossible it should, for that remains with the Sheriff; and had the Plaintiff alledged no more than the Receipt and *Asportavit, Arrestavit*, it had been sufficient: For it is not material to shew what sort of Process he entred by; it is laid in the Declaration that the Dean and Chapter had a Grant to execute all the King's Writs, &c., and that this Liberty was granted to him for Life. As to the last Objection, which is taken to the Word *Libertatem, &c.*, he is stiled *Ballivus Libertatis*, and it is well known that the City and Liberty of *Westminster* are synonymous Terms, and so they are promiscuously used in *17 Eliz.* But as to these two last Objections, he said they were not assigned for error; they extend to Matter of Form only, and therefore by the express Word of the Statute, ought to have been specially assigned.

Page, Justice. Possession only is sufficient to maintain this Action; it is brought for a Tort, and the Defendant is a Wrong-doer. In Actions for stopping up Lights, it is always said *Quod cum possessionatus fuit*; and that is sufficient. The other two Objections extend to the Form only, and therefore should have been specially assigned. Judgment for the Plaintiff, *nisi, absente Raymond*, C. J. Note, *Bracton* calls a Freehold in Law, *Civilem & Naturalem possessionem, seu Seisinam*. 1 Inst. 266 b; *Bracton*, l. 4, fo. 206, 236. Note also, that the Plaintiff in his Declaration did not set forth a Grant from the Crown to the Dean and Chapter, but alledged a Seisin in Fee in the Dean and Chapter. And afterwards in the same Term the Judgment was made absolute.

201.—THE KING and JENOUR. [1733.]

Information for a Libel.

An Information was moved for upon a Libel published by way of Advertisement in a publick Paper called the *Daily Advertiser*, and the Libel complained of was to this Effect, *viz.* That *James Haywood* sold Wines by Retail very cheap, and at reasonable Rates; and that *Mr. Haywood* hath an excellent Salve for the Cure of Womens Breasts, Price one Shilling.

[251] *Mr. Reeves* and *Mr. Filmore* to oppose the Information: A Libel is an infamous Paper made publick, aspersing the Credit of the Person libelled, or defaming the Character of one deceased in such Terms as may be prejudicial to the one in his Business, or so provocative as to tend to a Breach of the Peace, or else by reflecting upon the other so as to make his Character infamous. But supposing the Defendant to be the Publisher of what is here alledged against him, there is nothing libellous upon the Face of it. To say a Man sells Wine by Retail is no Reflection, or to say a Man hath an excellent Salve, can no ways traduce his Character: He may have such a Salve, and may dispose of it charitably. The Court won't grant Informations of this Nature, unless some thing scandalous and infamous appears upon the Face of it. In Actions of Assault and Battery the Court won't grant Informations, unless something flagrant and particular hath been done by the Party; as drawing of Swords, &c. So in Libels, for every trifling Reflection an Information won't go. If the Prosecutor has sustained any Injury, he may take his Remedy in the ordinary Course of Proceedings: He may have his Action for the particular Injury, or may bring an Indictment upon the libellous Matter. But it does not appear by the Affidavit that the Defendant was the Publisher; it is only said that his Son acknowledged the Receipt of the Advertisement, and read it to his Father; but not one Word of his publishing the Paper where his Advertisement is inserted.

Serjeant Urling and *Mr. Fazakerly cont'*: The Matter is of itself libellous; the Plaintiff is a great Wine Merchant, and to say that he sells by Retail, by Quarts and Pints, is reflecting and lessening his Credit; to call a Shoemaker a Cocker is libellous. *Vent.*

Cur': If the Party hath sustained any Injury, he may have his Remedy either by Action or Indictment. Libels are not to be encouraged; but to say that a Merchant sells Wine by Retail is no Reflection: The greatest Merchants have done the same, and great Fortunes have been acquired that way; and so the Information was denied.

202.—THE KING and INHABITANTS of WOOLASTON. [1733.]

Orders of Justices.

Mr. Wirley Birch moved to quash several Orders of Justices of the Peace for Maintenance of the Poor: His first Objection was, that it did not appear to be under Hand and Seal, which is necessary, being a judicial Act. *2dly*, It doth not appear to be made upon Oath. *3dly*, It doth not appear to be made [252] by Justices living within the Parish. *4thly*, The Facts are not set out in the Order. Note, The Motion was to quash an Order of Sessions made in Confirmation of these Orders. If the original Orders are bad, consequently the Orders of Sessions must be so. *Salk.* 482.

Mr. Parker to shew Cause why the Order should not be quashed, and in Answer to the first Objection, he said, That though in the Conclusion of the Order it does not

appear to be under the Hands and Seals of the Justices, yet in the Beginning it is set forth and begins thus, *viz.* We whose Hands and Seals are hereunto subscribed ; which is a plain Answer to the first Objection. As to the second, That it does not appear to have been made upon Oath, or that the Overseers were summoned as required by 9 G. 1, c. 7, there nothing appears to the contrary ; and the Court will not intend them to proceed extrajudicially. *Vide* Carth. 366. A Person was removed by Order of Justices, and Objection being taken to the Order, as it did not appear that he was removable, and perhaps he might have rented a Tenement of £10 *per Ann.* But the Objection was over-ruled, and said, that the Court would not intend it. As to the third Objection, that it is not said to be made by Justices within the Parish, nor is it averred that there were no Justices within the Parish, he answered, That it was not necessary to alledge any such Matter upon the Order ; and that if there were Justices resident within the Parish, it was proper to be shewn on the other Side ; and cited Hob. 78, *St. John* and *St. John*. Action upon the Stat. 23 H. 6, c. 10, for not returning a Burgess, where the Words of the Statute are, that the Sheriff shall send his Precept to the Mayor, and if there be no Mayor, then to the Bailiff. The Plaintiff declared that the Sheriff had made his Precept to the Bailiff, without averring that there was a Mayor ; and this was moved in Arrest of Judgment ; but the Court was clearly of Opinion that it was good, for we shall not intend that there is a Mayor, except it be shewn, and that should come properly on the other Side. So in the present Case, if this Order was made by Justices out of the Parish, and at the same Time there were Justices resident within the Parish, this would have been a proper Objection upon the Appeal, and the Party should have shewn this Matter at the Sessions. As to the Objection, that the Overseers were not summoned, it is not necessary : This should appear upon the Orders ; and cited the Case of *The King* and *Venables*, *Trin.* 11 G. 1 [1725]. Indictment to suppress an Alehouse ; and it was objected, that it did not appear the Defendant was summoned ; but held that the Court would not intend the contrary : So was the Case of *The King* and *Holland*, which was an Order of Bastardy, 5 G. 2 [1731–32]. But note, in the Case of *The King* and *Glegg*, 7 G. 1 [1720–21], *Vide* Mod. Rep., Order of Bastardy was quashed, because not set forth that the Party was duly summoned.]

[253] Mr. *Fazakerly* and Mr. *Wirley Birch cont'* : The Objection that this Order does not appear to have been made upon Oath, is very strong ; for the express Words of the Act of Parliament, 9 G. 1, c. 7, are, That no Justice of Peace shall order Relief to any poor Person until Oath be made before him, &c. There is a great Difference where a Judge has Power to determine indefinitely, and where only under particular Circumstances ; for when the Statute gives him a Power to act indefinitely, he is a proper Judge what Evidence is necessary to support the Fact ; but when his Power is limited under particular Restrictions, as to be upon Oath, &c., he must confine himself within these Restrictions, and must follow the express Words of the Statute ; and he must appear to have done so upon the Face of the Order ; as in Carth. 365. Order of two Justices for Removal of a poor Person ; and the Order recited, that upon Complaint made concerning the poor Person, &c., they had so ordered, &c. And it did not appear by the Order who it was that made that Complaint ; and because the 13 & 14 Car. 2, c. 12, says, it must be upon Complaint of the Churchwardens and Overseers of the Poor, therefore it is absolutely necessary in the Body of the Order to shew that it was done upon the Complaint of the Churchwardens, &c., for otherwise the Justices have no Authority to make it. This comes exactly up to the present Case : The Statute requires that the Order be made upon Oath, or otherwise the Justices have no Jurisdiction. It has been often laid down as a Rule of this Court, that nothing shall be presumed in Support of an Order ; in this Case the Court must presume every Thing to support the Order, that it was made upon Oath, that the Overseers were regularly summoned, and that there was no Justice residing within the Parish ; for unless these Facts are presumed, the Order cannot stand. *Vide* the Statute, which expressly provides that no Justice of Peace shall order Relief to any poor Person, until Oath be made unto him of some Matter which he shall judge a reasonable Cause of giving such Relief, and until such Justice has summoned two of the Overseers of the Poor to shew Cause why such Relief should not be given. *Vide* Carth. 58, *The King* and *Martin* : The Sessions confirmed a Poors Rate, but did not set forth that it came before them upon Appeal ; and for this Reason the Order was quashed, for the Sessions have not an original Jurisdiction.

Mr. *Fazakerly* took another Objection, That it did not appear the Person relieved had gained a Settlement ; for it is only said for the Relief of a Pauper within the Parish : But the Court over-ruled this Objection, for though perhaps it might not be good in the Case of a Settlement, yet it is well enough in this Case. Mr. *Fazakerly* then objected to the Merits of the Order, that the Justices had no Jurisdiction to order a gross Sum to [254] be paid to a third Person for the Relief of a Pauper ; and cited the Case of *The King and the Inhabitants of Bensham*, 7th of the late Queen, where it was so adjudged ; and the Case of *The King and the Inhabitants of Woolbury*, Hil. 6 G. 2. And upon this Objection the Court was of Opinion that the Order should be quashed, but gave no Opinion as to the three first Objections.

Mr. *Parker* then objected, that this Order was not properly before the Court ; and took Exception to the *Certiorari*, because it varied from the Order ; for the Order was that the Overseers should pay £5 to Mr. *Simon Barker* for curing a Pauper ; and in the *Certiorari* it was ordered to pay £5 to Mr. *Simon Baker*, without the (r), Surgeon ; and for this Reason the *Certiorari* was quashed.

203.—GORE v. GORE, with all the Arguments of Counsel. [1733.]

[S. C. 2 P. Wms. 28 ; 9 Mod. 4 ; Barnard. K. B. 209, 229, 355 ; 2 Stra. 958 ; 10 Mod. 501 ; 2 Eq. Cas. Abr. 339. See *Stansfield v. Habergham*, 1804, 10 Ves. 276.]

Devise.

The Case was sent out of Chancery for the Opinion of the Judges of this Court, and the Case in Effect was this : *William Gore* being seised of divers Manors and other Tenements in Fee, devised them to Trustees for the Term of 500 Years, with a Power to cut down Wood, or sell any Part of his Estate in order to raise Money for the Payment of his Debts, and also to raise several other Sums which he had devised to his younger Children for their Portions, with Remainder in Tail to the first and every other Son of *Thomas* his eldest Son to be begotten, and upon Failure of such Issue, then the Remainder to his Son *Edward* in Tail Male, Remainder to his Son *William* in Tail, Remainder to his own right Heirs. He likewise devised an Annuity of £50 *per Ann.* to *Thomas* his eldest Son, and then takes Notice of the Reason why he made no greater Provision for him, *viz.* because he was a Spendthrift, and his Father had already expended and paid considerable Sums upon his Account. There was likewise a particular Direction, that if his Estate should afterwards come to *Edward* or *William*, that then the Money devised to be raised for their Portions, should not be raised. Upon the Construction of this Will, there arose two Questions ; 1st, Whether the Limitation to the first Son of *Thomas* (he having no Issue at that Time) was a good Limitation. And 2dly, If it was a good Limitation, in whom was the Freehold after the Testator's Death vested during the Contingency.

Mr. *Boote* as to the first Point argued, That the Devise to the first and every other Son of *Thomas* (he having no Issue then nor at the Time of the Testator's Death) was void. If it can take Effect at all, it must be either by way of a contingent [255] Remainder or an executory Devise : The first it cannot be, because no Freehold to support it ; for whenever the Inheritance is granted upon a Contingency, the Limitation is void, unless there be a Freehold to support the Contingency ; neither can it operate by Way of executory Devise, because the Contingency cannot arise within the Time prescribed by Law. It is possible indeed that *Thomas* might have a Son within forty Weeks after the Testator's Death, yet that is a Possibility only, and such Son could not take it until after the Determination of the 500 Years Term. Executory Devises are not of long Establishment by Common Law, and the Judges have always held the Time limited for the Contingency to arise in, was not to be extended. 30 *Eliz.* It was determined that executory Devises must arise within the Compass of one or two Lives at the furthest ; and though it hath been limited to arise after the Determination of several Lives, yet those Lives were all existing at the same Time, and so is all one as if limited but to one Life. In *James* the First's Reign, the Judges thought it Time to limit the Bounds of such Devises, Cro. Jac. 459 ; Palmer, 253 ; 2 Jones, 15 ; 1 Roll. Abr. 613. Where the Judges said they would not permit an executory Devise to exceed the Devise in *Matt. Manning's* Case, for the Inconveniency which they had perceived by it. In the 13 *Car.* 2 [1661–62], Lord *Bridgman*, Ch. J., said, if *Matt. Manning's* Case was to be adjudged again, he questioned not but the Judgment would

be otherwise, but they would not extend their Resolutions further or more favourably to such Devises. 1 Sid. 37. And so it was held in 3 Keb. 127, 178, the Case of *Carpenter and Smith*, which was a springing Use but falls within the same Rule, and there it is held, that the furthest such Devises are to be carried, is within the Compass of one or two Lives in being. *Pasch.* 11 W. 3 [1699], the Case of *Scattergood and Edge*, 1 Salk. 229. It was held that a Devise to the first Son of A. (A.) having none at that Time was void, and in that Case *Treby*, Ch. J., said, that an executory Devise to arise within the Compass of a Life or Lives was good, because the Candles are all lighted at once, but they were not to be carried one Step further by his Consent; because these Limitations make Estates unalienable, every Devise being a Perpetuity as far as it goes (that is) an Estate unalienable though all Mankind were to join in the Conveyance. A Limitation to the Heirs of a Man may be good by Way of executory Devise, because it takes Effect immediately after the Death of the Ancestor; but where the Devise is to the first Son of *Thomas*, and he has no Son at the Time of the Testator's Death, the Limitation is void; so that it plainly appears by the Resolutions above-mentioned, that the Judges have always been disposed to narrow the Bounds as far as was consistent with Determinations of former Cases. Taking it therefore that the [256] Time in which executory Devises must arise is settled, and that such a Devise must arise within the Compass of a Life or Lives in being, it will be necessary to consider how the Devise in the present Case agrees with this Principle of Law. *William Gore* devises his Estate for 500 Years, and after the Determination of that Estate, to the first Son of *Thomas Gore* in Tail, Remainders over to his Son *E.* and *W.* successively; *Thomas* had no Son at the Time of *William's* Death, and perhaps might have none during his own Life, and though he might have a Son within 40 Weeks after his Death, yet such a Devise is not good according to the Principles which hath been before insisted upon, for it does not take Effect within the Compass of a Life. It may be objected that here is no Danger of a Perpetuity, because the furthest it can be extended is no more than 40 Weeks after the Death of *Thomas*; but by the same Reason that it may be extended 40 Weeks it may be extended as many Years. Supposing in the Case of a springing Use or a contingent Remainder, and either of them should arise within a Year after the Time limited by Law; would the Estates which were before united and consolidated open again to let in the Contingency? They certainly would not: By the same Parity of Reason, an executory Devise shall not; for the Inconveniencies that would be introduced by such a Construction are the same in both Cases. This Case is the same or rather stronger than the Case in *Salk.* for there the Devise to Trustees was only for the Term of eleven Years, whereas this is for 500 Years. He also said that the Words *Procreatis vel Procreandis* made no Difference, for they may be both mutually extended to Issue begotten or to be begotten; but what makes this Case the stronger is, that the Devise is not to take Effect 'till after the Determination of 500 Years: And though there are Trusts annex to this Term, yet that makes no Difference; for now we are in a Court of Law, and must consider it in a legal Sense, and the Law takes no Notice of Trusts. It must therefore be taken as an absolute Term, and should the Trustees declare upon it, they must plead it as such, as in Case of a Mortgage, which is no more than a Pledge of Lands for the Security of Money, yet it is always pleaded as an absolute Conveyance. In the Case of *Scattergood and Edge*, *Treby*, Ch. J., held, that an executory Devise depending upon a Term, and to arise within a reasonable Time was good, and that 20 nay 30 Years had been held a reasonable Time; but this hath never been carried beyond the Term of one Life. The Antecedent Term in this Case, and which must determine before the Limitation can take Effect is 500 Years; and this Difference was before taken in 1720 in this Court, and the Judges then held that an executory Devise, which could not take Effect 'till after the Expiration of so long a Term, was void, and gave Judgment accordingly. If the Devise in this Case be good, it must necessarily [257] create a Perpetuity: For if the Limitation to the first Son of *Thomas* be good, it must be by Way of executory Devise, and then it consequentially follows, that the Limitation to *E. & W.* which depend thereupon must be by Way of executory Devise likewise, and so are not to be defeated by a Recovery or otherwise. As to the second Question he said, should the Devise to the first Son of *Thomas* be admitted to be good by Way of executory Devise, he could not conceive what would become of the Freehold after the Death of the Testator, and before *Thomas* had Issue born; but if the Devise to the first Son of *Thomas* be void, the Remainder is executed in *E.*, and the Freehold

vested in him *eo instanti* the Testator dies. 1 Rep. 154 ; 7 Ed. 3, fo. 19. A. seised of Lands in fee, conveys them to B. for Life, Remainder to his Issue in tail, Remainder to the Feoffor for Life, Remainder to C. for Life ; the Remainder to the Feoffor is void, and the Estate in C. takes Effect upon Determination of Estate Tail.

Serjeant Chappell *contra* : The Devise to first Son of Thomas is a good Devise either by way of contingent Remainder, or as an executory Devise. As to the First, he said Thomas took an Estate for Life by Implication, which was sufficient to support a contingent Remainder. Cro. Eliz. 744, *Sherlow and Baker*. In Wills the Intent of the Testator is to be considered, and therefore the Devise of Lands equally to be divided makes a Tenancy in common. Poph. 188. In this Case the Testator takes Notice that Thomas was unmarried, and therefore when he Devises his Lands to the first Son of Thomas, it must be his Intention that the Freehold shall descend 'till such Issue be born. 1 Inst. 42. How must the Estate go 'till a Son be born ? It cannot go to E. or W., because it appears to be the Intent of the Devisor, that neither of them should take 'till the Death of Thomas without Issue Male : It must therefore necessarily go to the Heir at Law in the Interim, and this *ex favore Legis*, for the Respect the Law always pays to the next Heir : But should the Court be of Opinion, that this cannot rise as a contingent Remainder, yet it will arise by Way of executory Devise. A Devise to the first Son of J. S. *per verba de presenti*, and J. S. hath no Issue at that Time, is void, but here the Devise is *in futuro*, to the first Son to be begotten. Vid. 1 Salk. 230. With regard to a Contingency, there is a Difference when the Fee is given over, and where it remains in the Devisor till the Contingency happens. The Devise in this Case is to the first Son of Thomas, who had no Issue at that Time, so that the Freehold must in Consequence remain in the Interim in the Devisor and his Heirs. 1 Roll. Abr. 612 ; Cro. Jac. 394 ; 1 Roll. Rep. 318. A Devise to an Infant in *Ventre sa Mere* is good by Way of executory Devise, and the Land shall go to the Heir in the Interim. Sid. 253 ; 2 Mod. 292 ; 1 Roll. Abr. 609 ; Noy, 43 ; Salk. 230 ; [258] Raym. 83. It is laid down as a Rule, that an executory Devise must arise within one or two Lives in *Esse* ; the Case falls within the Rule, for here the Contingency must happen in the Life-time of Thomas, or immediately after his Decease : But it is objected, here is a Term antecedent to the Devise which is for 500 Years, and must determine before the executory Devise can take Effect : But a Term of Years is not of any Consideration in Law, no more than a Charge attending the Inheritance. Salk. 254. And as soon as a Son is born to Thomas, the executory Devise is vested and the Contingency gone.

Mr. Boodle by Way of Reply. By the Devise Thomas was to have an annuity of £50 *per Annum*, and no more, for the Testator takes Notice of him, that he was a Spendthrift, and should have nothing to do with the Estate, so that it is impossible Thomas should take a Freehold by Implication ; where is the Freehold to be vested then ? It is insisted upon that the Freehold by Implication of Law is vested in the eldest Son : Had this Construction prevailed, the Limitation in Salk. could never have been disputed. It is further insisted upon, that it was the Intent of the Devisor, that E. and A. should not take till after the Decease of Thomas without Issue Male. In Construction of Wills the Intention of the Testator shall prevail, so long as that Intention is consonant and agreeable to the Rules of Law, but where it is repugnant and inconsistent with the Rules of Law it is to be rejected, and in this Case, whatever the Intention of the Testator was, since the Limitations of the executory Devise had exceeded the Bounds prescribed by Law, it is bad. As to the Cases cited by Mr. Serjeant, he said the Case of *Cotton and Heath* in Roll's Abr. was not reported by the Judges to whom the Case was referred, which much lessens its Authority. The executory Devise in Raym. 82, was to arise within the Term of 15 Years, which does not come up to the present Question. A Devise to an Infant in *Ventre sa Mere* must happen within the Compass of a Life, and so falls within the Rule, that executory Devises must arise within the Compass of a Life or Lives in being or not at all. But it is said there is no necessity to extend the Time of Thomas having a Son to the Time of his Death, for it is probable he might have Issue Male in his Life-time : This is a Possibility only, for he may not have a Son 'till 40 Weeks after his Death, and the Law goes upon Certainities, and will not wait such an Expectancy as the dying without Issue. As to *Bale's Case*, Salk. 254, the Remainder was executed, and therefore the Wife was intitled to Dower. It is said there is no Danger of a Perpetuity in this Case, for when the Contingency happens the Estates are all vested ; but how are they vested by way of executory Devise ?

For the subsequent Premises depend upon the executory Devise, which cannot be barred by Recovery, &c., and so creates a Perpetuity.

[259] *Raymond*, C. J. There are two Ways to make this Devise good ; by way of a contingent Remainder ; or an executory Devise. The first it cannot be, because no Freehold to support it. *Thomas* is cut off by Will, so no Estate by way of Implication can arise to him. The only Question is, whether this is good by way of executory Devise ; and this depends upon Construction of what Time the Law allows for such Devises to arise in. It does not appear that any certain Time has hitherto been settled. A Life or Lives in being hath been held a competent Time ; but whether it may not be carried further is not so clearly settled. It has been argued, that the Contingency in this Case cannot vest 'till after Determination of 500 Years ; but the Contingency does not depend upon the Expiration of the Term ; for *Eo instanti* the Contingency arises the Estate is vested. The Cases cited do not come up to this Case, the chief one relied on is the Case of *Scattergood and Edge*. *Treby*, C. J., was of Opinion, that the Time of limiting executory Devises was to be carried no further : But in that Case there is Contrariety of Opinions, and that Case was not determined upon this Point : But the Limitation there was considered as an immediate Devise ; and when a Writ of Error was brought in *B. R.* upon that Judgment, *Holt*, C. J., was of Opinion, that the Time in which an executory Devise was to arise, was not then settled. And Note, this present Case was determined in *B. R.* and adjudged that the Devise to the first Son of *Thomas* to be begotten, he having no Issue at that Time, was void : But *Raymond*, C. J., said, that he was not satisfied with that Determination. (*Vide* 1 Salk. 226, *Goodright* and *Cornish*.) And therefore in *Hillary* Term 6 G. 2 [1733], it was again argued by *Peer Williams* for the Plaintiff, and Mr. *Fazakerly* for Defendant. And Mr. *Peer Williams* said, that this Devise was not void in its Creation, because by Possibility *Thomas Gore* might have had a Son before the Death of the Testator ; and tho' it is no absolute Will during the Life of the Testator, yet to many Purposes it is a good Will, and shall take Effect from the Time of its Execution, as in 1 Salk. 237, the Case of *Bunter and Coke*. A Devise of Lands is not good if the Testator had nothing in them at the Time of making the Will ; and tho' he should afterwards purchase Lands, yet they would not pass by the Devise. The Limitation over to the first Son of *Thomas* might have been good when the Will was made, and he might have taken by way of Remainder notwithstanding the Term ; for had a Son been born in the Life-time of the Testator, it might then have vested as a Remainder. This was possible at the Time of making the Will ; and it is held in 2 Saund. 388, that where a Limitation over by Will may operate as a contingent Remainder, it shall never operate by way of executory Devise. In the present Case it might have operated as a contingent Remainder, *Ergo*, &c. But it is [260] objected, that this being a Devise for Years only, it cannot operate as a contingent Remainder because no Freehold to support it ; neither can it take Effect as an executory Devise, because it is a Limitation by Words in *presenti* and not in *futuro* : The Words indeed are to the first Son of *Thomas* to be begotten, but that makes no Difference, for the Words *procreatis & procreandis* are of the same Effect, and so it is expressly held by my Lord *Coke* in his 1 Inst. 20 b. And as this is the natural Construction that has always been put upon those Words in a Deed, so they have been equally adjudged to carry the same Construction in a Will. 2 Vern. 545, the Case of *Cook* and *Cook*. Supposing in the present Case where the Devise is to the first Son to be begotten, *Thomas* had then had a Son born, this Son should have taken, and so he should altho' *Thomas* should have another Son born afterwards. And so is the Case in Vern. : The Words are used promiscuously, as it would be now dangerous to put another Construction upon them. He further urged, that this Limitation over could not take Effect as an executory Devise, because it could not arise within the Time settled by Law for that Purpose ; for it is not to commence till after the Determination of the 500 Years Term ; and tho' it has been held good when the Limitation over was to arise after the Determination of a Term for 10, 20, or 30 Years, yet that seems tacitly to exclude Limitations over where the Term is for a far greater Number of Years, as in this Case. There are two Reasons why this Devise to the first Son of *Thomas* is void ; first, because there is no Freehold to support it, therefore it cannot be good as a Remainder ; and secondly, it cannot operate by way of executory Devise, because it is expressly limited by way of Remainder. He said he would not trouble the Court with explaining the Nature of executory Devises, and the Time prescribed by Law for their Commencement, but the prescribed Time in which they

are to arise has been sufficiently settled ; and it has been said by Judges that they were sorry they had gone so far. In the Case of *Scattergood and Edge*, it was said by *Treby*, C. J., that they would not carry them one Inch further : But said Mr. *Bootle* had spoken so fully to this Point, that he would not trouble the Court with any further Repetition. The chief Point that he insisted upon was, that this Limitation over to the first Son of *Thomas* could not vest, till the Term for 500 Years was spent : For in the first Place the Devise is to Trustees for 500 Years, and after Expiration of that Term, then the Remainder over, so that the Term must expire before the Remainder can vest. If a Court of Law will take any Notice of these Trusts in Equity, it must at the same Time be considered that the Trust may last as long as the Term ; for the Trustees in this Case are not only to pay Annuities for Life, but they are likewise to raise Money for younger Childrens Por[261]-tions, and this Provision is not to take Effect till after *Thomas's* Death, so that these Portions may not have been raised as yet, and perhaps may not these many Years. In the Case therefore a Trust of a Term which must continue so long as this ; a Court of Law will not take Notice of it as a Trust, but will consider it as an absolute Term, and therefore the Limitation over cannot arise 'till after the Determination of the Term. Consider the Nature of an executory Devise, which he said must be considered as an original Devise, and when it is not limited to arise by way of Remainder, and in effect cannot arise as a Remainder, it is properly called an executory Devise. Supposing the Testator had devised to A. for 500 Years, and after to the first and every other Son of *Thomas Gors*, he having no Issue Male living at the Time of the Devise, it is certain no legal Estate could have vested at that Time ; for if any Estate could have vested, it must have been by way of Remainder : For supposing *Thomas* to have had a Son, the Estate must have been then vested in the Son as a Remainder, and when by Possibility the Estate may vest as a Remainder, it can never afterwards take effect by way of executory Devise. But in this Case it is impossible the Remainder could have vested before the Expiration of the Term ; for till that Time the Devisee had no Interest that was assignable, as he must have had provided the Remainder was vested. A Devise is made of a Term to A. for Life, Remainder to B. B. has only a Possibility which is not assignable in Law, nor even in Equity where the Limitation is voluntary. Every executory Devise is to be taken as an original Devise in it's self, and independent of any preceding Term, and must be considered as if no Term had been limited. To draw the Rule then to the present Case, supposing the Limitation had been to the first Son of *Thomas* to commence at a future Day, the Son takes nothing in the Interim, as in *Lutw.* 798. If a Man devises Lands to A. six Months after his Death, the Lands shall descend in the mean Time, and therefore nothing vests in the Divisee 'till the Time appointed. Where the Limitation is to arise at the End of six Months, or six Years, it is the same Thing ; for during that Time nothing vests in the Devisee, and consequently he has nothing in him to grant or assign over, and cited Cro. E. 678 (*sed Qu.* how applicable). The only Question that remains is, how long the Law allows for an executory Devise to arise in ; and this Point seems well settled in the Case of *Scattergood and Edge*, where it is said, that an executory Devise to arise after the Expiration of a Term for 20 or 30 Years may be a good Limitation, which implies that where the Devise is to arise after the Determination of a longer Term it is then void, th' the Devise be to Persons in *Esse*, a *fortiori* must be void where the Limitation is to Persons not *in esse*. Supposing the Devise to the first Son of *Thomas* had been of different Lands, as [262] if a Man is seised of two Manors, *viz.* of *Dale* and of *Sale*, and devises the Manor of *Dale* to Trustees for 500 Years, and that upon and after the Determination of that Term, then the Manor of *S.* shall go to A. This surely could not be good by way of executory Devise, and yet this Case in effect comes up to the present Case, and plainly tends to create a Perpetuity. The Reason why executory Devises have been supported is, because the Freehold descends 'till the Contingency arises, for the Freehold cannot be in Abeyance ; but in this Case it cannot descend because the Heir is expressly excluded from taking. Supposing in this Case the Term had been but for five Years only, and after to the first and every other Son of *Thomas*, with a Remainder to a third Person for Life, there is no Doubt but the Remainder over for Life is good, for during the Term the Estate is in the Trustees, and if *Thomas* have no Son living at the end of the five Years, then he in Remainder for Life must take ; and the Remainder being once vested can never afterwards be divested to make way for the contingent Remainder. Agreed that where the Estate descended it was liable to be divested, but where it enures by Purchase it is otherwise.

In the Case of *Scattergood* and *Edge* the Freehold descended, and there was no intermediate Remainder vested ; said there was no Case in the Books where a Contingency has been limited to arise after the Expiration of a Term for Years with a Remainder over to another *in esse*, who takes by Purchase, that in such Case the Freehold should descend, much less in the present Case ; for here *Thomas* is not only expressly excluded, but a Rent-charge is likewise devised to him, which must be merged provided the Freehold should descend to him. For to every Rent-charge a Distress is incident, and it is absurd to say a Man can distrain upon himself, which must be the present Case, should the Fee descend to *Thomas* and the Rent continue and not be merged in the Fee. If therefore the Fee should descend, it must be contrary to the express Words and Intention of the Testator, and the Creation of the Rent thereby becomes nugatory. Here is a Person *in esse* capable of taking by the Devise by way of Remainder, and therefore the Limitation over to the first, &c., Son of *Thomas* shall not by an unnecessary Construction be held good to defeat the Estate in Remainder which was before vested, and cited the Case of *Goodright* and *Cornish*, 1 Salk. 266. A. having Issue two Sons, *John* and *Richard*, devises Lands to *John* for 50 Years if he should so long live ; and as for my Inheritance after the said Term, I devise the same to the Heirs Male of the Body of *John*, and for Default of such Issue, then to *Richard*. The Court held this Devise to the Heirs Male of the Body of *John* to be void in its first Creation, for the want of an Estate of Freehold to support it, it was void as a Remainder, and they seemed not to think [263] it an executory Devise, because it was limited as a Remainder. It may be said, it was the Intention of the Testator to put the Freehold in Abeyance, but the Law will not regard his Intention as to this respect. Suppose *Thomas Gore* had a Son living at the Time of the Devise, who should afterwards die without Issue, and the Estate had gone over to the next Heir in Remainder, and then *Thomas* has a second Son ; the Law will not suffer him in Remainder to be divested of his Estate, although it was the Intention of the Testator that his second Son should have taken in this Case : And so he concluded that if the Limitation in the present Case to the first, &c., Son of *Thomas* be not good, because by Possibility it might have vested as a Remainder, and therefore shall not vest as an executory Devise ; or if it be so remote that it cannot arise within the Time settled for all executory Devises to arise in ; or if being limited by way of Remainder, it cannot by Construction be intended as an executory Devise ; if in any one of these Points the Court is of Opinion for the Plaintiff, he must have his Judgment, and the Defendant has no Title. Mr. *Fazakerly contra* : This is good by way of executory Devise, and the Freehold in this Case must descend to the Heir at Law, not by the Words of the Devise, but by Operation of Law. It is clearly the Intention of the Testator that the first Son of *Thomas* should take. He said he would not dispute that the Limitation was strictly agreeable to the Rules of Law, but there was no Repugnancy to them, and when the Intention of the Party may be so far collected, as to make them agree and consistent with the Rules of Law, the Court will support it. If this is considered as an immediate Devise *in presenti*, it is unquestionably void for want of a Freehold to support it ; but if it is considered as a future Devise, then the Limitation is good. It is insisted upon, that the Words *procreatis vel procreandis* are in Effect the same, and must be taken to mean the same thing, as in 1 *Inst.* 260. He agreed that in point of Limitation they both bear the same Construction, for in that Case the whole Estate Tail is in the Ancestor, and when the Issue come to take they are in by Descent and not by Purchase. And so is the Case in *Vernon*, and cited the Case of *Darbinson* and *Beaumont*, 9 *Ann. in Canc.* [1710–11]. A Devise to *John Peirce* for 99 Years, Remainder to his first and other Sons in Tail, and in Default of such Issue, then to the Heirs of my Aunt *E. Long* begotten then living (she having three Sons living at that Time) ; and in that Case it was insisted, that the Words begotten or to be begotten are of the same Effect and Meaning : Yet the Court held that they imported an immediate Devise, notwithstanding the Words, Heirs of the Body of *E. Long* could have no Heirs in her Life-time, and so adjudged her Issue to take immediately : Which plainly proves, that though these Words are sometimes used and considered in the same Sense, [264] yet the general Construction is always to make them answer the Intent of the Testator, and to vary the Meaning of them so as the Limitation may take Effect. In the Case of *Scattergood* and *Edge*, it was held, that had the Devise been to the first Son to be begotten, that the Limitation in that Case had been good as an executory Devise. In the present Case here are future Words. To the first Son of *Thomas* to be begotten, and it is plain from the Sense of the Will, that it was the

Testator's Intention, that it should take Effect as a future Devise, and the Court will rather chuse to presume something in Support of a Limitation, than reject Words in order to destroy it; the Testator in his Will takes Notice that *Thomas* was not married, and in case *Thomas* has a Son, he appoints Guardians to take Care of his Education. It is plain therefore the Testator could not intend his Devise should take Effect in present, and as there are future Words, why should they be constrained to a Limitation in *presenti*. In 1 Lev. 135, the Case of *Snow and Cutler*, it was held, that a Devise to an Infant in *Ventre sa Mere* was good notwithstanding the Case in *Dyer*, 304, which upon looking into the Record was not found to warrant the Opinion there reported; and cited the Case of *Bate and Amherst*, Raym. 82. This therefore must be taken as a future Devise, and then there is an End of the Objection. The only Question that now remains is, Whether this Construction of Law can be good so as to arise within the Time limited. The first Time this Case was argued, it was said, that this executory Devise might not take Effect, till nine Months after the Death of *Thomas*; but in this Case the Contingency has happened within the Time, and so no Danger of a Perpetuity. It might be difficult to tell how long the Law will allow for executory Devises to arise in, but it will certainly allow so much as may be thought reasonable for a Man to make Provision for his Family, and Nature lays all Men under the same Obligation to provide for Posthumous Children as for those *in esse*. Why therefore should this Case be thought to go farther than is allowed by Law? I don't know that any precise Time has as yet been settled; and though *Treby*, C. J., thought fit to carry them no further than for Life or Lives in being, yet a Latitude has always been given according to the Circumstances of a Case, as in *Moor*, 847. *Blandford* and *Blandford*, and in 1 Roll. Abr. 612, p. 3. And notwithstanding *Treby* said the Time was sufficiently settled, yet the rest of the Judges were of a different Opinion. Wherever an executory Devise has been appointed to arise within such a Time as to avoid carrying it to a Perpetuity, it has always been held good. In Show. Parl. Cases, *Sir Evan Floyd's* Case, the Contingency was carried the Space of 12 Months beyond the Time, and that was by Deed, which is stronger than the present Case; for the furthest that this can go is only nine Months. 1 Vern. 234 and [265] 304. The Compass of 21 Years for a Contingency to arise in was held good, because the Time is circumscribed. The Limitation in this Case is for the Provision of Posthumous Children, and is founded upon great Reason and Justice. It would be a great Objection to the Law was it so straitlaced, that a Man could not so limit his Estate, as to make Provision for the Children that might be born after his Death. He cited the Case of *Hodgkins and Andrews* at the Rolls in 1730; upon a Marriage Settlement, six hundred Pounds belonging to the Wife was given in Trust to the Wife for Life, and if the Husband should survive her, to him for Life, and after to the Heirs of their Bodies, payable at twenty-one or Marriage, but in Default of Issue, or if it should happen that such Issue should die before the Time, Remainder over to one *Newland* and another. The Wife had Issue two Daughters, who both of them died before Marriage or the Age of twenty-one. The Father took out Administration, and insisted that he was absolutely intitled to the £600 Fortune; but the Limitation was held good by the whole Court, for it did not extend to create a Perpetuity, and if the Issue had died but one Day before the Age of twenty-one, yet the Limitation over had been good, and the Remainder should have taken Place. In this Case, the Estate is to vest as soon as the Contingency happens, and no Occasion either from the Nature of the Thing or the Intention of the Parties to wait the Expiration of the Term. It is in the Power of the Court to make a favourable Construction of Words in order to support the Intention of the Parties, and in 6 Rep. 16 *b*, *Wild's* Case, the Word Issue, is construed differently in Support of the Testator's Intention; so have the Words *procreatis vel procreandis*. This is a Contingency 'till a Son is born, and then it is no more a Contingency: For supposing there had been a Son, it had then been a Remainder vested. 3 Rep. 13. Suppose in this Case there had been no Term, but the Devise had been to the first Son of *Thomas* when born, such a Limitation has been held good, and there is no Reason why a Term should make any Difference; for if it should, it would in Effect put it out of the Power of a Man to make Provision for his younger Children, or the Payment of his Debts. Since therefore a great Inconvenience may happen on the one side, and there can be none on the other, should this be construed a good Limitation, the Court will always put the most favourable Construction, and so was the Opinion of Lord *Hobart*. It is allowed that when a Son is born he may take Advantage of a Forfeiture or Surrender; which makes it plain that the Estate

vests in him before the Expiration of the Term, for if he had no Interest during the Term the surrender would be void. If a Term of Years is raised for Payment of Debts, the Surplus shall go to the Heir or to him in Remainder. In this Case here is a Term of 500 [266] Years raised for a particular Purpose; but the first Son is not to wait the Expiration of it. In Equity, it is no more than a Security, and after that is satisfied, it is then always considered as a Term attending the Inheritance. As to the Testator's Intention, it is plain from the Codicil he intended the Remainder should vest before the Term was spent. For he there takes Notice that if *Thomas* should have a Son, the Trustees should be his Guardian, and have the Care of his Education and of his Estate till the Age of twenty-one; and can it be supposed that he would have made this Provision, unless he intended the Rent to vest as soon as the Contingency should happen. It is objected, here is no Proviso to merge the Term. There is no Occasion, for when a Man makes his Will, he considers how the Limitation will be taken in Equity as well as at Law, and that the Term is only raised as a Security. If a Son had been born in the Life-time of the Testator, it is agreed that the Limitation must have vested as a Remainder. This is giving up the Question, for if the Birth of a Son in the Life-time of the Testator would have vested the Remainder, this clearly shews that the Remainder must vest upon the Birth of a Son, and so no Difference where a Son is born, living the Testator, or afterwards, for whenever a Son is born, the Remainder will vest. It is held in *Paul's Case*, That as soon as the Contingency arises, the executory Devise takes Place, and when it is once vested it is no longer as an executory Devise, but becomes an Estate in Possession. The Case which has been put, of the two Manors, is not to the Purpose; for there the Devise of the second Manor cannot take Effect, till after the Term raised out of the first Manor is expired. It has been a Question in this Case, where the Freehold shall be during the Contingency; for say they it cannot descend, because it is given from the Heir at Law. And so it is in all executory Devises. But it is not under the Will that the Heir takes in these Cases, but by Operation of Law. In *Lewis Bowles's Case* the Remainder vests by Purchase, but upon raising of the Contingency, it opens again to let in the Contingency: And these Cases depend upon the Construction of the Statute of Wills, which has always a Regard to the Intention of the Parties. In the Case of *Scattergood and Edge*, provided the Limitation had been good, as to the first Son to be begotten, the Remainder over would have vested, had it not been for the Contingency: But this was never held to be an Objection in that Case. As to the Case of *Goodright and Cornish*, that was not determined upon this Point, but the Reason there given is, because it was an immediate Devise, and therefore not being capable to take Effect in point of Limitation of Law, by way of Remainder, it could not as an executory Devise, because limited to take Effect in present; and so concluded that in all Cases where the Intention of the Parties can be preserved without [267]-out destroying the Rules of Law, it is the Duty of the Court to support the Intention of the Parties: Here it may be supported without impeaching the Rules of Law; therefore the Court will consider this as a good Limitation.

Stood over for the Opinion of the Court. And after great Deliberation Judgment was given that this was a good executory Devise.

204.—JACOBS and CROSBY. [1733.]

Assumpsit.

In Assumpsit Plaintiff declared upon the mutual Agreement, that the Defendant in Consideration that Plaintiff would transfer £2000 *York Buildings* Stock he promised, &c., and avers that on the twenty-ninth of *February* being the Day appointed, the Transfer Books were opened, and continued so from 3 to 5, which was the usual Time that he attended at the transfer House, and tendered, &c. Upon demurrer Mr. *Reeves* argued for the Defendant, that all Declarations ought to be certain like the Case of Indictment, otherwise the Defendant may take Advantage of it upon Demurrer. The Facts as they are stated in this Declaration may be true, and the Plaintiff not intitled to recover; it is only alledged that he came to the House in general, and then tendered, &c., but it is not said, that was at the Place of Transfer and tendered, &c. The Tender must be made in the most notorious Place; as in a Lease upon Condition to pay Rent, the Tender must be made at the Door of the House, &c.

Cur': It is laid in the Declaration, that the Delivery of the Stock was to be made

at the Transfer House, and it is averred that he attended at the Transfer House, and a House may consist of but one Room.

Mr. *Reeves* objected, that the Stock tendered by the Plaintiff did not appear to be the same Sort of Stock that was contracted for, which was that the Plaintiff should deliver so much common Stock, and the Tender was of £2000 Joint Stock, which is different from the Contract, and the Court cannot take it to be the same Stock.

Mr. *Marsh con'*: The Agreement was to deliver £2000 Common Stock, and the Averment is that he tendered the aforesaid £2000 Joint Stock. *Prædict'* is a good Word of Reference, and the Word *Conjunct'* be rejected, it can have Relation to nothing but £2000 Common Stock that was agreed for, and therefore a good Cause of Action upon the Face of the Declaration.

Cur': Had the Word *Conjunct'* been the Averment that he tendered *Prædict'* Stock it had undoubtedly been good: The Word *Prædict'* always aids even in the Name of the Parties, [268] and there is no direct Repugnancy in this Case between the Common Stock and the joint Stock. *Et sic Judicium pro Quer'* upon both Points.

205.—THE KING and SAUNDS. Trin. 6 & 7 G. 2 [1733].

Information.

For an Information in the Nature of a *Quo Warranto*, to shew, by what Authority *Saunds* acted as Recorder of the Corporation of *Easham*. The Consitution of this Corporation is vested in the Mayor, Aldermen, capital Burgesses, a Recorder and Chamberlain, all which put together constitute the Common Council: And by a Clause in the Charter the Mayor, Aldermen, and Burgesses, are to proceed to the Election, &c., as Places shall become vacant: But by a subsequent Clause it is expressly provided, that the Chamberlain shall not be present at the Election of a Recorder, nor the Recorder at the Election of a Chamberlain. So that a Recorder and Chamberlain cannot be elected at a publick Common Council, which is contrary to the Express Words of the Charter, and so his Election illegal: And the Case of *The King and Corporation of Carlisle* was cited. The Corporation of *Carlisle* consist of a Mayor, Aldermen, and capital Burgesses, who together make a Common Council; but the Election of capital Burgesses and other Officers of the Corporation was vested in the Mayor and Aldermen: A Court of Common Council was held such a Day particularly mentioned, and after the Business of the Corporation was over, the Mayor and Aldermen summoned one *Coulton* to appear, *et sic ut præfertur assemblat'* made an Order to remove him; and upon Motion for a *Mandamus* to restore him, it was held that this Removal was not good: For they ought to have met particularly in that distinct Capacity which was given them by the Charter in this Case, and not to have meddled with this Matter at a Common Council.

In the principal Case, the Court granted the Motion, for it appears from the Books, that this Election was at a Common Council, which is contrary to the Charter.

206.—Inter the PARISHES of ST. CLEMENT DANE and ST. MARTIN IN THE FIELDS. [1733.]

Settlement.

Ann having gained a Settlement in *St. Clement's Dane* by Servitude, married *John Male*, who had no Settlement, and by him had a Son named *Jacob*; after the Death of *John* her first Husband, she married another Man whose Settlement was in *St. Martin's in the Fields*. *Jacob* the Son comes afterwards into the [269] Parish of *St. Giles*, and was removed from thence to *St. Clements Dane*, who appeal to the Sessions, and they ordered him to be sent to *St. Martin's* where *Ann* his Mother was at present settled. Both the Orders being removed by *Certiorari* in *B. R.* The Question was in which Parish *Jacob* was legally settled, whether in *St. Clements Dane*, where his Mother had gained a legal Settlement, in her own Right, or in *St. Martin's* where she had a Settlement in Right of her Husband only. *Serjeant Corbet* argued, that if the Father's Settlement cannot be found, the Child must be sent to the Place where the Mother's Settlement is, not to her last legal Settlement, but where she is legally settled at that Time; and so it was adjudged *Michaelmas* 1714, inter the Parishes of *St. George* and *St. Catherine*. So was the Case of *Paulus Perry* and *Wooden*, 1726. There is

the same Reason in this Case, for the Woman by her Marriage gains a new Settlement. Serjeant *Baines contra* : The Wife gains no Settlement by Marriage but in Right of her Husband, and it is expressly adjudged in Salk. 528, the Case of *Cummer and Milton*, where a Widow leaving Children under the Age of seven Years, marries a Man of another Parish, the Children shall go with the Mother for Nurture, but after seven Years of Age they shall be sent back to the Parish where the Father was settled : For she cannot gain a Settlement for them in this last Parish, because under Coverture ; and so it is held 2 Salk. 482, p. 35, both which are Cases in point. The Cases cited on the other Side are not comparable to the present Case. In the Case of *Paulus Perry and Wooden*, the Wife removed with her Children, and gained a subsequent Settlement in another Parish, but this was in her own Right, and there is no Question but the Children shall have their Settlement in this last Parish, and so was the Case between the Parishes of St. George and St. Catherine. The Wife rented a Tenement of £10 *per Annum*, in the last Parish, and so gained a new Settlement.

The Court gave no Opinion. But *Lee*, Justice, said he thought *Jacob's* legal Settlement, was at St. Clements Dane, for there his Mother had gained a Settlement in her own Right : And cited the Case of *Wangford*, Carth. 49, which is a Case in Point, *Quod vide*, where a Widow gains a subsequent Settlement in her own Right, the Settlement of the Children follow that of the Mother.

207.—OATES and COLLINS. [1733.]

Promissory Notes.

Action upon a Promissory Note payable to the Plaintiff or Order for the Sum of £20, Defendant pleaded *Non Assumpsit*, and gave the Statute of 9th of Anne in Evidence, intitl[ed] An Act to prevent Gaming ; and at the Trial it appeared that this was a Note for £20 won at a Horse-Race, and whether this was within the Statute was a Point saved to the Defendant by *Raymond*, Ch. J., before whom this Action was tried.

Mr. *Fazakerley* for the Defendant : This Case is within the Words of the Act, and therefore good if within the Meaning. Gaming in general is no more than laying Wagers between Man and Man upon any Chance or Hazard relating to Pastime, or Recreation. Seeing a Horse-Race, playing at Cards, are Things innocent in themselves, but lead People into Inconveniencies by laying greater Wagers than they are able to answer without injuring themselves and their Families. This is what was intended by that Statute of Gaming to be prohibited. This therefore is to be considered as a beneficial Law, and to be construed in an extensive Manner. This is intitl[ed] An Act for the better preventing excessive and deceitful Gaming, and takes Notice that the Laws then in being were insufficient to prevent the Mischiefs which happen by Gaming, and therefore will not put a stricter Construction upon this Act of Parliament, than has formerly been done upon other Acts for this Purpose, and though Horse-Racing is not particularly mentioned within this Act of Parliament, yet it falls within the general Words ; for after having mentioned some particular Games, the Statute goes on and says, or other Game or Games whatsoever, and by 16 Car. 2, c. 7, Horse-Races are particularly mentioned within that Statute to be Gaming, and therefore both Acts of Parliament are to be considered together, as having Reference the one to the other. and therefore it is clear that this falls within the general Words and Intention of the 9 Ann. c. 12.

Mr. *Spelman cont'* : It is admitted that Horse-Races are not expressly mentioned within 9 Anne, but it is said to be included within the general Words, Game or Games, because Horse-Racing is taken Notice of as Gaming in former Acts of Parliament, and therefore must have Relation to those Acts : But general Words are not always to be extended in the most absolute Sense. 3 Lev. 373 ; 2 Rep. 46. The *Stat. 13 Eliz.* where the Words Ecclesiastical Persons do not include Bishops, and yet that was a beneficial Law. So in 2 Inst. 408. *Omnes aliæ Aquæ* does not extend to the River Thames, 2 Lev. 142. (But note, this last Case was denied to be Law in the Case of *Dalton and Stocklane*.) 5 Mod. 449 ; Salk. 609. It could not be the Intent of the Act of Parliament to include Horse-Races, for there are several Acts of Parliament made for the Encouragement of breeding Horses.

Page, Justice. This is a new Case, and depends upon the Construction of two Acts

of Parliament. It seemed to him that this did not come within the Description of Gaming; for every Thing that depends upon Hazard or Chance is not Gaming, for then Policies of Assurance might fall under that Consideration; [271] supposing a Man has a Brace of Greyhounds and lays a Wager that one runs faster than the other, or that one Man walks to such a Place within such a Time, this cannot properly be called Gaming.

Probyn, Justice: This Act is to prevent excessive Gaming under any Shape whatsoever: there is no Distinction between one Sort of Gaming and another, but where a Man ventures a large Sum of Money upon a Hazard or Chance, that is Gaming. This is particularly mentioned within the Statute of *Charles*, and is of the same Consequence with Bowling, Cockfighting, &c., and therefore held it to fall within the general Words Game or Games.

Lee, Justice: The Statutes of Gaming are Remedial Laws, and to be construed liberally. The Statute of *Car.* expressly mentions Horse-Racing, and it is not to be imagined that because some particular Games are only mentioned in 9 *Anne*, that this Statute intended to exclude all others, and the rather because having made mention of some particular Games, then follows the Words, or any other Game or Games whatsoever: And therefore these two Acts of Parliament must be taken to have Reference the one to the other.

208.—THE KING and INHABITANTS of STROUD. [1733.]

Order of Sessions.

Mr. Yates: To quash an Order of Sessions, a Servant Maid articted to serve her Master a Quarter of a Year, and if she and her Master then liked one another, then for a Year certain. She served her Master a whole Year without making any new Contract; and the Question was, whether this was a Service for a Year within the Statute, to give the Servant a Settlement at *Stroud*.

The Court held that she had gained a legal Settlement at *Stroud*: For having served a whole Year, the first Agreement shall be construed a Living for a Year subject to a Condition: For the Act of Parliament says there must be a Living and a Service for a Year, and both the Living and the Service need not be upon the same Contract, but where the Living for a Year is certain it may relate back to a preceding Service: As if a Person is hired for Half a Year, and after that for a whole Year upon a fresh Contract, and serves Half of that Year, this is a good Settlement, for the Act of Parliament is complied with. Here is a Living for a Year and a Service for a Year, which is all the Statute requires. *Vid.* 3 Salk. 535, *cont'*: Two several Livings for Half a Year, and Service for a Year not sufficient to gain a Settlement: But in *Hanmore and Elluell, Mich. 4 G. 2*, It was adjudged, that a Servant hired for Half a Year, and after for a whole Year, he served the Half Year, and eight Months of the whole Year, a good Settlement.

[272] 209.—THE KING and TAYLOR. [1733.]

Information.

To set aside a Judgment of *Ouster* upon an Information in Nature of a *Quo Warranto*, for usurping the Office of capital Burgess from 20th of August 1732, to the Time of filing the Information. Defendant in his Plea admitted Usurpation from 20th August 1732, to 29th Sept. following. He was elected and sworn in a capital Burgess: And upon this Confession Judgment of *Ouster* was entred generally for the whole Time laid in the Information. The Question was whether the Judgment should stand as it was entred generally, or should be entred specially for so long only as the Usurpation continued.

Serjeant Chappell, Hussey, &c. Argued no other Judgment could be entred except a *Capiatur pro fine*, as is usual in all Cases; and as the King was intitled at all Events to a Judgment, it could be enter'd no Ways than this was. Co. Ent. Quo Warranto, 27, 28, 29. Quo Warranto is a Prosecution in the Nature of a real Action, that is, to punish the Person and recover the Thing, and from these concludes that there must be two Judgments, *scil.* a *Capiatur pro fine* and Judgment of *Ouster*; for here can be no Judgment *recipere in Manus Domini* because no Occupation. Fleta Lib. 5, c. 9;

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Co. Ent. Quo Warranto, 535, 559. Said that the subsequent Election could not be valid till Satisfaction was made for the Usurpation. *Co.* He compares a *Quo Warranto* to a Writ of Right, and Judgment in that is to hold to him and his Heirs for ever, and therefore Judgment in *Quo Warranto* ought to be so too, and then 9 *Anne*, c. 10, Sect. 7. Where Sheriff usurps, there shall be a Judgment of *Ouster* and Punishment likewise. *Vide* Rastal's Entries Quo Warranto, where Lord of a Manor prescribed to hold a Court Leet, the *Attorney General* replied, that he had no Pillory or Tumbrel, and the Judgment in that Case was, that the Leet should be seised into the King's Hands, and the Lord fined, but the Lord prays to submit to a Fine, and so had the Leet restored, and from thence argued, that Judgment of *Ouster* as it was entred generally should stand, and upon the Defendant's submitting to a Fine he should be restored.

Mr. *Kettleby* on the same Side, cited the Case of the *King and Pindar*, 10 *G.* 1, *B. R.* and after carried into the House of Lords. The case was this, *Pindar* was elected Mayor of *Bodmin* in *Cornwall*, but was never sworn in, notwithstanding which he acted as compleat Mayor; and this was held Usurpation for the whole Time, and Judgment of *Ouster* was entred generally; and the Question in the House of Lords had no Relation in this Case to the Judgment, but whether Error might be brought upon the Refusal of a *Mandamus*, which Point was carried in the Ne-[273]-gative. In the Case of the *King and Hicks*, Judgment was never given, but concluded by Compromise. There is not one Instance of a Judgment in *Quo Warranto* being entred specially; in a *Quo Warranto*, Judgment against the Party is final, but not against the King. He observed upon the 9th *Anne*, that it did not extend to Offices determinable upon Years; where any Part is found for the Crown, the Crown must have Judgment. That the Word shall, in this Act of Parliament is compulsory. In the Case of the *King and Hicks*, there appeared no Continuance of an Usurpation: It was only said *Usurpavit* and *non adhuc Usurpat*, where an Office is re-granted, it enures by Way of Pardon and purges the Offence. But where there is a Continuance charged in the Usurpation, *Ouster* is an essential Part of the Judgment. *Salk.* 511; *Show. Par. Cases*, *Hally's Case*; *Comberb.* 277.

Cur. The Judgment ought not to be entred generally, for the Confession is only to a Time past, and does not extend to the present Execution of the Office. In all Cases where Judgment is enter'd generally, it must be *Secundum subjectam materiam*.

210.—KEBLE and HICKERINGELL, determined in *B. R. Mich.* 6 *Ann.* [1707.]

Decoys.

The Plaintiff declares that such a Day he was lawfully possessed of a Close, *et de quodam Vivario vocat'* a Decoy-Pond, and that the Plaintiff at his own Costs and Charges had procured and maintained divers Nets and Decoy Ducks there, and made Profit thereof, and that there was a great Resort of Fowl thither, that the Defendant having and maliciously intending to damnify the Plaintiff and to frighten and drive away the Wild Ducks, and to deprive him of the Profit of his Decoy Pond, did such a Day, &c., come to the Pond Head, and shoot so many Times in Guns *ad et erga* the Pond, and thereby frightened away the Wild Ducks and Wild Fowl, whereby the Plaintiff lost great Benefit which otherwise he might have made of the Decoy Ponds, to his Damage £50. Upon Not guilty pleaded, there was a Verdict for the Plaintiff and £20 Damages found. Upon Motion in Arrest of Judgment, it was much debated whether an Action on the Case would lye against a Man for coming upon his own or another Man's Ground, and frightening the Wild Fowl in the Manner as laid in the Declaration. For it was agreed, that if it had been upon the Plaintiff's own Ground Trespass would lie. After several Arguments at the Bar,

Holt, Ch. J., delivered the Opinion of the Court, that Judgment ought to be given for the Plaintiff. He said this Action is altogether new, but yet they think it supported by the antient [274] Reason and Principles of Law: For the Plaintiff being possessed of the Decoy Pond, and having Ducks and Engines there, it is not only lawful for the Plaintiff but advantageous to him to make Use of them, and it is a Trade and Employment used by him in his own Freehold, and it is lawful for every Man to make the best Advantage of his own Land: There is the same Reason for this Action, as for any Tradesman whatsoever to have an Action against another that damnifies him in his Trade: What is the Reason that Action lies for Words whereby a Man may be damnified in

his Trade (and not only for Words that accuse him of a Crime); as to say of a Merchant he is likely to break, &c. This is a malicious Act purely to do the Plaintiff a Mischief without any Motive of Profit or Pleasure to himself. A Man indeed may have Damage done him for which no Action will lie; as in 11 H. 4, 47. A Grammar School-Master brought an Action against another for setting up a School near him; and it was held an Action would not lie, for it was *damnum sine injuria*: But supposing one shoots to frighten away Children coming to School, I make no Question but in that Case an Action would lie. There is a Case very like this in 29 Ed. 3, 18. Where the Owner of a Fair brings an Action for hindering People coming to the Fair, whereby he lost his Toll and Profit of the Fair, and yet perhaps the Goods they would have brought might not have been sold there: An action on the Case lies against one that by Threats frightens away his Tenants at Will; and so in 21 H. 6, 31. It has been objected the Declaration does not set forth the Number of the Wild Fowl or the Nature of them: But it is impossible to shew that; and this is not like *Playter's Case*; besides the Plaintiff does not bring his Action for the Property he had in the Wild Fowl (for he had no Property) but for frightening and hindring great Numbers from coming to his Decoy Pond. 2 Cro. 123. The Case of *Dent and Oliver*, which was an Action for assaulting the Plaintiff's Servant, and disturbing him from gathering the Plaintiff's Toll. It was moved in arrest of Judgment, that the Declaration did not say *Per Quod servitium amisit*, but over-ruled, because the Action was not brought merely for the Assault, but for hindring the collecting of the Toll: And this Case, without setting out the Number and Nature of the Wild Fowl, is as certain as that. Owen, 109. Action for hindring him to take Toll of divers Pieces of Wool: Exception was taken that it was not shewn what the Toll was, nor how many Pieces of Wool, and yet held good, because the Foundation of the Action is the Disturbance. *Vid.* 2 Cro. 604, *Dawney and Deed's Case*; and 9 Rep. 50, *Lord Salop's Case*. It is objected that the Word Wild Fowl is uncertain, for all Birds whatsoever are so: But it is certain what Wild Fowl are, and is shewn by 25 H. 8, 11. And the Latin Word in this Declaration is a very proper Word, [275] *Fluminis Volucres*, and is made Use of in *Littleton's Dictionary*. It is likewise objected that *Vivarium* is too general a Word to signify a Decoy Pond: But it is a very proper Word by Reason of the Wild Fowl that resort there.

Powel, J., said, He thought Decoy Ponds were new Things, but since they are become so valuable a Property they ought to be preserved. *Holt, Ch. J.*, said, that if a Man accept the Grant of a Market, Fair, &c. And another Man the next Day gets another Grant of the like to the Prejudice of the first Grantee, the Action on the Case will lie for the Damage, and the Reason is, because the Publick have a Property in it, and the Man that accepts the Grant is indictable if he does not keep it up.

211.—THE KING and the Bishop of LANDAFF, &c. *Hil.* 7 G. 2 [1734].

Error in *Quare Impedit*.

Error upon a Judgment in *Quare Impedit* at the Grand Sessions in Wales. *Quare Impedit* recites the 25 H. 8, c. 21, and particularly what was enacted in the 3d and so on to the 8th Section, and refers generally to the Statute. The Writ then sets out that Queen Anne was seised of the Advowson of Saint Andrew's in Gross per se de Feodo, and being so seised John Tyler, Doctor of Divinity, was elected Bishop of Landaff, and afterwards 24th of June 1706 (*Ecclesia illa vacante*) the Archbishop granted Letters of Dispensation *Secundum formam Stat., &c.*, and reciting the Bishop of Landaff's Petition, and that the Queen also gave him the Deanery of Hertford *retinere, gaudere et habere, et in Commendam tenere prout per literas Dispensation' plenius liquet et apparet*. 25th of June the Letters of Dispensation were confirmed under the Great Seal, by Virtue whereof Dr. Tyler becomes intitled, &c., *et fuit Capax retinere prædict' Rectoriam Ecclesiæ sci' Andreæ prædict' in Commendam cum Episcopatu Landaven'*. 25th of July 5 Annæ, Dr. Tyler being then Parson of St. Andrew's was created Bishop of Landaff, and by Virtue of said Letters of Commendam retained said Church for his Life. 1st August 1714, Queen Anne died seised of the said Advowson, &c., and George the First became thereof seised *ut de uno Grosso in Jure Coronæ*, and the Church becoming void by the Death of the said Bishop, it belonged to the late King to present, who 11th June 1727 died seised, &c., and it belongs to the now King to present, but he is hindred by Defendants. The Bishop pleads that he claims nothing but as Ordinary. Lord Brooke one of the other Defendants pleads in Bar, that his Father was seised of the Manor of

D. P. whereunto a Moiety of the said Advowson, *i.e.* every other Turn belonged to him, and being so seised, and the Church becoming vacant by the [276] Death of the Incumbent, it belonged to his said Father to present, and he presented the Defendant *Humphreys* who was admitted, instituted, and inducted, and traverses Seisin in the Queen to the Advowson, &c. The other Defendant *Humphreys* pleads to the same Effect; and to this Plaintiff replies that the Queen, &c., was seised of the Advowson, &c., in *Gross per se ut de Feodo prout Nar' supponitur*, and concludes to the Country. Issue is joined upon this, and Verdict for Plaintiff.

Mr. *Strange*, for the Plaintiff in Error insisted upon four Points. First, That in *Quare Impedit*, it is not sufficient to alledge Seisin only, but Plaintiff must likewise aver a Presentation in himself, or in those under whom he claims; and this Rule extends to all Cases, as well when the Crown is concerned, as in the Case of a Subject, and though there may be shewn Cases to the contrary, yet those Cases are particular, and the Reason for not alledging Presentation specially shewn. 2dly, This is not a *Commendam accipere*, but a *Commendam retinere*. 3dly, Though a *Commendam accipere* does amount to a Presentation, yet a *Commendam retinere* does not. 4thly, If the Court should be of Opinion, that this is a *Commendam capere*, yet it will not aid the Defect in *Quare Impedit*, because as it is here pleaded, it is a void *Commendam*, and not within the 25th of *Henry* the 8th. As to the first Point he argued, the alledging Seisin only without shewing a Presentation is not sufficient except in special Cases, as in *Fitz. N. B.* 33, and under the subsequent Letters *J.* and *K.* A Man by the King's Licence makes a parochial Church, which shall be presentable; he may have a *Quare Impedit* without alledging any Presentation, and shall count upon the special Matter. So in the Case of a Lapse or Donative, Patron may have a *Quare Impedit* without shewing a Presentation: But generally speaking, a Presentation is necessary, for that is a possessory Action, and the Presentation is the Possession. *Cro. E.* 518; 5 *Rep.* 97; *Vaugh.* 57. And the Law in this is the same in Case of the King, with a Common Person. 2 *Roll. Abr.* 378; *Vaugh.* 53, 56, 57. And so are all the Books and Precedents in the Books of Entries. 2 *Roll. Abr.* 378, p. 6; *Skinner*, 651; *Co. Ent.* 403 a, 404 a, 509 a, 514, 515, 520; *Rast. Ent.* 505 a, 529 a, b, 530; *Lutw.* 1078, 1083, 1086, 1090; *Lev. Ent.* 184; 14 *H.* 4, 36 b. That this is a *Commendam retinere* is clear upon the Face of the Pleading, and from the express Words, for the Words are, *retinere, gaudere et habere*, and a Man cannot retain what was not in his Possession before, and therefore my Lord *Hob.* says, that what is generally called a *Commendam retinere*, is indeed no *Commendam*, but is only a Faculty of Retention, and Continuation of the Benefit in the same Person and Estate wherein it was: So a *Commendam* it is not, for my own Benefice cannot be commended unto me. *Hob.* 143, 156; 4 *Rep.* 79 b, in *Digby's Case*, this [277] Distinction taken and held good in Law. And this is the Reason that a *Commendam retinere* cannot amount to a Presentation, for the Church being then full, there can be no Presentation: But in Case of a *Commendam Capere* it is otherwise, for there is no Difference between such a *Commendam* and a Presentation, but that the one presents the Parson to the Church, and the other commits the Church to the Parson. *Hob.* 150. The fourth and Principal Point was, that neither the *Commendam* nor finding of the Jury, that the Queen was seised in Fee *Jure Coronæ*, can cure the Defect in *Quare Impedit*. As to the *Commendam*, though there is a Latitude of Description left in the Archbishop, yet he has not an absolute, indefinite Discretion, but is circumscribed by certain Rules. For the Stat. 1, 3, gives the Archbishop the Examination of the Causes and Qualities of the Persons, and therefore if he affirms the Cause just, or the Quality of the Person worthy, there can be no Objection to the Dispensation: But this Point is very imperfect in the Dean, for here is no Averment that the Bishoprick was insufficient, but that the Bishop's Petition did so inform. *Hob.* 158. As to the other Matter, that the *Quare Impedit* was not cured by Verdict, he said it was not necessary for Plaintiff to prove more than his Declaration, and that he might do, without giving Presentation in Evidence; for if he proves Seisin, that is sufficient to support what is alledged in Declaration, and the Court cannot intend that more was proved at the Trial. 2 *Salk.* 662, *Bumnden v. Sharp*. Plaintiff declared, that Defendant kept a Bull that used to run at Men, but did not say *Sciens* or *Scienter*, &c. This was held nought after Verdict; for the Action lies not unless the Master knows of this Quality, and we cannot intend it was proved at the Trial, for Plaintiff need prove no more than is laid in his Declaration, and so it was held *Hil.* 12 *W.* 3. The Court goes in Presumption of Evidence necessary to support the Court only. *Cro. Jac.*

46, *Burser and Martin*. Trespass *Quare Equum cepit a persona*, and it was objected in Arrest of Judgment that Declaration was ill, because not alledged to be *Equum suum*, or that he was taken from the Plaintiff's Possession, and the Declaration cannot be aided by Intendment, but ought to be certain, and so it is in 1 Sid. 184. Trespass for taking Goods, the Declaration is not good without saying they were in Possession of Plaintiff. So was the Case of *Dell and Newton*, Hil. 10 Ann. Trespass *quare duo plaustra cepit*, and held bad, because no Possession alledged.

Draper cont': *Quare Impedit* is not a mere Possessory Action only, but in some Cases differs and falls under the same Consideration with a Writ of Right, and so it is said in the Case of *Digby and Fitzherbert*. *Quare Impedit* alledges Seisin in the Queen, that she was seised *Jure Coronæ*, and upon that Issue is joined, and the Jury have found that she was so seised. In Ac-[278]-tions possessory Seisin must be alledged, but not necessary to shew how seised. As in Trespass, *Quare Clausum suum fregit*, Plaintiff never shews in what Manner he was seised, though Presentment is necessary to be shewn in the Case of a Common Person, it is not so in the Case of the King, and therefore in a Writ of Right of Advowson brought by the King, the Tenant shall not tender the Half Mark, because *Nullum Tempus occurrit Regi*, and therefore the King shall alledge that he or his Progenitors were seised without shewing any Time. 1 Inst. 294 b. But a Presentment before Time of Memory is not sufficient, for it is not triable. 2 Roll. Abr. 379; Cl. Law, 446. Here is Seisin positively alledged, and Seisin and Possession is the same thing. 1 Inst. 153; 6 Rep. 57. This is a *Commendam capere*, and not a *Commendam retinere*, for it is expressly averred that the Church was then void (*Ecclesia illa tunc Vacante*), the Words of the *Commendam* are, *dedit et concessit tenere*, which are Words of Grant, and then follows, *pro et durante vita ipsius Johannis, &c., et quamdiu* he shall remain Bishop, so that this Condition has all the Properties of a *Commendam capere*; for Grant to a Man so long as he continues Bishop, &c., is a Grant for Life, as in 1 Inst. Grant to a Woman *durante Viduitate* or *dum Sola* is a Grant for Life. *Gib. Co.* 956. As to the last Point, he said this Defect was now cured by Verdict; for Jury have found that the Queen was seised *Jure Coronæ*, and if Presentment be necessary to support this Action, the Court will intend it to have been given in Evidence, or otherwise the Plaintiff could not have a Verdict. *Mich. 4 G. 1, Nuttall's Case*, Trespass for disturbing Plaintiff in his Right of Burial, and declares that he was seised of an antient Messuage, and by Virtue thereof prescribes to a Right of Burial. Defendant pleads he was Vicar, and obliged to repair the Chancel, and traverses the Prescription; and after Verdict it was objected in Arrest of Judgment, that it was not alledged to be in Consequence of Repairs, &c. But it was answered that this was aided by the Verdict, for the Court would intend it necessary to be given in Evidence.

Strange by Way of Reply. It is insisted upon that this is a *Commendam capere*, because at Time of granting the Presentation the Church is said to be void: It is indeed said so, but it appears clearly through the whole Record that the Case was otherwise, and these Words thrown in so loosely is no sufficient Averment to the contrary. The Word *Retinere* implies a Faculty of Retention and Continuation in the same Person, and the Word *tenere* following, does not alter the Case. It is no more than if it had been expressly said, you shall retain and hold for so long Time. Lord *Hob.* says, that a *Commendam capere* must be for Life; this is not so, but only so long as he continues Bishop. It is certain that the Statute of Limitations does not extend to the Crown; but that is not the Question, but whether [279] the Crown must not conform to Rules of Pleading. Where Seisin and Possession express the same thing, as in 1 Inst. 153, Pleading is good, whether alledged by the one or the other; but that does not prove where the Difference is so material, that pleading the one will satisfy the other. Though Presentment might be given in Evidence in this Case, yet not necessary to support the Facts laid in the Declaration: And in all Cases where the Declaration is cured by Verdict, it is where the implied Evidence was necessary to support the Declaration: But in this Case, Seisin might have been proved, which proves the Declaration without giving a Presentation in Evidence.

Y. C. J. This is a Possessory Action, and therefore the Plaintiff must shew a Possession: But in *Quare Impedit*, there is no Way of doing this except by alledging Presentation in the Plaintiff. There are two Questions to be made upon this Point, 1st, Whether there is any Thing appearing upon the Face of the Record to shew a Presentation in the Crown. 2dly, If any Thing is alledged in excuse of this Defect. As to the first it has been insisted upon, that this amounts to a *Commendam capere*: But I do not

find there has been any Thing said to prove this Assertion. The Words in the *Commendam retinere, habere, &c.*, which proves the Church to be full at that Time; for otherwise a Man cannot be said to retain what was not before in his Possession. It has been said, that this is a *Commendam capere*, or else the *Commendam* is void; if so, it then stands upon the same Foundation with *Quare Impedit*, where there is no Recital of any *Commendam*, and in that Case a Presentation is necessary. But the chief and principal Point is, whether this Defect is cured by Verdict, and as to this Point, there are two Ways of curing Defects in Pleading by the Verdict: The one Artificial, the other Natural; the first is where Defects in Pleading are cured by Act of Parliament, as the Statute of *Jeofails*; and this I call Artificial, because neither the Finding in itself, nor any Thing thereupon implied in Law could have aided in these Cases, without having Recourse to the Act of Parliament. The other, which is the natural Way, is something implied in Law necessary to have been given in Evidence, to induce the Jury to bring in their Verdict: And this is in Cases, where without such an Implication the Facts laid in the Declaration could not be sufficiently proved. But how does this appear to be the present Case? If Seisin could not be found without giving in Evidence a Presentation, there is no Question but this Declaration is cured. But Seisin may be proved without proving a Presentation, and that is proved by the Cases cited, or otherwise it could not be necessary to be alledged in pleading, And it is very true, what has been said by Mr. *Strange*, that if Seisin can be proved any other Way than by proving a Presentation, the Court will not intend any particular Way. *N.B.* This Case was again argued, and Judgment for the King.

[280] 212.—REKHEAD v. CATCHCART. [1733-34.]

Covenant.

Rekhead brought Covenant upon Charter-Parties, against Defendant *Catchcart*, who pleaded that it was not the Deed of *Catchcart* and *Blackwood*, but of *Catchcart* only, and that the Covenants in the Charter-Parties were not separate but joint between *Blackwood* and *Catchcart*.

Mr. *Filmer* moved to set this aside for a Sham Plea with Costs, for Plaintiff cannot go to Issue upon it, because the Deed is only executed by *Catchcart*, and therefore if we should join Issue upon this Plea there must be a Verdict against us.

Mr. *Draper cont'*: The Covenants in the Charter-Parties are joint between *B.* and *C.* but the Execution of the Deed is by *C.* only, and cited a Case in 2 Lev.

Cur': If the Deed is executed by *C.* only, it is his Deed only, and the Action lies against him only, and therefore set aside the Plea with Costs.

213.—THE KING and COMPANY OF GUNMAKERS. [1733-34.]

Mandamus.

Mandamus to admit *J. S.* to his Freedom of the Gunmakers Company, having been educated in the Art and Mystery of a Gunsmith, and served seven Years Apprenticeship. The Company returned they were incorporated by Charter, by *Char. 1.*, and set out the Charter, that no Person was intitled to his Freedom but those of the Trade residing in *London*, or within ten Miles thereof at Time of the Incorporation, and such of their Children as should serve seven Years Apprenticeship to that Art and Mystery; and as to other Persons it left the Company at large to admit or reject as they thought proper and convenient, and they returned that they did not think proper to admit him. Objection was taken to the Return, that it did not answer the Suggestion, as to his being educated in the Art, &c., and serving seven Years Apprenticeship.

Cur': Not necessary; they have returned the Charter, and shew that he is not intitled, which is sufficient.

214.—THE KING v. GROSVENOR et al'. [1733-34.]

Information.

Information in Nature of a *Quo Warranto* to shew by what Authority Sir *Robert Grosvenor* and Mr. *W. W. Wynne*, and several other acted as Aldermen of the Corpora-

tion of *Chester*. [281] Upon shewing Cause Defendants produced a Charter, under the Great Seal, tested 37 *Car.* 2, which vests the Election, &c., in the Mayor, Aldermen, and Common Council. The Prosecutors in Answer produced another Charter granted 4 *Jac.* 2, Reciting the Petition of the said Corporation to be restored, and a Regrant of their Liberties and Franchises granted by 16 *Car.* 2, but took no Notice of that of the 37th, and denied Acceptance of this last Charter. As evidence of Acceptance, it was insisted upon, that the 37th of *Car.* 2, appointed certain Officers called Leave Lookers, not mentioned in any previous Charter, and that in Pursuance of this Charter such Officers had been elected. That by the Charter certain Hospital Lands were granted to the Corporation, and that the Corporation was now in Enjoyment thereof : That this Method of Election had been established by constant Usage for sixty Years and upwards, before the Charter, and that the Body in general had from Time to Time acquiesced under such Elections : There was likewise a By-Law produced in Confirmation of this, but not insisted upon as conclusive Evidence. There was an Objection taken by the Prosecutors to the Qualification of Sir R. G. and Mr. W. W. Wynne, that they were not Inhabitants, &c.

Yorke, Ch. J. The Charter does not make it a necessary Qualification that the elected should be Inhabitants, but leaves the Election at large. The Word which is made Use of in the Charter is *Concives*, which imports no more than Fellow Citizens. The single Question is, whether Defendants have produced sufficient Evidence of Acceptance to induce the Court to refuse granting an Information. Informations in Nature of *Quo Warranto's* is a Remedy given by Law at the Discretion of the Court, to try the Right in these Cases between the Parties, and there is no other Remedy. The Evidence therefore upon which Informations are denied ought to be very clear and strong ; for by Refusal we conclude the Right of the Corporation. The Evidence that has been insisted upon in Proof of Acceptance of the Charter 37 *Car.* 2, is the Appointment of Leave Lookers ; but this is not sufficient Evidence of Acceptance by the whole Body ; for how are the Leave Lookers appointed ? Not by the Mayor and Commonalty in general, but by a select Number, *viz.* The Mayor, Aldermen, and Common Council, and Evidence of Acceptance to bind the whole Corporation, must be an Acceptance by the whole Body in general ; and this Rule does not impeach what is laid down in the Case of Corporations reported by *Coke* ; and likewise in *Jenkins's Centuries* : For in that Case the select Number of the Electors was appointed by the Body in general. But in the present Case what is there to prove Acceptance by the Commonalty ? The Grant of the Hospital Lands is not sufficient, for the Corporation might [282] have enjoyed those Lands before the Charter was granted ; and the mentioning them again might only be by Way of Confirmation or Regrant : If it be otherwise it is proper to come from the Defendants. As to the Usage insisted upon, that does not seem to be of such long Continuance as to prevail against the express Words of a Charter. The Case of the Corporation of *Brecknock* (in which he said he was Counsel) is much stronger. For there was Proof of Usage so long as from the 15th *Eliz.* But that Usage, being contrary to the express Words of the Charter, the Court would not admit of ; and upon this Error was brought in the House of Lords, and the Judgment of this Court was affirmed. The Defendants were certainly right, not to insist upon the By-Law : For if they had, an Information must have gone upon that Point only : But it was only produced as Evidence of Acceptance : But how is this proved by the By-Law ? There is no Reference in it to the Charter, nor is the Charter so made as once mentioned : On the contrary, it seems an Evidence against the Charter ; and the rather, because it was confirmed afterwards by the Commonalty, which had been needless, if the Charter had ever been accepted. *Page*, *Probyn*, and *Lee*, Justices to the same Effect, and Information was denied.

215.—THE KING v. CORPORATION OF SHREWSBURY. [1733-34.]

Mandamus.

Mandamus to restore *Corbet Kynaston*, Esq., to the Office of Alderman. The Corporation returned, that by the Charter the Aldermen were obliged to Residence either by themselves or Families, except in the Time of Plague or other contagious Distemper, and alledged that C. K. Esq., was not resident either by himself or Family for the Space of three Years last past, and that thereupon he was lawfully removed

by the Mayor and Majority of Aldermen duly assembled ; and averred that neither the Plague or other contagious Distemper raged within the Town or the Precincts during that Time.

Strange took several Exceptions to the Return : And first as to the Merits, he said this was a general Exception in the Charter, and not confined to the Town or Suburbs, nor can this be intended the Meaning of the Charter, that a Man should continue Resident, till the Plague, &c., was actually within the Suburbs, and therefore the averring it not to be within the Town and Precincts is not sufficient. The next Exception was in Point of Form, that this did not appear such an Assembly as was intitled to remove. It is only said by the Mayor and Aldermen duly assembled ; but no Averment that Notice was given of their Assembling [283] for this particular Purpose, nor that it was a Charter-day ; though that had not been sufficient ; for it has been held, where the Meeting is of a Charter-Day, and any particular Act is to be done *extra* the general Business of the Corporation, a Summons of the whole Body is necessary. *Hil. 1 G. 1, The King and Strangeways* ; and this cannot be intended from any Thing appearing upon the Face of the Return. The Words of the Return, that he was removed by the Mayor, &c., duly assembled makes no Difference : for whether duly assembled or not is Matter of Law, and the particular Manner ought to have been shewn, that the Court might judge whether this was such an Assembly as had legal Power to remove : As in Convictions upon the Game Act, where the Words are general (*the Defendant was convicted according to Law not being duly qualified*), has been held naught ; for the particular Circumstances of his Disqualifications ought to have been shewn. He further objected, that as there was no Summons of the whole Body, so neither was there Notice given to the Defendant : And to remove a Man from his Freehold without Notice is contrary to natural Justice. In case of Attainder, a particular Time is fixed for the Party to come in, before the Attainder goes ; and this is always held sufficient Notice ; and so in Outlawries, Writ of Proclamation issues to the Sheriff, which the Law looks upon as sufficient Notice. Supposing a Man is serving his King and Country in a publick Employ as Member of Parliament, &c., or in case of Sickness, these are sufficient Excuses to dispense with his Residence : Besides by the Charter, personal Residence is not necessary, for if his Family resides there it is sufficient ; and it does not appear but that his Family was Resident. It has always been held, that Summons or Appearance of the Party : But a Summons without Appearance, or Appearance *sans* Summons, is sufficient : And so was Doctor *Beniley's* Case : For there was neither Summons by the Convocation, nor Appearance on the Doctor's Part, and therefore the Order of Convocation was held naught. And so it is held in *Serjeant Whitacre's* Case, 2 Salk. 535. Want of Notice is cured by Appearance.

Yorke, Ch. J. The Objections that have been taken depend upon the Construction of the Words of the Charter, whether the Restriction to Residence (except in the Time of the Plague, &c.) can be dispensed with, because the Plague is at that Time in some other Part of the Kingdom. The Charter must have a reasonable Construction put upon it, and such a one as will make it consistent with itself, and therefore the Exception must be confined to the Town and Suburbs, or otherwise the Restriction in general would be defeated, and the rather, because of the Words (or any other contagious Distemper) which at some Time or other prevails. As for Instance the Small-Pox is raging in some [284] Part of the Kingdom. The Objections that are made in Point of Form, are, that it does not appear there was a Summons or Notice given to the Defendant : There was no Necessity for either in this Case, for it is expressly alledged, that Mr. *Kynaston* was neither Resident by himself or Family at any Time during the Space of 3 Years : And it has been often resolved, that Summons or other Notice is not to be served out of the Suburbs of the Corporation : If such a Suggestion was necessary, it must have been so in *Serjeant Glide's* Case, Show. 363. But this was made no Objection in that Case. The next Exception is, that this does not appear to be a proper Assembly. By the Charter the Power of Removal is vested in the Mayor, Aldermen, and Assistants ; and in the Return, the Non-Residence of the Defendant is alledged, and that the Mayor and major Part, &c., duly assembled then and there did remove, &c. It has been rightly insisted upon, that this could not be a legal Assembly unless Summons ; but the Question is, whether a Summons is necessary to be alledged in the Return ; in Pleading it is not necessary, but might be given in Evidence at the Trial. The Difficulty that remains with me is, whether there is not a Defect in the Description of the Assembly. It is said to be an Assembly

of the Mayor and major Part only, &c., whereas the Power of Removal is vested in the Mayor, Aldermen and Assistants; and the Assembly ought to consist of the Whole, and not of the major Part only. Suppose this had been in Case of a Return to an Information in Nature of a *Quo Warranto*, would it be sufficient to say that at an Assembly of Mayor and major Part, &c., duly assembled he was elected, &c. As to Dr. Bentley's Case, it appeared by the Return that he was Resident, and therefore the University ought to have shewn a Summons, or an Appearance by the Doctor, to excuse the want of a Summons. Page and Probyn Just. to the same Effect. And Lee, J., agreed that the Return was sufficient in Regard to the Merits or Want of alledging Summons; for it appears he was Non-Resident the whole Time: Sickness may be alledged in excuse, but that is proper to come on the Part of the Defendant: As to what is objected against the Legality of the Assembly, he thought the Return sufficient; for it is said to be by the Mayor, &c., duly assembled; and we cannot by Inference intend it an illegal Assembly in order to vitiate the Return to a *Mandamus*. The Removal appears to be by the Mayor and major Part, &c., which is an Averment sufficient to refuse a peremptory *Mandamus*. Therefore this last Point was reserved to be spoke to again.

[285] 216.—THE KING v. FULLER. [1733-34.]

Conviction.

Conviction for selling distilled Liquors *sans* Licence. Two Objections were taken, That the Conviction was in the præterimperfect Tense, viz. That he has been convicted, and has forfeited, &c. The next Objection was, that there was no Distribution made of the Penalty. In Answer to this last Objection, were cited the Case of *The King and Minton*, Mich. 3 G. 1, and *The King and Chandler*, both Convictions for Deer-stealing; where it was held that *Ideo convictus est* was sufficient without distributing the Penalty. In the present Case, the Court was strong of Opinion to the contrary; and said, that in the Case of *The King and Haws* it was adjudged that the Penalty must be distributed. And therefore the Conviction was quashed without Argument upon both Points.

217.—THE KING and FLOYD, Clerk of the Peace *pro* Com' Cardigan.
Mich. 7 Geo. 2 [1733].

The Quarter-Sessions removed Defendant from his Office upon Examination and a full Proof made of his taking several Sums of Money extorsively in the Execution of his Office. The Order of Removal being return'd by *Certiorari*.

Fazakerly took several Exceptions; and 1st he said, this being in Nature of Conviction, the Evidence upon which he was convicted ought to have been set out upon Record: But here it is only said upon Examination and full Proof, which is not sufficient; for the Court cannot judge whether the Evidence was sufficient Foundation for Conviction. In all summary Convictions the Evidence must appear to this Purpose: Here is a Conviction, but the Defendant must be found Guilty of the Misdemeanors he is charged with before the Sessions can remove him. This is a Power given by 1 W. & M. 21, 6 & 7. And the Punishment runs extremely high, it is no less than a Deprivation of his Freehold. And this is the rather to be considered as a Conviction, because this is a Power which cannot be traversed, and by the Act of Parliament must be upon full Proof: But how must the Court judge in this Case unless the Evidence appears upon Record. Another Objection is, That the Charge against the Defendant is for extorsively taking Fees *colore Officii ad general' Quar' Session' pacis tent' coram Justiciariis (quorum unus)* but does not name the Justices, nor the Time when the Sessions was held. If an Indictment or Order to be returned into this Court, such a general Description as this would be insufficient; and so it was held in the Case of *The King and Harland*; the Indictment was quashed because the Justices were not particularly named, but the Caption was as here, *coram Justiciariis* generally. The Quarter-Sessions is no Court of itself but from Justices sitting there.

Draper cont': All Convictions arise upon penal Statutes where the Informer is to have a Benefit; and therefore Evidence must appear upon Conviction, that this Court may judge upon it whether sufficient to give a Jurisdiction. This is a Proceed-
C. v.—20*

ing at Quarter-Sessions, which is a Superior Court of Record; and the Evidence which is the Foundation of their Judgment is never recorded. It is not said by the Act that either the Examination or Proof shall be reduced into Writing: It is only said that the Examination must be in open Court, which is always *viva voce*. It is objected, that it does not appear when the Quarter-Sessions was held.—Not necessary.—The Removal is for extorsively taking Money, and whether in Sessions or out of Sessions, not material.

Fazakerly: If this is looked upon as a Conviction, whether that Conviction be at the Sessions or out of Sessions is not material: A Conviction before two Justices only, is equally a Conviction in Court of Record as in open Sessions: In many Cases they have a final Jurisdiction, and are the dernier Court of Record, from whence no Appeal lies.

Yorke, C. J. It has always been held in this Court, that in all Cases of summary Convictions, the Substance of the Evidence must be set forth; and so it was held, *Pasch. 13 Ann. Queen and Brown, Queen and Gray, Queen and Handall*, where it was only said, *Sacramentum præstat corporale de veritate, &c.*, which was insufficient. And in Case of *Queen and Green, Hil. 12 Ann.*, it was held the Conviction must not only appear to be upon Oath, but must go further and shew upon whose Oath the Conviction was, & *quod jurat & deponit quod, &c.* The Question is, whether this Case can be materially distinguished, whether a Conviction at Sessions, differing from summary Convictions before private Justices. If this Case was left to ordinary Way of Proceeding at Sessions, it ought to have been by Jury. But the regular Method of Proceeding in these Cases is in a summary Way, and whether by two or more Justices makes no Difference. It is said the Conviction was upon Examination and full Proof, which are the Words of the Act of Parliament; but it is not said this Proof was upon Oath.

Lee, J. The Question in this Case is, whether the Removal in this Case is to be considered in Nature of a Conviction, or an Order of Justices only; for if the latter, not necessary to set out the Evidence. In all Orders of Bastardy, the Evidence is never set out, and yet these may more properly be called Convictions than the present Case.

[287] 218.—THE KING *v.* RUSHWORTH. [1733–34.]

Mandamus.

Mandamus to Bishop of *Litchfield* and *Coventry* to grant Licence to *John Rushworth* to teach School, he being appointed Under-Master of *Coventry* School, founded in Time of *Edw. 3d.* by *John Haines*. It was moved to supersede *Mandamus*, this being a School of a private Nature within Statute of Uniformity, by which Bishops had a judicial Capacity, and therefore this Court could not compel him.

Birch Serjeant, oppos'd this Motion, and said, that teaching was *res mere laica*; that a School-Master is a Lay Employment, and was formerly under the Care of the Civil Magistrate, 2 Salk. 672, *Mathews* and *Burdet*. That no Law or Canon required a Licence till the Council of *Lateran*; that the Canons which made it necessary did not bind the Laity, because never confirmed. That *Mandamus's* had been granted in Cases of an inferior Nature, and in which the Publick was not so much concerned. 1 Sid. 107. *Mandamus* to make one free of a Corporation or Company, 1 Vent. 115. *Mandamus* to Ecclesiastical Court to swear Churchwardens elected by the Parish, 1 Vent. 187. To the Mayor and Aldermen of *London* to give Judgment upon *Stat. 13 Car. 2, c. 11*; 1 Vent. 335. To grant Probate of a Will under Seal after Refusal by Executor, 1 Vent. 143, 153, *Isle's Case*. *Mandamus* to restore a Sexton. It was much doubted at first, because said to be rather a Servant than an Officer, or one that had Freehold in the Place: But upon Certificate that he held it for Life, *Mandamus* was granted. School-Master is a Person of publick Concern, and for that Reason a *Mandamus* should go, 1 Sid. 169. To restore *M.* to the Place of Treasurer of the *New River Water*, and *Mandamus* granted because an Office of publick Concern; and said in that Case that *Mandamus's* have been granted to restore Parish Clerks, School-Masters, Ushers, Fellows of Colleges, &c., *Mich. 1 G. 2, The King* and *Bishop of Litchfield*. Mr. *Lee* moved for a *Mandamus* to restore the School-Master of *Coventry*, and tho' that Case went off for Defect in Affidavits, yet the Court were of Opinion that a *Mandamus* would lie, and advised Mr. *Lee* to amend his Affidavit, *Pasch. 13 G. 1. Mandamus* to license a Lecturer, and tho' it was not granted in that Case,

because a Suit was depending in *Scac'* concerning the Right, yet the Court seemed inclinable that a *Mandamus* would lie. Case of *Vincent and Bishop of London*. It appears by the Writ, that this is a publick School, and is called a Free Grammar School founded in the Reign of *Edward* the 3d., and the Master has a Freehold. In all Cases where a Person has a Temporal Right, the Law gives him a Temporal Remedy, and not suffi- [288]-cient for Bishop to say he has a judicial Capacity, but must shew the Reason of his Refusal. 1 Lev. 75, *Hurst's Case*, *Mandamus* to restore an Attorney ; and in that Case agreed by the Court that *Mandamus* had been granted in Case of a School-Master, Parish Clerk, &c., because Offices of publick Concern.

Y. C. J. Whether *Mandamus* to license a School-Master will lie, has not yet been fully settled. It has been said, that a Licence not necessary ; if so, the Application for a *Mandamus* is to no Purpose : For a *Mandamus* presupposes a Licence necessary, and is to compel the Bishop to grant one. But it has been said, likewise in Opposition to the Motion, that a *Mandamus* does not go, and the Remedy is by Appeal to the Metropolitan, but no Case cited to establish that Doctrine. In the Case of a Lecturer, *Mandamus* has been granted ; and in the Case of *Vincent and Bishop of London* the Court did not refuse it upon the Merits, but because the Right was depending in *Scac'* *Mich.* 4 Ann. *Hollfat and Newcomb*. Said by *Powell*, if Bishops refuse to grant Licence to preach, upon the Act of Uniformity, *Mandamus* will go. In *Carth.* 464, it is held, that Ecclesiastical Court cannot punish a School-Master teaching without Licence, and in that Case a Prohibition was granted : But in 2 Lev. 222, which was a Suit in Ecclesiastical Court for teaching School without Licence, a Prohibition was prayed and granted *nisi* : But afterwards upon Argument, Consultation was granted. *Vide* 3 Keab. *Corey's Case*. In the principal Case, the Court granted the *Mandamus*, that this Point might be fully spoke to upon the Return.

219.—THE KING v. KEMPSON. [1733–34.]

Order of Sessions.

Order of Sessions to compel Defendant to maintain his Son's Widow by Virtue of 43 *Eliz.* This Order being brought into Court by *Certiorari*, Mr. *Abney* took two Exceptions. That by the Order it appears this Case came to the Sessions by Appeal, whereas the Jurisdiction is originally in them, The Statute does not extend to this Case, the Person to be provided for is the Son's Wife, and the Order is made upon the Husband's Father, which is too remote to lay any Obligation upon him to provide for her ; and so was *The King and Munday, Pasch.* 5 G. 1, Order to maintain *Anne Gerram* Widow, *Munday's* Wife's Mother ; and the Order was quashed : But admitting her to fall within the Description of 43 *Eliz.*, yet by her own Act she has depriv'd herself of all Benefit she might have otherwise been intitled to from her Husband or his Relations. She is here said to have eloped from her Husband, and to be an Adulteress ; and so it was held in the Case of *Morris and Martin, Hil.* 12 G. 1, which was an Action against the Husband for Necessa- [289]-ries sold to the Wife ; and upon Evidence it appeared she had eloped, and was an Adulteress ; and though no Proof that Plaintiff had Notice of this from Defendant, yet *Raymond, C. J.*, held the Husband not liable.

Parker cont' : It does not appear this came before the Sessions by way of Appeal, only said upon Appeal of Overseers, &c., against *Samuel Kempson*, but not said to be an Appeal from any original Order ; and the Word *Appeal*, in this Case, means no more than the Application of the Overseers. As to second Objection, he said Defendant was clearly within the Statute, and bound to maintain his Daughter in Law ; and cited 2 Bulst. 345, *Draper* married a Person whose Granddaughter was a Pauper, and the Question was, whether *Draper* should be obliged to give Maintenance to the Child ; and held that he was liable by the Statute : And so is 2 Bulst. 346 ; *Stiles*, 283 ; 1 Keb. 489. That notwithstanding she was an Adulteress, yet the Marriage continues, and she has all her Right. *Salk.* 115 ; *Cro. Eliz.* 508 ; *Moor*, 605.

Y. C. J. It does not appear this came before the Sessions upon Appeal from any Order, the Word *Appeal* may be used and construed in the Sense of a Complaint ; but the great Objection is, whether the Father is obliged to maintain his Daughter in Law by 49 *Eliz.* The charge of Adultery makes no Difference in this Case ; for whatever Privileges she may deprive herself of by her own Act, that cannot turn to the Prejudice of the Parish, and bring a Charge upon them. The 43 *Eliz.* is made

in Ease and for the Benefit of the Parish ; for tho' natural Right obliged Persons to provide for their own Relations, yet there was no compulsory Law before this Statute : This Question has been under the Consideration of the Court before, *Hil. 12 Ann. Queen and Dutton*. Order of Sessions was to compel the Father to maintain his Son's Widow, and in that case Serjeant *Chappell* took the same Objection that is now made, viz. that by the Death of the Son the Relationship fails ; but the Court quashed the Order upon another Objection, because not said that Person upon whom the Order was made was of sufficient Ability. In the Case of *The King and Munday*, it was held, that the Statute only extended to natural Relations ; and that Case was determined upon Argument and full Consideration. The Cases in *Bulst.* and *Stiles*, were at that Time considered ; and *Prat* said in the first Case in *Bulst.* that it was misprinted, and the Word *Not* omitted. For the Substance of the Case is, that he was not to maintain his Wife's Grandaughter. The Case of *Gerrard* (which is the other Case in *Bulstrode*) was not judicial Authority, but a private Opinion only of a Judge at his Chambers, and therefore at that Time the Court considered it as a *res integra*, and quashed the Order. This is a Case which comes up to the present Question, [290] and so concluded that the Order should be quashed. *Page*, *Probyn*, and *Lee* of the same Opinion.

220.—THE KING v. WEEKS. [1733-34.]

Information.

Information in Nature of a *Quo Warranto* was moved for, to shew by what Authority *Weeks* acted as a Burgess of Corporation of *Calme*, in *Wiltshire*. Upon shewing Cause it was alledged, that Defendant had been illegally disfranchised, had applied to this Court for a *Mandamus*, by Virtue of which he was restored, and by the Return, his Restoration appeared to be by the whole Corporation, which was sufficient Authority to empower the Defendant to act. In Answer to this, a Record was produced in Court but not read, being a Judgment of *Ouster* against *Stephens* one of the Burgesses who voted for the Defendant's Restitution.

Cur' : This Record is no Evidence, the Return is by the whole Corporation, and by that it appears that *Weeks* was restored. It is not proper to examine by Affidavits, whether there was a Consent of the Majority. If the Return be false, the proper Remedy is against the Mayor. 2 Salk. 331, 432. It was then objected, that *Weeks* was an Infant at the Time of his Election, and so the Election void. And so it was held *Hil. 3 G. 2, King and Duke of Bedford*, Governor of *Bedford Levels*, in which Case an Information was granted upon the same Objection. Answer : The Reason of that was, because he acted under Age, but Question is whether the Election be void. Marsh. 40. An Infant may be Mayor, and in the Case of *Young and Taylor* ; it was held that Corporation Acts by an Infant Mayor are good, and the Distinction made in these Cases is, where the Infant executes a judicial Authority, and where a Ministerial one. The Law for several Purposes takes Notice of the Age of Infants. He may contract Matrimony at the Age of 12, at 14 he may chuse his Guardian, at the same Age he may sue his Guardian by Soccage to account as Bailiff. So an Infant Papist must take the Oaths of Allegiance and Supremacy at the Age of 18, or he loses his Estate. 11 & 12 W. 3, c. 4.

Cur' : Before we determine the Law in these Cases, it is proper an Information should go to try the Fact.

221.—BRASSEY v. DAWSON. [1733-34.]

Bankrupt, Land-Tax. S. C. 2 Str. 976.

J. S. Collector of the Land Tax became a Bankrupt, but before Commission was taken out, the Defendant by Virtue of a Warrant from the Commissioners of Land Tax took his Goods [291] in Execution ; the next Day a Commission of Bankruptcy was had, and Assignment made to Plaintiff, who has brought Trover against *Dawson*, who had the Goods in Execution as above. Upon Trial, before *Raymond*, C. J., two Questions arose, for Opinion of Court : Whether the Goods were bound from the first Act of the Bankruptcy, or from the Time of suing out the Commission. And 2dly, Whether the King's Prerogative was included within the general Rule. Serjeant

Darnell insisted, that by Assignment the Assignee had a Property by Relation from the Time of the Bankruptcy. That this was a general Law and bound all Parties, and cited the Case of *Andrews* and *Sir Mathew Decker, Pasch. 3 G. 2. 3 Lev. 69, 191, Philips and Thompson.*

Serjeant Eyre cont' : Before Assignment the Property was not divested but remained in the Bankrupt. That Execution in this Case was in Nature of an Extent, at the Suit of the Crown, which cannot be defeated by any Matter *ex post facto*. That this was by Virtue of the King's Prerogative, who shall be preferred in his Debt; that this Prerogative is by the Common Law, and is not taken away or abridged by any Act of Parliament. That neither Statutes Merchant nor Staple nor a Bankruptcy mention the King, and therefore he is not bound by them. 3 Keb. 14; Sir W. Jones, 203, *Awdley and Halsey*, and this appears plainly by 21 *Jac. c. 19*, which impowers Commissioners to proceed when Bankrupt by Fraud makes himself Accomptant to the King. In all Cases where the Crown is intitled, no Difference between an Extent and a Distress executed at the Suit of the Crown, and an Extent is of that Nature, that after it is once served, though not compleatly executed, yet it defeats all Mesne Acts done by the Conusor in the Interim. Sir W. Jones, 202. It is true the Assignee in some Respects is in by Relation from the Bankruptcy, so as to avoid all Mesne Acts, but not so as to be actually invested with the Property. And of this Opinion was Holt, C. J., Salk. 111. He cited 3 *G. 2, fo. 25*. Goods bound in whatever Hands found, and the Act of Parliament which gave the Land-Tax had altered the old Law.

Darnell. The Prerogative does not come in Question in this Case, for Insufficiency of the Collector does not affect the Crown: The Parish, &c., remains liable, and the Statute gives them a Remedy against the Collector by subjecting his Estate in Satisfaction to them.

Yorke, C. J. There are two Questions which arise upon Construction of this Case. Whether this is to be considered in the Case of a private Person, or as a Case which concerns the King's Prerogative. If it is looked upon as the Case of a private Person, though Commissioners of Bankrupt have no Property in the Bankrupt's Effects, but only a Power to vest them in the Assignee, yet after Assignment, the Assignee has a Property from [292] the very Time of Bankruptcy. Where Plaintiff sues out Execution previous to any Act of Bankruptcy, and this Execution is compleatly executed, the Goods sold and Money paid to Plaintiff, and after that there is an Assignment made, the Relation which it has to the Time of Bankruptcy shall not defeat all this. *Sed Quære* 3 *Lev. 191*. But where Execution is not compleated, but the Goods remain in Officers Hands, they are subject to the Commissioners of Bankrupts. In the present Case the Execution was not compleated, but the Officer was in Possession at the Time of the Assignment, and therefore if this Case was considered as between Party and Party only, the Plaintiff must have Judgment: But the second Question is a Case of much greater Consequence, wherein the King's Prerogative is concerned. There is no Question, but the Land Tax is the Property of the Crown, and after it is collected becomes in Point of Law the King's Money. The Power of distraining upon the Collector by a Warrant from the Commissioners, is a summary Remedy given by the Act of Parliament in favour of the Crown. But if this Method of Proceeding should be under the Controul of the Bankrupt's Act, it would put the Crown in a worse Condition than it was before. For in Case of an Extent, the Goods are bound from the Teste, and a Commission of Bankrupts cannot break in upon it, and this is with great Reason: For the Crown cannot come in upon the Bankrupt's Act and claim a Dividend. It is said that this Case does not affect the Crown, because the Parish remains liable; but that makes no Alteration in the Nature of this Case. It is the King's Money, and the Parish only remains as so many different Securities. *Vide* Case of *Perry and Crispin*, Salk. 108, and 1 *Vent. 360*; *Perry and Rogers*, Skin. 30; *Cro. Car. 109*; *Show P. C. Case 72*; 2 *Roll. Abr. 157*; *Hob. 222*.

222.—THE KING v. GRIFFIN. [1733–34.]

Information.

Information was granted upon this Case; a Workhouse was erected at *Lambeth*, and the Government thereof vested in Trustees: Afterwards Disputes arising between them and the Parishioners, Defendants fixed up Notice in the Church purporting

that Parishioners would meet on *Thursday* to consider of and inquire into the Management of the Workhouse. Upon this, the Trustees likewise fixed up Notice in the Church that the former Notice was not given by the Direction of the Trustees appointed by Vestry, and that the said Trustees designed to continue their Meetings on *Sundays* as usual. In answer to this, Defendants fixed up a third Paper, that notwithstanding the said Notice by the said Trustees, the Parishioners did intend to meet on *Thursdays* to enquire into the several Abuses permitted and suffered [293] to be committed by Virtue of the pretended Authority of the said Trustees, and it was upon these last Words that the Information was grounded. This Case was afterwards tried and the Defendants found guilty. It was now moved in Arrest of Judgment, and two principal Objections were taken. 1st, That the Matter contained in the Notice was not libellous; and 2dly, That the Manner and Form in which the Information was laid was not good. As to the first Objection, it was said, that a Libel is a malicious Defamation of a Person of another, tending to blacken and asperse his Reputation. Here is no Charge of any particular Crime or Offence in this Information, all that is said is, that several Abuses were suffered and permitted, &c., which must necessarily happen where so many Persons are intrusted with the Management of an Affair of so publick a Nature. The Management of the Workhouse is an Affair which concerns the Parish, and therefore the Parish has a Right to enquire into all Abuses: Abuses may be suffered and permitted, and yet those Abuses not scandalous. The Statute provides that all Persons receiving Relief from the Parish shall wear Badges. *Vide* 8 & 9 W. 3, c. 30. Supposing then a Person not wearing a Badge is relieved, this is an Abuse, and yet surely such an Abuse is not infamous. As to the second Point several Objections were made, First, that there was only three Trustees named in particular in the Information, *viz. E. Dawson, R. Dawson, and J. Theobald*, and all the rest are mentioned generally, *et alii Fiduciarii*, which is not sufficient; for in Informations of this Nature, not only Persons offending, but the Persons offended must be mentioned particularly. *Bro. Abr. Tit. Indictment*, p. 21; *Show.* 389, 390; *Carth.* 226; 2 *Leon.* 39; 2 *Lev.* 208. By the same Reason that three only may have an Information, all the rest may have separate Informations, and so create Multiplicity of Suits, and Defendants be punished *ad infinitum pro uno delicto*. 2dly, It is said they acted as Trustees, &c., but not shewn *quo jure*, as they ought to have done. *Allen*, 78. For if they usurped their Authority, or were not *Legiti modo constituti*, they are not Trustees. 3dly, The *Stat. 9 G. c. 7*, which enables the Churchwardens and Overseers of the Poor with Consent of Parishioners in Vestry to erect Workhouses, gives them no Power to appoint Trustees, and of themselves, they cannot delegate such Authority. *Lane*, 21. It is only alledged generally, that a Workhouse was erected, but does not shew how, whether by Consent of Parishioners or major Part of them: It does not appear that a Vestry was convened, nor that it was erected for Support and Maintenance of the Poor. But the last and principal Objection was, that it is not averred that the Persons mentioned in the Information, are the Persons described in the Notice: For the Notice upon which the Information is grounded, is relative to the Notice fixed up by the Trustees. For the Words are, notwithstanding [294]-ing such Notice fixed up by the Trustees aforesaid, which Words are relative, *viz. to the Trustees appointed by Order of Vestry*, and the Trustees in the Information are called Trustees appointed by Consent of the Parishioners: How then do these Trustees appear to be the same? It ought to have been averred that they are the same, for the Court cannot intend them the same, be the Inference ever so natural; this was argued by Mr *Hayward* as a fatal Objection. But notwithstanding these Objections the Court unanimously gave Judgment for the Prosecutors.

Yorke, C. J. said, There are two Objections made to the Information, that the Matter is not in itself libellous, the other is to the Manner and Form as laid in the Information. As to the first, that depends upon the Paper itself, and that appears to contain scandalous Matter and to be libellous; and this may be considered two Ways, either as to Persons acting in a publick or a private Capacity. Where Persons act as publick Magistrates, every Charge of Abuse in the Execution of that Office is libellous. It is an Offence of a publick Nature, and does not only tend to a Breach of the Peace as reflecting upon their Persons in particular, but is also a Reflection upon the Government, which establishes and supports that Authority; but this is not the present Case. This does not appear to be a Workhouse erected by the publick, and therefore must be taken to be a private Workhouse erected by Charity, and the particular Govern-

ment thereof vested in Trustees, but it being a Trust of a private Nature does not alter the Offence ; for any Charge of an infamous Nature against Persons acting in a private Trust is libellous, and tends to a Breach of the Peace likewise, and therefore Prosecutions of this Nature have always been encouraged to prevent that vindictive Method, which otherwise the Party injured might pursue in order to gain himself a Satisfaction. It is said indeed, that here is no particular Charge, but only that Abuses have been suffered and permitted : But this is in itself a Charge, and is aspersing the Trustees as the Cause and Instruments of such Abuses. It has also been argued, that the Defendants are Churchwardens and Parishioners, and therefore have a Right to enquire into the Abuses of the Parish, &c. No Doubt of it, and if the Case had been so, it might have required further Consideration, and would have been proper Evidence at the Trial: But nothing of this appears in the present Question, and we cannot intend them to be so. As to the second Point, it has been objected, that all the Trustees are not particularly mentioned. Here are three, *viz. E. Dawson, R. Dawson, and Ja. Theobald*, and if the Words following (*Et alii Fiduciarii*) had been omitted, yet the Information had been good. This indeed might have been an Objection in an Action upon the Case, but in Indictments and Informations which are at the Suit of the Crown, a Person cannot be punished twice ; for a former [295] Judgment may be pleaded in Bar to a Prosecution of the like Nature. The only Objection which seems to have any Weight is the last, but that has been fully answered by Mr *Fazakerley*, for the *Fiduciar' prædict'*, is not relative to the Trustees described in the Notice, but to the Trustees before-mentioned in the Information, and there is that in the Information which amounts to a positive Averment ; for the Words are *de et concernent'* the said Trustees, and though they are not exactly described in the Information in the same Manner as in the Libel, yet there is no seeming Inconsistency : For Trustees appointed by Vestry, must be Trustees appointed by Consent of Parishioners in Vestry, and so no Repugnancy or Contradiction in the Description. There was a Case cited by the Court, the Case of the *King and Horne, Trin. 11 W. 3*, which was an Information for publishing a Libel, called the Ladies Invention ; this the Jury found to be a Libel, but against what Persons, was unknown, and the Court held that the Information was not good.

223.—THE KING v. INHABITANTS OF RIPON. [1733–34.]

Order of Removal.

The Sessions discharged an Order of Removal brought before them by Appeal, and the Order of Discharge was in these Words.—It is ordered that the Order of Removal be discharged, without giving any Reason, or alledging it to be upon hearing of the Parties.

Cur' : It appears this Order came to the Sessions by Appeal, which gives them an undoubted Jurisdiction ; and there is no Necessity for setting out the Reason of their Judgment : We never do it in this Court, and therefore this Motion made by Mr. *Parker* was denied.

224.—DARBY v. POOL. *Mich. 8 Geo. 2* [1734].

Debt upon Bail Bond.

Action of Debt upon a Bail Bond taken in the Marshalsea Court, the Defendant craved *Oyer* of Condition only and not the Bond, and then pleaded *Stat. H. 6*. That no Sheriff, under Sheriff, or under Officer, &c., should take a Bail Bond but in the Name of his Office, and then goes on, &c., and says that the Defendant being in Custody, the Plaintiff took a Bond in the name of *Burleigh*. Plaintiff replies, that at the Time of making the Bond he was Sub-marshal, and then goes on and sets forth by Way of Inducement, that the Bond was taken by *Burleigh vigore Statut. and secundum formam and Effectum, &c.*, and then traverses that the Bond was taken by *Darby modo et forma, &c.*, and upon this Issue is joined, and Verdict for Plaintiff. It was now [296] moved in Arrest of Judgment that the Bond was taken by *Darby* in the Name of *Burleigh*, whereas by the Express Words of the Statute it ought to have been taken by the Officer in the Name of his Office.

Mr. *Fazakerly* for Plaintiff : The Replication is good, the only Objection is to what is alledged by Way of Inducement, which is not material ; the Defendant pleads that the Bond was taken out by *Darby* in the Name of *Burleigh* ; this the Plaintiff traverses and denies its being by *Darby modo et forma* ; this avoids the Fact which is alledged in the Defendant's Plea, and upon this Point the Parties were at Issue, and Jury found it for the Plaintiff. The Defendant in this Case craved *Oyer* of the Condition, by which Means the Plaintiff was deprived of the Benefit of setting out of the Bond, which otherwise he might have entered at large upon the Record, and by that Means he would have avoided the Defendant's Plea of the Statute, because then it would have appeared the Bond was taken in the Name of his Office, as in *Carth.* 301, 302 ; *Lutw.* 680.

Mr. *Denison cont'* : The *Stat.* 23 H. 6, cap. 10, is set out and made Part of the Record, and it appears by the Statute, that the Bond must be taken in the Name of his Office, or otherwise it is void, but as the Bond is pleaded in this Case, it does not appear to be taken according to the Statute, and this Defect is not aided by Verdict ; for where a Matter is of Substance and essentially necessary to be set forth, the Omission is not cured by Verdict, and to this Purpose he cited 2 Saund. 177. Supposing the Plaintiff should bring an Action of Covenant, and should not alledge sufficient Breach to intitle him to his Action, a Verdict will not aid him in that Case, but it shall be taken as a void Issue. The Issue is only here whether the Bond was taken by one Man or the other, but it doth not appear to be taken according to the Statute, and the Court cannot now intend it to be so taken.

Benny, pro Quer' : There is no Objection to the Bond itself with Respect to its Form : the chief Objection is, that it was not taken in the Name of his Office, but this is sufficiently set forth in the Replication, for there the Plaintiff avers that he was an Officer and Sub-marshal of the Court, and that he took the Bond *secundum formam et effectum, &c.*, and cited 1 Lev. 254, *Lenthal* and *Crook*, 1 Saund. 156 ; 10 Rep. 100, *Sir William Drury's Case*.

Raymond, Chief Justice. The Replication in this Case is cured by the Verdict. The Defendant pleads the Statute, and that the Bond was taken by a Third Person in the Officer's Name. This he traverses by setting forth he was Sub-marshal and took the Bond *vigore Stat.* and *secundum formam et effectum, &c.*, *absque hoc*, that he took it *modo et forma*. Though the Inducement to the traverse is short, yet it being after Verdict is aided by [297] the Words *secundum formam, &c.*, *Statut'*, which must imply he took the Bond in the Name of his Office. The Defendant should have craved *Oyer* of the Bond and then it would have appeared upon Record, how taken.

Probyn, Justice. The Plaintiff in Replication hath followed Defendant's Plea, and traversed the Fact insisted upon by the Plea, and that is found for the Plaintiff. There is nothing set forth in the Inducement that destroys the Replication, and though it is not alledged so fully as might have been, yet is now cured by the Verdict ; and the *secundum formam, &c.*, implies that it was taken in the Name of his Office as the Statute requires.

Lee, Justice. The Statute is here pleaded, and it must appear upon Record that the Bond was taken in the Name of his Office, and this is usually set out in the Declaration. Had the Inducement been out of the Case the Replication had been good, but the Inducement is now become a necessary Part of the Plaintiff's Replication, and the Court must take Notice of it. By this it appears by Plaintiff's Confession, that the Bond was taken by him as an Officer, and a Verdict cannot be found contrary to a Man's Confession ; but the Plaintiff goes further and says, that the Bond was taken by him *secundum formam*, and traverses its being taken *modo et forma* as alledged by the Defendant ; how far the *modo et forma* goes, and whether the *secundum formam, &c.*, will give a Cause of Action is the Question. Supposing in this Case the Defendant had demurred this had been a good Objection. But the Court gave Judgment for the Plaintiff ; *Lee dubitante*.

225.—MANDY v. MANDY. [1734.]

Fee in Reversion.

The Case in Effect was no more than this. *Venterus Mandy* being seised in Fee of the Reversion of several Messuages expectant upon two several Terms for Years, out of which was reserved a Ground Rent of £29 *per Annum*, and having several Sons

and Daughters, devised to them and their Heirs severally, the several Rents of 6, 7, and 9 Pounds *per Annum*, issuing out of the Ground Rents. He likewise devised to his eldest Son £5 *per Annum*, and taking Notice in this Will of the Undutifulness of his first Son, declared it his Intentions, that he should take no more of his Estate than what was expressly devised to him; and whether the Reversion in Fee expectant upon the Lease for Years passed by this Devise to his several Children was the Question.

Serjeant *Baines*. If the Testator in this Case had devised the Rents and Profits of his Estate, that undoubtedly had been an equivalent to the Devise of the Lands themselves and the Reversion would have passed. But here the Rent only is devised, and [298] therefore nothing shall pass but the Rent itself, for Rent is not a sufficient Word by the Statute of Wills to pass Lands by, and he cited *Moore*, 460, *Derick* and *Kery*; but note this Case is reported *aliter* in the same book, fo. 771, and with this last Report agrees *Crook James*, 104. But in the present Case the Testator hath not devised to his Children all his Rent, nor hath he given in express Terms the Ground Rent itself which might have been an Indication of his Intent, but he hath only given an annual payment issuing out of his Ground Rents, nor is the Rent in question reserved upon one single Demise, but issuing out of several Leases which have different Determinations. Besides here is no particular Rent devised, nor what House each Devisee shall have; so that should the Reversion be construed to pass by this Devise, it will make great Confusion how to apportion. He likewise cited *Cro. Eliz.* 637, 651; *Moor*, 549; 1 *Leon.* 315. He also said there was a difference between a Rack Rent and a Ground Rent; a Rack Rent always includes the whole Profits, but a Ground Rent seldom includes a tenth Part.

Serjeant *Eyre cont'*. The Reversion in Fee expectant upon the several Leases will pass by the Devise for two Reasons; First, because it plainly appears to be the Intent of the Devisor, that the Inheritance should pass, and 2dly, because the Words themselves are sufficient and amount to a Disposition of the Reversion. The Intention of the Testator appears from the words of the Will. *Item*, 'Concerning the Disposal of *all my worldly Estate*, my Will is, &c. These Words of themselves are sufficient to create a Fee. 2 *Vern.* 715. He likewise gives an express Estate to his eldest Son, and there are negative Words to shew his Intentions, that he should take no more than what was particularly devised to him. The Limitation to his Children is to them and their Heirs for ever, which is inconsistent with a determinable Estate, and therefore it must be his Intention, that the Reversion expectant upon the Leases should pass likewise. Secondly, He argued that the Words in themselves are sufficient in a Will to convey the Inheritance. By the Conveyance of a Rent at Common Law nothing passes but the Rent, but in Wills it is different, for the Statute of Wills does not tie a Man up to any set Form of Words, as Conveyances at common Law do, and therefore if a Man by Will conveys all his Estate the Reversion in Fee passes. So if a Man devises away all his Livelihood, all his Inheritance, &c., this is sufficient to convey over the Fee. *Owen*, 30; 2 *Lev.* 41; 3 *Leon.* 165; *Stiles*, 178. And the Case in *Moor*, 771, is a strong Case, that by a Devise of Rent the Reversion passes. This Case is mentioned in *Duke on Char' Uses*, 72, and in *Cro. Jac.* 104, and the Circumstances of both Cases are alike; in both Cases a Rent is devised issuing out of a Term for Years. There the Words of the Will are, As to the Disposal of all my [299] Lands and Tenements; here the Words are, As to the Disposal of all my worldly Estate; there an Estate for Life was given, and here it is to his Children and their Heirs for ever. It is held in 1 *Vent.* 322, that by a Devise of all his Rents, a Reversion expectant upon a Lease will pass, and so concluded, that first it appeared to be the Intent of the Parties the Reversion should pass, and 2dly, by a favourable Construction that is made of the Words of a Will, the Words are of themselves sufficient to carry the Reversion.

Raymond, C. J. It appears to be the Intention of the Testator to dispose of his whole Estate, the Limitation is to the Children and their Heirs, which could not be if no more was to pass than the bare Rent, for that is determinable upon Leases. The Reversion in this Case cannot go to his elder Son, for he expressly excludes him from taking any more than the particular Estate devised to him. In Deeds it is necessary to make Choice of apt Words of Conveyance, but Wills are always taken favourable, and the Intent of the Testator is to be considered. *Probyn* and *Lee* of the same Opinion.

CASES IN EQUITY during the Time of the Late LORD CHANCELLOR TALBOT. [1733–1738.] Third Edition by JOHN GRIFFITH WILLIAMS, Barrister-at- Law. 1793.

[1] DE TERM. S. MICHAELIS, 7 GEO. II. [1733], IN CURIA CANCELLARIÆ.

Case 1.—TYTE *versus* WILLIS.

5 Dec. [1733].

A. devises lands to J. his wife for life, then to his son H. for life, then to his son G. and his heirs for ever ; if he die, without heirs, then to his two daughters K. and L. This is an estate-tail in G.

George Tyte devised his lands, &c., to his wife *Jane* for life, remainder to his son *Henry* for life, remainder to his son *George* and his heirs for ever ; and if he died without heirs, then to his two daughters *Katherine* and *Jane*.

The question was, Whether *George* took a fee simple, or only estate-tail ? And the case of *Webb and Herring*, Cro. Jac. 415, was cited, to prove that where a devise is to one and his heirs, and if he die without heirs, remainder over to another, who is or may be the devisee's heir at law, such limitation shall be good ; and the first limitation construed an intail, and not a fee, in order to let in the remainder-man : but where the second limitation is to a stranger, it is merely void, and the first limitation is a fee-simple.

[2] *Lord Chancellor*. In this case *George* took only an estate-tail. The difference which has been taken is right ; and the reason of it is, that in the latter case there is no intent appearing to make the words carry any other sense than what they import at law ; but in the former, it is impossible that the devisee should die without an heir while the remainder-man or his issue continue : and therefore the generality of the word *heirs* shall be restrained to *heirs of the body* ; since the testator could not but know, that the devisee could not die without an heir while the remainder-man, or any of his issue, continued. 3 Mod. 123.(1)

(1) 1 Roll. Rep. 398, 399, 436 ; 3 Bulst. 192, 193, S. P. adjudged, and a diversity taken by the whole court when a remainder is limited to a collateral heir, and when to a mere stranger. *Allen v. Spendlove*, 2 Eq. Cas. Abr. 305 ; *Parker v. Thatcher*, 3 Lev. 70 ; *Nottingham v. Jennings*, 1 P. Will. 23 ; *Attorney General v. Gill*, 2 P. Will. 369. *Tilburgh v. Barbut*, 1 Ves. 89, where in a devise to one and his heirs, and if he died without heirs, remainder to his *half brother*, and devise was held a fee, and the remainder void, this being a devise over to a stranger, as the law considers him, and who could not in any wise inherit as heir to his brother (the first devisee). 3 Atk. 617, S. C. S. P. and admitted in *Goodwright v. Dunham*, Doug. 264 ; *Morgan v. Griffiths*, Cowp. 234 ; *Hanson v. Fyldis*, Cowp. Rep. 834.

Case 2.—The Countess of FERRERS *versus* Earl FERRERS. [1733.]

Interest for the rents and profits of an estate, is never decreed : in what cases of an annuity or rent-charge, interest may be decreed or not ; and for what reason ? (1)

One of the points in this case was to this effect :

The countess dowager of *Ferrers* was, by settlement and will of her late husband earl *Robert*, intitled to a jointure estate of £1000 *per ann.* but was kept out of possession by earl *Washington*, the son of earl *Robert* by a former venter, and she now insisted upon the arrears and interest from the time of her husband's death ; comparing it to the case of arrears of an *annuity*, or a rent-charge, which are decreed to be paid with interest.

Lord Chancellor. The arrears of an annuity or rent-charge are never decreed to be paid with interest, but where the sum is certain and fixed ; and also where there is either a clause of entry, or *nomine pœnæ*, or some penalty upon the grantor which he must undergo, if the grantee sued at law, and which would oblige him to come into this court for relief ; which the court will not grant but upon equal terms ; and those can be no other but decreeing the grantor [3] to pay the arrears, with interest for the time, during which the payment was with-held ; but interest for the rents and profits of an estate was never decreed yet, the sum being untirely uncertain. And though it may be said, that the lady is intitled to an estate of £1000 *per ann.* yet that is not sufficiently certain ; being only the perception of the profits of an estate, which are not to be paid at any one certain time, but only as the tenants of the land bring them in ; some at one time, some at another.

(1) The question, "Whether the arrears of an annuity or rent-charge are to be paid with interest," is in some degree discretionary in the court upon consideration of circumstances, and circumstances of weight are, when creditors cannot be paid their debts, if arrears are paid with interest, or when the payment of interest imposes an hardship upon an heir at law. *Morris v. Dillingham*, 2 *Ves.* 176. So the rule of the court for allowing interest for arrears of a jointure is not general, but the court will expect a special case to be made for that, as the being obliged to borrow money, and to pay interest for it, in which, as well as in the case of an annuity given by way of maintenance, the court will allow interest from a reasonable time, and that, whether the annuity is charged upon a real estate, without any power of entry (if in arrear), or is secured upon a penalty to enforce the payment out of a personal estate. *Litton v. Litton*, 1 *P. Will.* 542. *Batten v. Earnley*, 2 *P. Will.* 163. *Robinson v. Cumming*, 2 *Atk.* 411. *Newman v. Culing*, 3 *Atk.* 579 ; 2 *Ves.* 662. *Anon. Stapleton v. Conway*, 1 *Ves.* 428. *The Drapers Company v. Davies*, 2 *Atk.* 212.

Case 3.—MICKLETHWAITE v. CALVERLY and BAKER.

14 Decemb. 1733.

Where the testator had pleaded to a bill, and died before the plea was argued, the executor may plead *de novo* : for the first cannot be argued now.

The plaintiff filed his bill in this cause, to which the defendant *Baker* pleaded ; and before the plea came on to be argued, the defendant died ; the plaintiff revived, and now the same plea came to be argued : But the *Lord Chancellor* was of opinion, that it could not be argued ; but that the defendant's representative must plead *de novo*.

N.B. The reason seems to be, because the representative may have a plea to defend him without denying the merits ; for if an executor or administrator can truly plead *plene administravit* upon a *scire facias* at law (which must always issue in such case) the execution can only be *de bonis testatoris quando acciderint*.—But the answer of the testator, in a court of equity, will bind the executor who has assets.

Case 4.—Lord GLENORCHY *versus* BOSVILLE. [1733.]

[S. C. 2 Wh. & T. L. C. (7th ed.) 763.]

A. devises lands to his sister B. and C. and their heirs and assigns, upon trust, that until his grand-daughter D. should marry or die, to receive the profits, and thereout to pay her £100 a year for her maintenance : the residue to pay debts and legacies.

After payment thereof, in trust for the said D. and upon further trust, that if she lived to marry a protestant of the church of *England*, and at the time of such marriage be of the age of twenty-one or upwards, or if under that age, such marriage be with the consent of the said B. then to convey, with all convenient speed, after such marriage, to the use of the said D. for life, *sans waste* voluntary waste in houses excepted ; remainder to her husband for life ; remainder to the issue of her body, with remainders over ; and upon further trust, that if the said D. die unmarried, then to the use of B. for life ; remainder to the son of his other grand-daughter E. in tail ; remainder to the defendant C. remainder to his first and other sons ; remainder to A.'s right heirs ; and upon further trust, that if D. marry not according to the will, then upon such marriage to convey to trustees, as to one moiety to the use of D. for life, then to trustees to preserve contingent remainders : remainder to her first and every other son, being a protestant, with remainders over ; and as to the other moiety, to the son of his daughter E. in like manner. A. dies, D. attains her full age ; and upon a treaty of marriage with F. applies to B. and C. for a conveyance to herself for life ; remainder to her intended husband for life ; remainder to the issue of her body : B. executes such conveyance, but C. refuses ; D. suffers a recovery of the whole to the use of herself in fee, and then marries F. who made a considerable settlement upon her ; she covenants to settle her estate upon husband and wife ; remainder to the first. &c., sons in tail : remainder to survivor of husoand and wife in fee. They bring a bill to compel C. to convey, &c., decreed (not an estate tail to *H.*) but an estate for life *sans waste*, *ut supra*, as being the intent of A. upon the will with remainders over in strict settlement.

Sir Thomas Pershall devises all his real estate to his sister Anne Pershall and Robert Bosville, and their heirs and assigns, upon trust, that till his grand-daughter Arabella [4] Pershall marry or die, to receive the rents and profits thereof, and out of it to pay her £100 a year for her maintenance ; and as to the residue, to pay his debts and legacies ; and after the payment thereof, then in trust for his said grand-daughter ; and upon further trust, that if she lived to marry a protestant of the church of *England*, and at the time of such marriage be of the age of twenty-one, or upwards ; or if under the age of twenty-one, and such marriage be with the consent of her aunt, the said Anne Pershall ; then to convey the said estate with all convenient speed after such marriage, to the use of the said Arabella for life *without impeachment of waste*, *voluntary waste in houses excepted* ; remainder, after her death, to her husband for life ; remainder to the issue of her body, with several remainders over ; and upon further trust, that if the said Arabella Pershall die unmarried, then to the use of the said Anne Pershall for life ; remainder to the son of his other grand-daughter Francis Ireland in tail ; remainder to Mr. Bosville, the defendant, for life ; remainder to his first and other sons ; remainder to the testator's right heirs ; and upon further trust, that if his grand-daughter marry not according to the directions of his will, then, upon such marriage, to convey the said estate to trustees ; as to one moiety thereof, to the use of the said Arabella for life ; remainder to trustees to preserve contingent remainders ; remainder to her first and every other son, being a protestant, with several remainders over ; and as to the other moiety, to his daughter Ireland's son, in like manner.

[5] Sir Thomas Pershall died in the year 1722, and Mrs. Arabella Pershall in 1723, attained her full age ; and upon a treaty of marriage in 1729, she applies to the trustees for a conveyance of the estate to herself for life ; remainder to her intended husband for life, remainder to the issue of her body ; and such conveyance was executed by one of the trustees : but Mr. Bosville, the other trustee, who was also a remainder-man, refused to convey. However, she having by this conveyance a legal estate tail in one moiety, and an equitable estate tail in the other moiety, suffered a recovery to the use of herself in fee, and in 1730, married the plaintiff, the Lord Glenorchy, who made a considerable settlement upon her ; and as to her own estate, she covenanted to settle

it upon the Lord *Glenorchy* and herself for life ; remainder to the first and every other son of the marriage in tail male ; and upon failure of such issue, to the survivor of the said husband and wife in fee.

The bill was to have a conveyance of the moiety of the said trust estate from Mr. *Bosville*, to such uses as are limited by her in the said covenant ; And the principal question was, whether under the said will the Lady *Glenorchy* was tenant for life or in tail ? Upon which two other questions arose, *viz.* first, whether the words in the will, in an immediate devise of a legal estate, would have carried an estate tail ? secondly, if so, whether the court will make any difference between a legal title, and a trust estate executory ?

Lord Chancellor. I should upon the first question make no difficulty of determining it an estate tail, had this been an immediate devise ; but when you apply to this court for the carrying a trust estate into execution, the doubt is, whether we shall not vary from the rules of law to follow the testator's intent ? which will also bring on another question what is the testator's intent in the present case ?

Upon the second question it was argued for the [6] plaintiff's, that the Lady *Glenorchy* was, under this will, intitled to an estate tail in equity : for, this court puts the same construction upon limitations of trusts in equity, as the law does upon legal estates, and that to prevent confusion. This doctrine is laid down with the strongest reasons by the Earl of *Nottingham* in the Duke of *Norfolk's* case (*Select Cas. in Chanc.* 1) ; and the authority of *Baile versus Coleman*, 2 *Vern.* 670 (1 *P. Will.* 140, *S. C.*), where a trust to one for life, remainder to the heirs male of his body is held an estate tail, has never yet been questioned. So it is held in *Legat and Sewell's* case, 2 *Vern.* 551 (but more fully (1 *P. Will.* 87, *S. C.*) reported in *Abr. Eq. Ca.* 394), where money was given to be laid out in land to one for life, and after his decease, to his heirs male, and the heirs male of the body of every such heir male, severally and successively one after another ; and a case being made for the opinion of the judges, as of a legal estate, they certified it to be an estate tail (1). So in the case of *Bagshaw v. Downes, or Bagshaw v. Spencer*, at the Rolls, *Hill. 6 G. 2*, an executory trust was directed to the judges for their opinion as a legal estate. Upon the same reason do *cestui que trusts* (2) levy fines and suffer recoveries, which are held good in this court. Indeed, in marriage articles, if they covenant to settle to the husband for life, remainder to the heirs of their two bodies, this court will decree a conveyance in strict settlement, if any of the parties apply here ; because the children are looked upon as purchasers : but in a will it is otherwise ; they take through the bounty of the testator, and in such words as he gives it. (*Trevor v. Trevor*, 1 *P. Will.* 622. *Honor v. Honor*, ed. 125. *West v. Erisey*, 2 *P. Will.* 349.)

It was farther insisted for the plaintiffs, that the words *issue of her body*, would make a difference from all other cases ; for, in the statute *de donis*, which created entails, it is said to be a proper word for that purpose, and is used no less than ten times in that statute ; for this the authority of *King and Melling*, (3) 1 *Vent.* 214, 225, and the reason there given, cannot be contested ; which is also an authority in the principal case : for, there it is held, that to one for life, with a power to make a jointure, is much stronger to shew the intent of the testator, than the words *without impeachment of waste*. To A. for life, remainder to the issue of her body, and for want of such issue, remainder over, was held an estate tail in the court of exchequer, in the case of *Williams versus Thompson*, about three or four years ago. *Anders.* 86. To one for life, remainder to the children of his body, is an entail. So in *Wyld's* case, 6 *Co.* 16, and *Sweetapple versus Bindon*, 2 *Vern.* 536. (4)

It was farther argued, that if the remainder in this case to the issue be construed to be words of purchase they must be attended with the greatest absurdity : for, in what manner can the issue take ? All the sons, daughters, and grand-children are issue ; and if they take as purchasers, they must be jointenants, or tenants in common, and that for life only, 2 *Vern.* 545 (*Cook v. Cook*). Which construction can never be agreeable to the testator's intent ; and whatever estate was given in the first part of the will, yet the words, *and for want of such issue, then, &c.*, will give the plaintiff an estate tail, according to the cases of *Langley versus Baldwin*, (5) and *Shaw and Weigh*, *Eq. Cas. Abr.* 184, *Pl.* 28, 29. It was also farther urged, that from the face of the whole will, and by comparing this clause with the other, it appears, that the testator intended the plaintiff, the Lady *Glenorchy*, should take an estate tail ; and that the several clauses in a will are to be taken together, and make but one conveyance ; and that it was a proper argument to prove the intention of the party from the different penning of the several clauses. The person who drew the will knew how to convey, either by

words of limitation or purchase, where there was occasion for it ; for, where he limits the estate to Mrs. *Ireland*, it is in strict settlement by proper words of purchase ; and so, where he limits it to the Lady *Glenorchy*, in case she had married a papist. But farther to shew he well understood the doctrine of conveyances, when he limits by words of [8] purchase to sons not in *esse*, he has put in trustees, to preserve contingent remainders ; which he would certainly have done in this case, had he intended the Lady *Glenorchy* an estate for life only.

For the defendant it was argued, that though, in the construction of wills in this court, uses and trusts are to be governed by the same rules, as legal estates, and that there is but little difference between uses and trusts executed and legal estates ; yet trusts executory, (6) are by no means under the same consideration. In the cases of *Legat versus Sewell*, and *Baile versus Coleman*, the judges were divided in their opinions ; and since that time there is an express authority for the defendant. In the case of *Papillon versus Voyce*, (7) *Hill*. 5 G. 2. So likewise in the case of the *Attorney General* versus *Young*, in the court of *Exchequer* : and the case of *Leonard v. Earl of Sussex*, (8) 2 *Vern*. 526, as also in the case of *Brampston versus Kinaston*, heard at the Rolls in *June* 1728, where an estate was given to be settled upon his grand-child for her life ; remainder to the issue of her body : and when she applied to have an estate tail conveyed to her, she was decreed an estate for life only. And to shew that this court is not tied up to the rules of law in cases of executory trusts, the case of the *Earl of Stamford* versus *Sir John Hobart*, concerning *Serjeant Maynard's* will was cited, (9) where an estate was given to trustees, to convey one moiety to *Sir John Hobart* for 99 years, in case he should so long live, with several remainders over ; and this court decreed the Master should settle the conveyance according to the letter of the will ; but upon exceptions to the Master's report, *November* 19, 1709, it was ordered, that proper estates should be made to support the remainders, that the testator's intent might not be frustrated ; and this resolution was affirmed in the House of Lords. So in all matters executory, this court endeavours to find the intent of the parties, and lets it prevail against the rules of law. In marriage settlements it was never doubted but that this court would carry any [9] words into strict settlement, if the intent of the parties was such ; and so held in the case of *West versus Erisey*, (10) in the House of Lords ; and in that of *Trevor versus Trevor*, *Abr. Eq. Ca.* 387, and the same rules will prevail in all cases executory, whether wills or articles. Besides the present case is very much like that of marriage articles : the testator had all along the marriage of his grand-daughter in view, and intended this will as no more than heads or directions for the trustees in what manner he would have it settled ; and so it remains to be carried into execution by the aid of this court.

Then as to the word *issue*, it is sometimes a word of limitation, sometimes of purchase. There is a case mentioned in *Wyld's* case, 6 *Co.* 16, where *to one and his children*, is held to be an estate tail ; yet, had it been *one for life, remainder to his children*, there can be no doubt but that it had been a bare estate for life. And as to the objection, that the issue, if purchasers, are to take jointly and for life only, Why shall it not be as in cases where the limitation is to the first and every other son ? And where-ever *heirs of the body* are held to be words of purchase, they are construed to the first and every other son.

To make an estate-tail arise by implication upon the words, *and for want of such issue*, has been cited the case of *Langley and Baldwyn*, 1 *Eq. Cas. Abr.* 185. But there is the case of *Bamfield versus Popham*, 2 *Vern.* 427, 449, (11) for the defendant : so the case of *Loddington and Kyme*, 3 *Lev.* 431, (12) and that of *Backhouse and Wells*, 1 *Eq. Cas. Abr.* 184. Besides, it is a general rule, that where an estate is to be raised by implication, (13) it must be a necessary and inevitable implication, and such as that the words can have no other construction whatsoever ; and in the present case, there is the word *issue* mentioned before ; so that these last words must relate to the issue before mentioned : Whereas in the case of *Langley and Baldwyn*, the limitation is to fix sons only ; then come the words, *and for want of* [10] *issue* ; which words could not have relation to any thing before mentioned.

The *Lord Chancellor* had taken time to advise, and to have the opinion of the Judges upon this case : And the same coming now again to be argued upon the same points that had been before the late *Lord Chancellor*,

It was insisted by the plaintiff's counsel, that the Lady *Glenorchy's* marrying a protestant of the church of *England*, at or after the age of twenty-one, or if under that

age, marrying such an one with her aunt's, or in case she was dead, with the other trustees' consent, was a condition precedent; which when performed, would give her an estate tail.—That this intent appeared from the different penning of the several clauses in this will; for, it provides, in case she should not marry such a person as is before described, that she should have but a moiety for life, and trustees are appointed to preserve contingent remainders, none of which are enjoined in case she should marry a protestant of the church of *England*; which shews a difference was intended in case of performance and non-performance of the condition. Then considering it as a legal devise, no doubt but that a devise to one and the issue of his body will make an estate tail; and so it was held in the case of *King versus Melling*, 1 *Vent.* 214, 225, notwithstanding the proviso there, empowering the devisee to make a jointure: So if in this case the land itself had been devised to the Lady *Glenorchy*, it would have made an intail at law; and there is no difference between an intail of a legal estate and of an equitable one. *Wyld's case*, 6 *Co.* 16. Devise to a man and his children, who had then two children alive, the devisee took but for life; but in *King versus Melling*, 1 *Vent.* 214, 225, Lord *Hale* said, that had there been no children living, in that case of *Wyld*, it would have been an estate tail; though children be not so strong a word as *issue*; which in many statutes, particularly the [11] statute *de donis*, takes in all the children. In *Shelley's case*, 1 *Co.* it is said, that if there be a gift to one for life, be it by deed or will, and afterwards comes a gift to the heirs of his body, it is an intail; otherwise indeed, if the limitation be to the heirs male of such heir male, as in *Archer's case*, 1 *Co.* there it would make but an estate for life; because the limitation there is grafted upon the word *heirs*. So in the case of *Backhouse and Wells*, (14) in *B. R.* 1712, 1 *Eq. Cas. Abr.* 184, the devisee took but for life, the limitation being there grafted upon the word *issue*; which for that reason was taken to be only a description of the person in that case; but in *Cazen's case*, *Queen*, 29, and in *Langley versus Baldwin*, 1 *Eq. Cas. Abr.* 185, the estate tail was raised by implication; which shews that an estate tail may pass not only by express words, but by implication also. In *King and Melling* the Lord *Hale* said upon *Wyld's case*, that had it been to the children of the body, it would have passed an intail; and yet none of those cases seem so strong as the present. So in the case of *Cook versus Cook*, 2 *Vern.* 545, it is said, that a devise to one and his children if there be no children living, will be an estate tail.

The exception of waste is next to be considered; and had it not been for that, this would clearly have passed an intail; but this exception varies not the case: For here the estates must disjoin (according to *Bowles's case*, 11 *Co.*) to let in the husband's estate, which must intervene between her estate and that of her issue; and the power of committing waste (voluntary waste in houses excepted) was given only to make her dispunishable of waste during the time she should be tenant for life only; which she must be until her husband's death, by reason of the remainder to him; but not at all to restrain the estate, which the words of the will give her, which is plainly an estate tail. The adding the words, *without impeachment of waste*, can alter nothing; for if she was tenant in tail, she had already in her that power which these words would give her; and the expressing the power which was already in her, could not more abridge her estate (according to [12] the maxim of *expressio eorum, &c.*) than the power of making the jointure did in *King and Melling's case*. In *Langley and Baldwin's case* there were the same words as here; and in that of *Shaw and Weigh*, or *Sparrow versus Shaw*, *Abr. Eq. Ca.* 184, which went up to the House of Lords, the prohibition went not only to voluntary but to all manner of waste, and yet there it was decreed to be an estate tail; which was as much stronger implication, to make the sister to be but tenant for life, than any in the present case. And in *Baile and Coleman's case*, 2 *Vern.* 670, an estate tail was decreed by the Lord *Harcourt*, notwithstanding the power of leasing given to *Christopher Baile*: Nor can the other words, *voluntary waste in houses excepted*, carry the implication farther than the former; since this court will often restrain a tenant for life without impeachment of waste from committing waste, notwithstanding his power; as was declared by the earl of *Nottingham* in *Williams and Daky's case*, 2 *Ch. Ca.* 32, who there said, that he would stop the pulling down of houses, or defacing a seat, by tenant in tail, after possibility of issue extinct, or by tenant for life, though dispunishable of waste by express grant or by trust; and the like has been since done in the case of *Vane versus Lord Barnard*, (15) 2 *Vern.* 733. By comparing this with the other clauses of this will, it appears plainly that the testator did not intend the Lady *Glenorchy* a less estate

than to the other devisees ; but that his design was to prefer her and her issue to that of Mrs. *Frances Ireland*, though *Frances* was dead at the time of the will ; and that her son, who could expect no more favour than his mother could, had she been living, should not have an immediate estate tail, and so a greater estate than she who was intended to be most preferred. It is plain the testator well knew the difference between giving an estate for life and an estate tail, by the different wording of the clauses of this will : In that, whereby he devises the remainder to Mr. *Bosville*, these words are purposely omitted ; and in others he gives the Lady *Glenorchy* several estates, according to the marrying such or such persons, protestants or papists ; and consequently he must be thought to have intended her a [13] greater estate upon her performing than upon her not performing the condition. If therefore these words would create an estate tail at law, the construction will be the same here, since a court of equity ought to go farther than the courts of law ; as was held by Lord *Cooper* in the case of *Legat and Sewell*, 2 Vern. 551 ; 1 Eq. Cas. Abr. 395, and was also held by Lord *Harcourt* in the case of *Baile and Coleman*, 2 Vern. 670, where he takes a difference between cases arising upon wills, and cases arising upon marriage articles ; where the persons being all purchasers, the agreement is to be carried into stricter execution than in the case of a will ; where the parties being but volunteers, the words must be taken as you find them. The same is held *totidem verbis* in the case of *Sweetapple* versus *Bindon*, 2 Vern. 536, where it is said, that in a devise, all being volunteers, the devisee's estate is not to be restrained ; nor is there any argument to be drawn from this being an executory trust, since the case of *Baile* versus *Coleman* was such, and looked upon as such by the Lords *Cowper* and *Harcourt*. And the case of *Leonard* versus *Earl of Sussex*, 2 Vern. 526, is widely different from ours ; for, there was an express injunction that it should be settled in such manner as that the sons should never have it in their power to bar the issue.

It was argued for the defendant by Mr. Attorney General, Mr. Verney, and Mr. *Fazakerly*, that the Lady *Glenorchy* could take but an estate for life ; and they took a difference between the present case, being of an executory trust, and those of *Cozens*, and of *Cook* versus *Cook* ; which were legal estates, and executed. The resolution in *Sonday's* case, 9 Co. 127 b (which was likewise of a legal estate), was chiefly founded upon the proviso, restraining the son or his issue from aliening ; which made the argument that he was intended by the testator to be tenant in tail ; since if he had been but tenant for life, the restraint had been vain and needless. In the case of *Langley* versus *Baldwyn* an estate tail was raised by implication upon the words, *if he die* [14] *without issue male* ; because the devise extending no farther than the sixth son, no son born after could have taken ; but the heir at law must have been preferred : whereas his intent was to provide equally for all his sons ; and therefore the raising an estate tail by implication (besides that it was in the case of a legal estate) was carrying the testator's intent into execution. The case of *King* versus *Melling* has indeed gone very far ; but has always been looked upon as the *ne plus ultra*, beyond which no court would ever go. This appears from the resolution in the case of *Backhouse* versus *Wells*, where the party's intent prevailed against the doctrine now insisted on : but it is said, the word *issue* is always a word of limitation. In that of *Sweetapple* versus *Bindon*, the words did of themselves carry an estate tail, and there was no intent appearing to the contrary. And in *Legat* versus *Sewel*, one judge was of opinion it was but an estate for life ; and that case was afterwards agreed.

The difference which was insisted on in the former argument, and is still strongly relied on for the defendant, between legal estates and trusts executed, and trusts executory, is evident, and appears plainly from the Case of *Leonard* versus *Earl of Sussex* ; where the words were much stronger to create an estate tail than they are here ; but yet in that case the court declared, that it being a trust executory, the provision should be looked upon as strong for the benefit of the issue, as if it had been in marriage articles ; and that the testator's intent (appearing by the subsequent words, *that none should have power to dock the intail*) should be observed, therefore decreed but an estate for life. This difference appears likewise from the cases of *White* versus *Thornborough*, 2 Vern. 702, and *Trevor* versus *Trevor*, Eq. Ca. Abr. 387, and from that of *Papillon* versus *Voyce*, Hil. 5 G. 2, which is not distinguishable from our case, except that there were trustees appointed in that case to preserve contingent remainders, which are not in this : but notwithstanding that provision, the late Lord Chancellor declared in that case, that the [15] limitation, had it been by act executed, would have created an

estate tail ; but that the trust being executory, and to be carried into execution by the assistance of this court, he would keep the parties to the observance of the testator's intent ; which plainly governs the present case ; and by all those it appears that the testator's intent is as much to be observed in cases of executory, as of marriage articles. If therefore the testator's intent is to be observed, and that no words which may have any operation are to be rejected, it plainly appears from this and the other clauses of this will, that Sir *Thomas Pershall* intended this lady only an estate for life. It is true indeed, that the word *issue* in a will is generally a word of limitation, and creates an estate tail ; but that is only where no intent appears to controul it : And in every clause of this will, where he intends only an estate for life, he mentions the words *for life* ; and where he intends an estate tail, there is not a word mentioned of *impeachment of waste* ; which shews he knew what he was doing when he inserted this exception, and was not ignorant of the operation these words would have on the several estates. And these words were, in the case of *Loddington versus Kyme*, 3 *Lev.* 431, taken to be a strong implication of the testator's meaning to give but an estate for life, notwithstanding the other words, which seemed to carry an intail. Nor is there any colour for what has been insisted on for the plaintiff, that the power of committing waste, with the restraint of voluntary waste in houses, was designed only to attend on her estate for life, till by her husband's death she should come to be tenant in tail ; since no more could be meant by it than to restrain her from defacing or pulling down houses while she was in her husband's power, the testator not knowing who her husband might be. This power of committing waste has been compared to the power of leasing in the case of *Baile versus Coleman*, tho' they are widely different ; nor can it be compared to that of making a jointure in *King and Melling's* case : for, since tenant in tail cannot make a jointure without a recovery, the power was as proper to [16] be annexed to an estate tail as to an estate for life ; which was one of the reasons of Lord *Hale's* opinion in that case. In our case, to serve the intent of restraint of waste in houses, she must be decreed but an estate for life ; if it be an estate tail, she will be enabled to commit waste in houses as well as in all the other parts of the estate, notwithstanding any restraint to the contrary : nor will the answer that has been given to this, that she might be restrained in this court, avail ; since no instance can be shewn where a tenant in tail has been restrained from committing waste by injunction of this court.

[Lord Chancellor. That was refused in Mr. *Saville's* case of *Yorkshire* ; who being an Infant, and tenant in tail in possession, in a very bad state of health, and not likely to live to full age, cut down by his guardian a great quantity of timber just before his death, to a very great value ; the remainder-man applied here for an injunction to restrain him, but could not prevail.]

The other objection, that Sir *Thomas Pershall* could never intend the Lady *Glenorchy* a less estate than the children of his other grand-daughter *Frances Ireland*, turns rather against the plaintiff ; for, the testator's intent was to provide for the Lady *Glenorchy's* children, preferably to those of *Frances Ireland* ; and therefore he makes the lady herself but tenant for life, and her children tenants in tail. Nor is any thing more common than to limit an estate for life only to the first taker ; by which the intent of providing for children is better answered than if the first taker was made tenant in tail : nor will there in this case follow the inconvenience that has been mentioned ; by making the issue to be purchasers, *viz.* that the issue must take jointly, and take estates for life only ; for if issue be *nomen collectivum*, as has been insisted for the plaintiff, why may it not be so, as well where they take by purchase, as where they take by limitation ? especially where the testator's intent, that they should take successively, and by seniority of birth, is as [17] well served by their taking one way as the other ? And if the word *issue* (16) be tantamount to the word *heirs*, as it has been agreed to be, they have answered themselves. In the case of *Burchet versus Durdant*, (17) 2 *Vent.* 31, and in 2 *Lev.* 232, by the name of *James versus Richardson*, the words *heirs of the body* were held to be words of purchase, by reason of the words *now living*, which came just after, and yet were at the same time determined to carry an estate tail, the word *heirs* being *nomen collectivum* : And if so in case of a legal estate executed, much more ought this construction to hold here ; this will being meant by the testator only as heads of a settlement to be made ; and so may well be thought not to have been so accurate in the wording as if the conveyance were then

to have been drawn up with advice of counsel, and all other assistances to make it formal.

Lord Chancellor Talbot. Several observations have been made on the different penning of the several clauses of this will, from which I think no inference can be drawn ; the testator having expressed himself variously in many if not in all of them. It is plain, that by the first part of this will he intended her but an estate for life till marriage ; then comes the clause upon which the question depends. But before I give any opinion of that, I must observe, that the trustee has not done right ; for nothing was to vest till after her marrying a protestant : the trustee therefore, by conveying, and enabling her to suffer a recovery before marriage, which has been done accordingly, has done wrong.

But the great question is, What estate she shall take ? And first, considering it as a legal devise executed, it is plain that the first limitation, with the power and restriction, carries an estate for life only ; so likewise of the remainder to the husband : but then come the words, *remainder to the issue of her body*, upon which the question arises : the word *issue* does, *ex vi termini*, comprehend all the issue ; [18] but sometimes a testator may not intend it in so large a sense, as where there are children alive, &c. That it may be a word of purchase is clear from the case of *Backhouse* versus *Wells*, and of limitation, by that of *King* versus *Melling* ; but that it may be both in the same will, has not, nor can be, proved. The word *heirs* is naturally a word of limitation ; (18) and when some other words expressing the testator's intent are added, it may be looked on as a word both of limitation and purchase in the same will ; but should the word *issue* be looked upon as both in the same will, what a confusion would it breed ! for the moment any issue was born, or any issue of that issue, they would all take. The question then will be, Whether Sir *Thomas Pershall* intended the Lady *Glenorchy's* issue to take by descent or by purchase ? If by purchase, they can take but for life, and so every issue of that issue will take for life ; which will make a succession *ad infinitum*, a perpetuity of estate for life. This inconvenience was the reason of Lord *Hale's* opinion in *King* and *Melling's* case, that the limitation there created an estate tail. It may be, the testator's intent is by this construction rendered a little precarious ; but that is from the power of the law over men's estates, and to prevent confusion. Restraint from waste has been annexed to estates for life, which have been afterwards construed to be estates tail. I do not say that where an express estate tail is devised, that the annexing a power inconsistent with it will defeat the estate : no, the power shall be void. But there the power is annexed to the estate for life, which she took first ; and therefore I am rather inclined to think it stronger than *King* and *Melling's* case, where there was no mediate estate, as there is here to the husband ; there, there was an immediate devise, here a mediate one : so the applying this power to the estate for life carries no incongruity with it. As the case of *King* and *Melling* has never been shaken, and that of *Shaw* and *Weigh*, or *Sparrow* and *Shaw*, which went up to the House of Lords, was stronger, I do not think that courts of equity ought to go otherwise than the courts of law ; and therefore am inclinable to think it an estate tail as it would be at law.

[19] But there is another question, *viz.* How far in cases of trusts executory, as this is, the testator's intent is to prevail over the strength and legal signification of the words ? I repeat it, I think in cases of trusts executed or immediate devises, the construction of the courts of law and equity ought to be the same ; for, there the testator does not suppose any other conveyance will be made : but in executory trusts he leaves somewhat to be done ; the trusts to be executed in a more careful and more accurate manner. The case of *Leonard* and the *Earl of Sussex*, had it been by act executed, would have been an estate tail, and the restraint had been void ; but being an executory trust, the court decreed according to the intent as it was found expressed in the will, which must now govern our construction. And though all parties claiming under this will are volunteers, yet are they intitled to the aid of this court to direct their trustees. I have already said what I should incline to, if this was an immediate devise ; but as it is executory, and that such construction may be made as that the issue may take without any of the inconveniences which were the foundation of the resolution in *King* and *Melling's* case ; and that as the testator's intent is plain that the issue should take, the conveyance, by being in the common form, *viz.* to the lady *Glenorchy* for life, remainder to her husband the lord *Glenorchy* for life, remainder to their first and every other son, with a remainder to the daughters, will best serve

the testator's intent. In the case of *Earl of Stamford and Sir John Hobart*, Dec. 19, 1709, it appeared, that for want of trustees to preserve the contingent remainders, all the uses intended in the will and in the act of parliament to take effect, might have been avoided; and therefore the Lord Cowper did, notwithstanding the words of the Act, upon great deliberation, insert trustees. In the case of *Legat and Sewell*, the words, if in a settlement, would have made an estate tail; and in that of *Baile and Coleman* the execution was to be of the same estate he had in the trusts, which in construction of law [20] was an estate tail. Nor is the rule generally true, that in articles and executory trusts different constructions are to be admitted; the late case of *Papillon and Voyce* is directly against this; and it seems to me a very strong authority for executing the intent in the one case as well as the other. (*Vide* all the principal cases on limitations of this nature, collected and arranged by Mr. Cox with the utmost accuracy and judgment, in his note (2) upon *Bale v. Coleman*, supra.)

And so decreed (19) the Lady *Glenorchy* but an estate for life, with remainder, &c.

(1) Held by three judges against one, to be an estate tail, *Tracy, J.* dissenting, holding it to be but an estate for life, 1 *P. Will.* 87.

(2) *Clifford v. Ashley*, 1 *Cha. Cas.* 268. *Salisbury v. Baggot*, *ibid.* 278. *North v. Champenon*, 2 *Cha. Cas.* 63; 1 *Vern.* 13; 1 *P. Will.* 91; *Cruise upon Fines*, 187-190, but recoveries of this kind only operate on the trust estate whereof they are suffered, and the equitable remainder expectant thereon; and do not effect any legal estate; so that a legal remainder cannot be bound by an equitable recovery. *Robinson v. Cumming*, 167, *post.* *Salvin v. Thornton*, cited *Brown's Cas. in Chanc.* 73. *Shapland v. Smith*, *Brown's Cas. in Chanc.* 75; *S. P.* 2 *Chan. Cas.* 64; *Cruise upon Recoveries*, 239, 240-1.

(3) Where one devising lands to A. for life, remainder to his issue male by his second wife, it was adjudged an estate tail in A. and that his recovery barred all the remainders. *Vid.* also 1 *Vent.* 230. 1 *Mod.* 54, *Love and Wyndham's Case*.

(4) A. devised £300 to be laid out in land, and settled to the use of her daughter and her children, and if she died without issue, to go over; and she married B. and had a child by him, and she and the child being dead, and, the money not laid out; on a bill being brought by B. the money decreed to be considered as land, and the plaintiff to be tenant by the curtesy.

(5) Was a case referred out of chancery to the judges of the common pleas during the time of Lord *Trevor's* presiding in that court, where there was a devise to A. for life without waste, with a power for him to make a jointure, remainder to his first, second, and so to his sixth son (and no further), after which followed the words (if A. should die without issue male of his body, then to B. in fee); and in that case it was resolved by all the judges of C. B. that there being no limitation beyond the sixth son, and for that there might be a seventh and subsequent sons to take (but still to take as issue and heirs of the body of A. in tail by descent and not purchase), the court held the words, "in case A. should die without issue male of his body," did, in a will, make an estate tail, *vid.* also, *Attorney General v. Sutton*, 1 *P. Will.* 758.

(6) But in the case of *Bagshaw v. Spencer*, 1 *Ves.* 142, Lord *Hardwicke* strongly expresses his doubts of there being any difference between trust executed and executory, and seems to intimate that this distinction has never been established by any direct resolution, though said *arguendo*.

(7) A. devised £10,000 to trustees in trust to be laid out in lands and to be settled on B. for life, without waste, remainder to trustees and their heirs for the life of B. to support contingent remainders, with a power to B. to make a jointure, remainder to the heirs of the body of B. remainders over, and by the same will devises lands to B. to the same uses, and dies leaving C. executor. B. sues C. the executor for the deeds relating to the lands that are in his hands, and to have the money laid out in lands to be settled. Decreed by the *Master of the Rolls* that B. had but an estate for life in the lands, and so not intitled to the deeds, but that they were to be brought into court, and that the lands to be brought with the money were to be settled on B. for life, remainder to his first, &c., son. But by Lord Chancellor *King*, B. was decreed to have an estate tail in the lands devised, and consequently to be entitled to the deeds relating thereto; though as to the lands being purchased, that being executory, and in the power of the court, B. was to be but tenant for life, with remainder to his first, &c., son. 2 *P. Will.* 471. And *vide* the note at the end of the case.

(8) In which case A. devises lands to trustees to pay debts and legacies, and then to settle the remainder on her son B. and the heirs of his body, remainder over ; and directs that special care should be taken in the settlement, that it should never be in the power of her son to dock the entail ; decreed the son should be only tenant for life without impeachment of waste, and should not have an estate tail conveyed to him.

It is probable that Lord Talbot had this case in view when he determined *Glenorchy v. Bosville*, but in the former it was clear that the testatrix intended her son should take an estate for life only.

(9) See this case more fully stated in *Bagshaw v. Spencer*, 1 Ves. 149. And in *Fearne's Contingent Remainders*, ed. 4, 169-173.

(10) *Ante*, 6. The Court anxiously distinguished those cases from cases arising upon wills, and determined them to be estates for lives upon three grounds ; first, because they are upon valuable consideration ; secondly, because they are to be carried into execution against the parents ; thirdly, that if the party took an estate tail, the uses would be defeated, and, consequently, the children put completely into the power of their parents.—It is otherwise (says Lord Harcourt, in *Baile v. Coleman*) in the case of wills, which have not been construed upon the same grounds.

(11) In which case a devise was to A. for life, remainder to his issue, and if he died without issue, then to another, yet resolved that A. had an estate for life only, in regard the words were express.

(12) Determined *Hil. 12 Ann.* B. R. during the time that Lord Macclesfield presided there, where the case was, that A. seised in fee devised the premises to B. to hold to him for the term of his natural life only, without impeachment of waste ; and from and after his decease, to the issue male of his body, and to the heirs males of such issue male : and for want of such issue, remainder over ; and it was adjudged that B. took but an estate for life, the estate being given to him for life only, and there was a limitation afterwards to the heirs male of his issue, which was a description of the person who was to take the estate tail.

(13) In the case of *Robinson v. Robinson*, 1 Burr. 44, the cases upon this subject are collected. *Vide* also *Allanson v. Clitherow*, 1 Ves. 24. *Lethieullier v. Tracy*, 3 Atk. 784. *Evans v. Astley*. 1570. From all which cases it seems, that in the construction of words of this kind to effectuate the general manifest intention of the testator, will be the aim of courts both of law and equity, and consequently consider the raising estates by implication as depending upon such implication being necessary to effectuate that intention.

(14) In this case there was a limitation to one for life only, and after his decease to the issue male of his body and to the heirs male of the bodies of such issue : and here besides the respective word only, the limitation was to issue male, with words of limitation grafted thereon. And it is to be observed, that the word issue itself, even unattended with any engrafted words of limitation, is often a word of purchase, where the word heirs (or even heir, in the singular number) is not. And in this case, Lord Chancellor Parker observed, that if the words heirs male had been used instead of issue male, the operation of the law would have been too strong for the testator.

(15) *Prec. in Chanc.* S. C. *Bishop of London v. Webb*, 1 P. Will. 528. *Sir H. Packington's Case*, 3 Atk. 215. *Perrot v. Perrot*, 3 Atk. 95. *Aston v. Aston*, 1 Ves. 264. *Chamberlain v. Dummer*, 1 Bro. Cha. Rep. 166. *Earl Bathurst v. Burden*, 2 Bro. Cha. Rep. 64.

(16) With respect to the operation of the word "issue," vide *Backhouse v. Wells*, 1 Eq. Cas. Abr. 184, pl. 27. *Loddington v. Kime*, 1 Raym. 203. *Meure v. Meure*, 2 Atk. 265. *Ashton v. Ashton*, (cited) 1 Ves. 149. *Goodtill v. Otway*, 2 Wils. 6.

(17) So *Goodright v. White*, 2 Bla. Rep. 1010. *Vid.* also *Darbison v. Beaumont*, 1 P. Will. 229 ; *Fearne's Contingent Remainders*, 4th edit. 319.

(18) But in what cases words of limitation have been construed words of purchase, *Vid.* *Doe v. Laming*, 2 Burr. 1108. *Bagshaw v. Spencer*, 1 Ves. 147, and the cases there cited, 2 Atk. 571, S. C.

(19) This case appears to have been decided upon the principle of a distinction existing between legal and equitable estates, and between trusts executed and executory ; Lord Talbot admitting the word "issue" in a will to be as proper a word of limitation as "heirs of the body," and that he should upon the first question have made no difficulty of determining it an estate tail, had it been the case of an immediate devise. He thought, in cases of trusts executed, or immediate devises, the construction of the courts of law

and equity ought to be the same, for *there* the testator did not suppose *any other conveyance* would be made; but in *executory* trusts he left something to be done, the trusts *to be executed in a more careful and accurate manner*. But from several modern cases, it seems as if this distinction no longer prevailed; that a court of equity is as much bound by positive rules and general maxims concerning property as a court of law is, and that whatever is sufficient upon a devise to make an exception out of the rule holds as well in the case of a legal as in that of a trust estate—that if a testator make use of legal phrases and technical words *only*, the court are bound to understand them in the legal sense, but that if he use other words which *indisputably* discover his intention, and shew to *demonstration* that he did not mean what the technical words import, that intention must prevail, and which rule is applicable only to the nature and operation of the estate or interest devised, and not to the construction of the words—that the intention of a testator, if contrary to the rules of law, can no more take effect in a court of equity than in a court of law; but if, on the contrary, the intention be not contrary to law, a court of common law is as much bound to construe and effectuate that will, according to the intention of the testator, as a court of equity can be. *Garth v. Baldwin*, 1 Ves. 646. *Wright v. Pearson*, Amb. Rep. 358 (but more particularly stated in *Fearne's Contingent Remainders*, 4th edit. 187). *Austen v. Taylor*, Amb. Rep. 376. *Doe v. Laming*, 2 Burr. 1108. *Hodgson v. Ambrose*, Dougl. Rep. 340. *Jones v. Morgan*, 1 Bro. Cha. Rep. 206. However, the distinction laid down by Lord Talbot, has been admitted and acted upon in several preceding and subsequent cases, affording subject matter for its application: and if (in the words of Mr. *Fearne*) it should be found that the distinction is in its nature ascertainable with sufficient precision, and that it has in fact prevailed through a great majority of the most important and solemn decisions, it remains to be submitted to the wisdom of our courts how far a professed adherence to the same distinction may deserve their attention, as tending to the establishment of a system or uniformity of doctrine that may keep questions of this nature within some probable limits of construction. *Fearne's Contingent Remainders*, 4th edit. p. 167 to 221, where the propriety and reasonableness of the distinction is supported with admirable perspicuity, and considerable force of argument, by that very accurate and learned author.

Case 5.—LEGG *versus* GOLDWIRE.

[S. C. 2 Wh. & T. L. C. [7th edn.] 770. See *Bold v. Hutchinson*, 1855, 5 De G. M. & G. 558. Cf. cases collected in *Loxley v. Heath*, 1860, 1 De G. F. & J. 489.]

Nov. 10, 1736.

N.B. By Lord Chancellor, where articles are entered into before marriage, and settlement made after marriage different from those articles (as if by articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail, whereby he hath it in his power to bar the issue) this court will set up the articles against the settlement (*Streatfield v. Streatfield*, post, 176. *Hart v. Middlehurst*, 3 Atk. 371): But where both articles and settlement are previous to the marriage, at a time when all parties are at liberty, the settlement differing from the articles will be taken as a new agreement between them, and shall controul the articles. And altho' in the case of *West and Erisey* (3 Bro. Parl. Cas. 327 [2nd ed. 1 Bro. P. C. 225]), *Mich.* 1726, in the court of *Exchequer*, and afterwards in the *House of Lords* in 1727, the articles were made to control the settlement made before marriage; yet that resolution no ways contradicts the general rule; for in that case the settlement was expressly mentioned to be made *in pursuance and performance of the said marriage articles*, whereby the intent appeared to be still the same as it was at the making the articles.

(So *Honor v. Honor*, 1 P. Will. 123; 2 Vern. 658, S. C. *Partyn v. Roberts*, Amb. Rep. 315. *Roberts v. Kingsley*, 1 Ves. 238. The general doctrine upon this subject appears to be, that in the case of articles before marriage, containing limitations that would give the parents, or either of them, such an estate tail as would enable the father alone during the coverture, or the surviving parent afterwards, to bar the issue of the marriage under a legal settlement limiting the estate in the same words, equity will rectify it, and make a strict settlement; unless the issue is otherwise provided for than by the limitation to the heirs, &c., or

from other limitations or provisions in other lands, it appears the parties knew and intended the distinction. But that the court will not interfere, if both articles and settlement are made before marriage, unless the settlement in that can be expressed to be made *in pursuance of the articles*; for the court will suppose that the parties had altered their intention with respect to the terms of the marriage; which they may do before the marriage, though not afterwards; and that the settlement was made in pursuance of such *new agreements*, and not of the articles.—But when it is said to be made *in pursuance of the articles*, all room for such a supposition is precluded.)

[21] DE TERM. PASCHÆ, 7 GEO. II. [1734], IN CURIA CANCELLARIÆ.

Case 2.—CLARE *versus* CLARE.

May 8 [1734].

W. Clare declares his term of one thousand years, in trust for his son *T. C.* for so many years of the term as he should live; and after his death in trust for the issue male of *T. C.* lawfully begotten, for so many years, &c., as such issue male should live; and when the issue male of *T. C.* should happen to be extinct, then in trust for his second son *W.* for life, remainder in trust for the issue male of *W.* for so many years as they should happen to live; the eldest to be preferred before the youngest; and after the death of *W.* and from the time his issue male should happen to be extinct, then the premises to descend and continue in the issue male of the name and family of the *Clares*, which should be next of kin, for all the residue of the term; and made his son *T. C.* sole executor and residuary legatee. The testator died, and *T. C.* died without issue male. The residue of the term shall go to the representative of *T. C.* contrary to the will, in which there is a plain affectation of a perpetuity.

William Clare, possessed of a term of one thousand years, by will dated April 13, 1706, devises it to trustees, in trust for his son *Thomas Clare* for so many years of the term as he should live, and after his death, in trust for the issue male of his son *Thomas* lawfully begotten, for so many years of the said unexpired term as such issue male should live; and when the issue male of his said son *Thomas* should happen to be extinct, then in trust for his second son *William* for life; remainder in trust for the issue male of his said son *William*, for so many years as they should happen to live; the eldest of such issue male to be preferred before the youngest; and after the death of the said *William Clare*, and from the [22] time his issue male should happen to be extinct, then that the premises should come, descend and continue in the issue male of the name and family of the *Clares* which should be next of kin, for all the residue of the term; and made his son *Thomas* sole executor and residuary legatee. The testator died, and in the year 1718, *Thomas* died without having had any issue male. The question was, Whether the whole term did not vest absolutely in *Thomas*? and whether the limitation over to *William* the second son, after failure of issue male of *Thomas*, was not void?

Mr. Attorney General and Mr. Fazakerley argued, that the limitation was good; for, that the whole being vested in the trustees, *Thomas* the first son had but a contingent interest in so many years only as should happen to be expired at his death, and no absolute estate tail in the whole; as it must have been to prevent the limitation over to *William* taking place; then it must be the remainder in the trust for the issue male of *Thomas*, which must avoid the limitation over. Indeed the word *issue* is in a will sometimes taken to be a word of limitation (though in a deed it can carry but an estate for life) in order to fulfil the testator's intent; but that intent must be plain and manifest, and the words not controlled by any other. This appears from *Wyld's* case, 6 Co. 16, where the words, *after their decease*, made the other words to be words not of limitation, but of purchase; and from the cases of *Papillon versus Voyce*, and *Lord Glenorchy and Bosville* (*ante*, 3): And the reason why, in many cases, these words are determined to carry an estate tail is, because otherwise the testator's intent could never take place; which was the reason of the resolution in *King and Melling's* case, 1 Vent. 214, 225, but no inference can be drawn from the case of freehold to that of leasehold estates, which have been often differenced in this court. In the case

of *Peacock* and *Spooner*, 2 Vent. 195, the words were stronger than they are [23] here ; and yet the generality of them was restrained, and they were construed to be words of purchase. If then *Thomas* took but an estate for life, the remainder to his issue never taking place, must be looked upon as out of the question ; which will let in the limitation to *William* : and this is an eligible construction in order to let in a provision for his family, and to follow his intent, which was, that his son *William* should take : nor is this intent controlled by any rule of law, the contingency happening within the compass of a life, viz. that of *Thomas* the elder son. And that such construction may well be made, appears from the case of *Higgins* versus *Dowler*, (1) 2 Vern. 600, and from that of *Brook* and *Taylor*, Trin. 2 Geo. 2, in B. R. where there was a bequest of a personal estate to his wife, upon condition to give his three sisters £5 yearly for their lives ; and after his wife's death, he gave the same to his daughter *Mary Taylor*, upon the same obligation to his sisters ; and after his daughter's death, to the fruit of her body ; and for want of such fruit, to his brothers and sisters and their children then living : the opinion of the court was, that the limitation to the brothers and sisters was good ; and yet had there been any fruit of the body, they must have taken an estate tail ; but they never coming in *esse*, the second limitation was allowed to take place. As in the case of *Stanley* and *Leigh*, or *Mead* (2 P. Will. 618 to 631), at the rolls, about three terms ago, where there was a bequest to one for life, and to his first and every other son, and there never was any son, upon the words *if he died without issue*, it was insisted, that the limitation over should take place ; and that these words should be understood to be *issue at the time of his death* ; and so allowed by the court : for, that the limitation to the sons, and the heirs of their bodies, never taking place, the second limitation was good, there being no danger of a perpetuity. So in our case, had *Thomas* had any issue, they would have taken an estate tail ; but there being no issue of him, the limitation over to *William* the second son is good.

[24] Mr. *Solicitor General* and Mr. *Lutwyche* argued for the plaintiff (who was executor to *Thomas* the residuary legatee) that the limitation to *William* was void ; for, that it was plainly the testator's meaning, that the issue male, and the issue of that issue, should take *in infinitum* ; and then he says, that when the issue shall be extinct, it shall go to *William*. The extinguishment here meant is not of any one issue, but of the whole. The words *lawfully begotten* are likewise considerable, being held by the Lord *Hale*, in *King* and *Melling's* case, to be words naturally belonging to the creation of an estate tail.—Only suppose he had made as many limitations for lives as there had been possibility of people's taking : would not this, in a court of equity, be looked upon to be the same as if he had limited it to him and the issue of his body ? and has he not done it here ? He has limited it to as many as should be of the name and family of the *Clares*, according to Judge *Ritchell's* invention in 1 Inst. 377 b. But such practices have always been discountenanced, nothing being so contrary to our laws as the admission of a perpetuity. Nor will the other method, which has been attempted to support this limitation, do better ; which is that of construing *Thomas* to take an estate for life, and then striking out the remainder to his issue male, as if it had never been ; because there never was any issue male of him ; for it is admitted, that if *Thomas* had had any issue male, this limitation over had been void ; and the making it good by failure of issue male, would be making the validity of the limitation to depend upon a subsequent accident ; whereas it must stand upon its own bottom, and cannot be decreed to be good or bad upon any unforeseen accident. (2) The opinion of the *Master of the Rolls*, in the case of *Stanley* versus *Leigh*, was found upon the case of *Higgins* versus *Dowler* (*ante*, 23) ; and there are now thoughts of appealing from that decree at the rolls. If the case of *Brooks* versus *Taylor* (*ante*, 23), had depended singly on the words to her, and after her decease to the fruit of her body, it had clearly been an estate tail ; but the [25] reason was, that there were those other words, *To my brothers and sisters then living*, which brought it within the compass of a life ; and these words, *then living*, make the case to be the same as the Duke of *Norfolk's*, 3 Chan. Cases. In the case of the Lady *Lanesborough* versus *Fox* (*post*, 262), the sessions before last, in the House of Peers, the judgment was (by the advice of all the judges present) that there was no implied estate ; and consequently the recovery void : which shews that the court has never laid any stress on the accident of the death happening or not happening. And in the case of *Scattergood* versus *Hedge*, the Lord *Treby* and the other judges held that the accident of no son being born was not to influence the case one way or other ; which is another strong authority that subsequent accidents are not to be regarded.

Lord Chancellor. Two questions have been made in this case; the first is, what estate *Thomas* the eldest son took by this will? whether an estate-tail, or an estate for life only? And secondly, whether, if he took but an estate for life, the subsequent accident of his dying without issue male, or rather never having had any issue male, will let in the limitation to *William* the second son? As to the first, I am of opinion, that *Thomas* took but an estate for life: nor will the subsequent words, *That, from and immediately after his death the trustees should suffer, &c.*, enlarge his estate for life. The word *issue* (3) in a deed can never be a word of limitation; but is made so in wills to serve the testator's intent: which was the reason of the resolution in the case of *King and Melling*. And if the present case was like that, I should think myself bound to observe that resolution; but that was of a freehold, which may and must descend to the issue; and *this is of a leasehold*, which without a particular provision, can never descend; but must go in course of administration: and therefore, as here is an express estate for life limited to *Thomas*, it shall not be enlarged by any of the subsequent words; especially when in the limitation to *William* the second son, he has explained what he meant by the gift to the issue in the first part; for, there he gives it to the first and every other son, and the heirs male of their bodies: so it is plain he intended every issue that was born of *Thomas* should take; and then the limitation to *William*, being at so great a distance, is too remote, and cannot take effect.

The next question is, whether the subsequent accident of *Thomas* dying without issue will better the case for *William*? And as to that, I think, all deeds and wills are to stand as they did at the time of the making them, and cannot be made good by any after-act; especially where such act is collateral; and is, upon its happening, such a contingency upon which no estate can commence by law. Was it ever said in case of a limitation to one, *and if he die without issue living at the time of his death*, that you must wait till his death to determine whether the limitation be good or not? If so, that limitation would be no better than a general limitation upon a general failure of issue.

The case of *Higgins versus Dowler* is very imperfectly reported; and was upon a demurrer (*ante*, 23), where things are not argued with that nicety which they are upon arguing the merits of a cause. That of *Stanley and Lee* (*ante*, 24) has not been particularly mentioned; so that what we have of it is only upon memory: and I think it much better to stick to the known general rules, than to follow any one particular precedent which may be founded on reasons unknown to us: such a proceeding would confound all property. That of *Brooks and Taylor* (*ante*, 23) (whatever reason the judges might go upon), was certainly very different, by reason of the words *then living*; but there is a plain affectation of a perpetuity as strongly declared by the testator himself as can be; and a succession of estates for life to persons not in *esse*, is as much a perpetuity, and as little to be endured, as would be that of an estate tail, of which no recovery could be suffered. The case of *Lady Lanesborough versus Fox* (*post*, 262) is the strongest authority that can be; and even, had it not been in the House [27] of Lords, I should have thought myself bound to go according to the general and known rules of law.

And so decreed (4) the term to *Thomas*, as being the residuary legatee of his father; and from him to the plaintiff, who was the executor of *Thomas*

N.B. As to this last point *Burges and Burges*, 1 *Mod.* 114, 1 *Chan. Ca.* 229; and *D. of Norfolk's Case*, 3 *Chan. Ca.* 19, 29.

(1) *A.* demises lands for a long term in trust for *B.* for life, then to his son for the remainder of the term; and in default of issue of such son, to the second and other sons of *B.*, and for want of issue male, to the daughters of *B.* for the remainder of the term. There having never been a son, the limitation to the daughters was held good.

(2) *Sed vid.* Lord Mansfield's argument in *Doe v. Fonnereau*, *Douglas Rep.* 509. *Hopkins v. Hopkins*, *post*, 51. *Brownword v. Edwards*, 2 *Ves.* 249. The result of which cases seems to be, that a devise may operate either way, according to the event.

(3) In what cases used as a word of purchase, *vide Fearn's Contingent Remainders*, 4th edit. 163, 233, 248, 500, 553; and when as a word of limitation, 285

(4) *Reg. Lib. A.* 1733, fol. 443. It should seem that the authority of this case has been shaken in no inconsiderable degree, by *Sheffield v. Lord Orrery*, 3 *Atk.* 282. *Doe v. Fonnereau*, *Doug.* 470. *Marsh v. Marsh*, *Bro. Ch. Rep.* 293, which cases go

the length of establishing the doctrine laid down in *Higgins v. Dowler*, 1 P. Will. 98; *Stanley v. Leigh*, 2 P. Will. 686. And also *Lloyd v. Carew*, *Shower's Cas. in Parl.* 137. *Gower v. Grosvenor*, *Barnard.* 54. *Maddox v. Haines*, 2 P. Will. 421. *Stephens v. Stephens*, post, 228. *Sabberton v. Sabberton*, post, 245. *Fearne's Contingent Rem.* 407. The notes to *Doe v. Fonnereau*, *Dougl.* 485. 2 *Black Com.* 174. The result of which cases, as applicable to the present, seems to be this, that the principle of preventing perpetuities did not render it necessary to hold the limitation over to *William*, to be void in its creation; for if *Thomas* had died leaving issue male, the entire interest and dominion in the term devised, would have vested in him, and nothing left upon which the subsequent limitations could attach; but as the other alternative happened, viz. that *Thomas* had no son, the limitation over to *William* operated as an executory devise, the contingency happening within the time established by law to prevent perpetuities, viz. within the compass of a life, that of *Thomas* the elder son. *Sed vid.* *Wyth v. Blackman*, 1 Ves. 202. *Knight v. Ellis*, 2 Bro. Cha. Rep. 570.

Case 7.—STEPHENS *versus* HIDE.(1) [1734.]

H. H. devises three fourths of his personal estate to his three sons, equally to be divided between them; and the other fourth to them, in trust for his two daughters; the interest to be paid them respectively during their natural lives, and afterwards to their, or either of their child or children; and for default of such issue, to his three sons, equally to be divided between them; one his daughters leaves a son, under whom the plaintiff claims, and the other dies without issue. The moiety of the sister who died without issue, shall not go to the three brothers, but to the representative of the nephew.

Upon a rehearing, the case was thus: *Humphrey Hide*, the testator, did by his will in the year 1718, devise three fourths of his personal estate to his three sons, equally to be divided between them; and as to the other fourth he devised it to his three sons, but in trust only for his two daughters, and by their approbation to be put out at interest in the name of his three sons, and the interest to be paid to his two daughters respectively during their natural lives, and afterwards to their or either of their child or children; and for default of such issue, he devised it to his three sons, equally to be divided between them; one of his daughters leaves a son (under whom the plaintiff claimed) and the other dies without issue. The question was, whether the son should take the moiety belonging to his aunt, who died without issue? or whether it should go to the three sons? The *Master of the Rolls* decreed the son to take only the moiety belonging to his mother, and the other moiety to go to the three sons of *Humphry Hide*.

Mr. Attorney General and Mr. *Fazakerly* argued for the plaintiff, that the children of the daughters must take by purchase; and that the devise being to the child or child[28]dren of either of them, any issue of them or either of them, was entitled to the whole that was devised; that had the estate, instead of being limited to his two daughters, been limited to two strangers, there could be no doubt but that the surviving child must take the whole; and the two daughters taking only an estate for life, their child or children do not claim through or under them, and consequently it is the same as if the devise had been to two strangers, and then to the child or children of his two daughters. The testator does not say, that they shall take the motives respectively; but devises it to the child or children of either of them: so that, by the plain and necessary construction of the words, nothing could go to the sons if there was a child or children of either of the testator's daughters.

Mr. Solicitor General, Mr. *Lutwyche*, Mr. *Verney* and Mr. *Floyer* argued on the other hand for the defendant, that the moiety of the daughter who died without issue must go to the three sons; for, that there was no doubt but that, by the word *respectively*, the daughters were tenants in common; and the subsequent limitation, being founded on the first devise, must receive the same construction as to the children taking by purchase. This being a personal estate, the testator's intent could not otherwise be fulfilled than by making them take by immediate devise; but that intent was only to provide for his two daughters and their respective issues in the natural order;

viz. the child or children of one to take what belonged to his or their mother, and not what belonged to the other sister : so that this case must be considered as if the testator had devised one moiety to one daughter and her issue, and the other to the other and her issue ; and for want of such issue to the sons : where there can be no doubt but that, upon failure of issue of one daughter, her share must have gone over to the sons : but if the subsequent words should be explained according to the construction insisted on for the plaintiff, and that one daughter had died first, [29] both having issue, the moiety of the deceased (whose child or children were never to take during the other's life) must go either to the surviving daughter, which is contrary to the nature of a tenancy in common ; or else it must have expected, and been in abeyance until the death of the surviving sister ; which is absurd : but according to our construction it will go to the issue of the person first dying, and upon failure of such issue go over to the sons, in which there is no inconvenience. And if it had happened that one daughter had had but one child, and the other several ; then either the issue of each daughter must have taken their mother's share respectively according to our construction, or all the children must have taken equally *per capita* ; which is contrary to the testator's intent.

Lord Chancellor. The question here is, to how much of the testator's estate the plaintiff, claiming under the son of one of the daughters, is intitled ? And in this will, as well as in every other, the testator's intent is to be gathered from the words of the will, without either adding or rejecting any, which can possibly have any meaning. The testator has here devised his estate to be divided into four parts ; three whereof he gives to his three sons, and of those three the sons are plainly tenants in common : the fourth he has given to his two daughters ; but with this difference, that whereas the sons have the property of their respective shares given them, the daughters have not the absolute property in that share which comes to them ; but only the interest, which is to be paid to them respectively during their lives, and by this word *respectively* (*Fisher v. Wigg*, 1 P. Will. 1), they are tenants in common.

The next limitation to the children vests the whole property in them, and they take as purchasers according to *Wyld's* case, 6 Co. 16 a, but then it is contended that they must take respectively as well as their mothers : this I see no reason for, there being no words of division in the devise to them ; but the whole is to go over to either of their child or children. And when a testator has used [30] such plain words to shew his intent, that whether there was one or more children, that in either case the child or children should take the whole, I cannot add words to make the moiety only to go to his child or children, against the testator's plain intent ; which appears from this ; that wherever he intended a tenancy in common he has expressed it, as by the word *respectively* in case of the daughters, and the words *equally to be divided* in case of the sons. Nor is there any absurdity in supposing that if there had been many children of one sister, and none of the other, that the children should take the share of her, who left no issue in the mother's life-time ; since his intent was equal, and as rational, in case there had been many children, as but one, as in the present case. But if, on the other hand, after the death of one without issue, the whole was not to go over to the children of the other till their mother's death, the surviving daughter would have an estate for life by implication ; and so the absurdity of an abeyance or expectancy be avoided. Nor does it seem contrary to the testator's intent, that his grand-children should take *per capita*, they all being equally related to him ; but as these are only cases that might have happened, I think it not necessary for me to determine how the estate would then have gone ; that which has happened is only now in judgment ; and upon the whole, I am of opinion that the testator's intent was, that any child of either of his daughters should (in all events) take the whole of this fourth part, and no part to go over to his sons till failure of such issue.

And so decreed for the plaintiff.

(1) In *Reg. Lib.* A. 1733, fol. 321, this case is thus stated, *viz.* *Humphrey Hide*, by his will bearing date the 9th of August 1718 ; appointed his sons *John, William*, and *Edward Hide*, and his daughters *Elizabeth* (the wife of *James King*), and *Margaret* (then *Reynolds* who soon afterwards married the plaintiff), executors of his will, and directed that the residue of his personal estate should be divided into four equal parts, three whereof he gave to his three sons, and directed the other fourth part thereof to be put out on good security, in the name of his said three sons, upon trust only, to and

for the respective uses of his said daughters, and the interest to be paid to them respectively during their lives, and afterwards to their or either of their child or children, and for want of issue, to his said three sons equally; on the 16th May 1719, the said testator died, and his said sons and daughters proved his will, and after payment of his debts, &c., made a division of the residue of his personal estate, which amounted to £3440, and one-fourth being £860 was placed out by the said *John*, *William*, and *Edward Hide*, at interest, in their names, and in trust for the respective uses of the said *Elizabeth King* and *Margaret Reynolds* and their children, in manner following, viz. £600 in lottery annuities, were with their consent subscribed into the South Sea Company, and the £260 residue remained in the hands of the said *William*, *John*, and *Edward Hide*, on their agreeing to answer interest for the same. *Elizabeth King* died without issue, and soon afterwards the said *Margaret Reynolds* died, leaving issue only the defendant *Reynolds*; the plaintiff long before the death of the said *Elizabeth King*, married with the said *Margaret*, and thereby became entitled to the whole produce of the said stock, and annuities and interest of the said £260 from the death of the said *Elizabeth King*, to the death of the said *Margaret*, when the defendant *Reynolds* became entitled to a fourth part: the defendant *Reynolds* by deed of the 8th July 1731, in consideration of £24 a year, sold his interest to the plaintiff. The said *John* and *Edward Hide* being dead, the said estate subject to the said trust, became vested in the said defendant *William*. *John Hide* having made his will, appointed the defendant *Mary* executrix; she insisted upon such interest as her husband was entitled to. The defendant *William Hide* insisted, that the plaintiff was not entitled to the whole dividend of the said stock and interest of the £260, but that on the said *Elizabeth King's* death, without issue, one moiety of the premises came to, and ought to be divided between him, the said defendant, and his brother *John*, in thirds, viz. two-thirds to him in his own right, and his brother *Edward's* right (he being dead, and had appointed the defendant *William* his executor). The defendant *Mary* claimed no interest in the premises, and the defendant *Reynolds* by his answer, admitted the said assignment. Upon the hearing the Master of the Rolls, decreed that the said *Elizabeth King's* moiety of the said £260, and of the said South Sea Stock and annuities, belonged to the said testator's three sons, she being dead without issue, and that the defendant *Reynolds* could only take the other moiety thereof, given to the said *Margaret* his mother. From this decree, the plaintiff appealed, and upon the rehearing before the Lord Chancellor, his lordship declared, that the plaintiff was entitled to the £260 and the South Sea Stock and South Sea annuities, which was the produce of the lottery annuities, and to the interest and dividends thereof; the defendant *Reynolds* having assigned the same to the plaintiffs; but no costs on either side.

[31] Case 8.—HEBBLETHWAITE *versus* CARTWRIGHT.

[See *Doe v. Hallett*, 1813, 1 M. & S. 136; *Massy v. Lloyd*, 1863, 10 H. L. C. 262; *Locke v. Dunlop*, 1888, 39 Ch. D. 398.]

May 21 [1734].

A. upon his marriage with B. settles his estate to the use of himself for life, remainder to first and other sons in tail male, remainder to trustees for one thousand years, remainder to his brother C. for life, remainder to the heirs male of his body hereafter to be begotten; and then declares the trust of the term, that if there should be no issue male of the bodies of A. and B. begotten, that should live to the age of twenty-one years, or be married and have issue, and that there should be a daughter or daughters of the bodies of A. and B. such daughter should have £4000 for her portion; and if two or more, they to have £5000, equally to be divided at their ages of twenty-one, or days of marriage, which should first happen; and if only one daughter, she to have the yearly sum £100 to be paid her half yearly for her maintenance; if two or more, the like sum to be paid them half yearly in equal shares, until their respective portions paid; if the portions not paid, the trustees to raise them out of the rents, or by sale or mortgage of the premises, or of part. Provided that if the father should in his life-time prefer them in marriage with portions equivalent, or the remainder man should, after the father's death, or that there should be no daughter who should attain the age of twenty-one, or be married, then the term to cease. B. died in the

life of A. leaving no son, but three daughters, who are all unmarried : C. took an estate tail under this settlement : and the portions may be raised for the daughters in the life-time of A. their father.

James Hebblethwaite, upon his marriage with *Bridget Cobb*, settled his estate to the use of himself for life, remainder to his first and other sons in tail male, remainder to trustees for one thousand years (the trust whereof is afterwards declared), remainder to his brother *Charles Hebblethwaite* for life, and after his decease to the heirs male of his body hereafter to be begotten ; and then declares the trust of the term to be, that in case there should be no issue male of the bodies of the said *James* and *Bridget* begotten, that should live to the age of twenty-one years, or be married and have issue, and that there should be one or more daughter or daughters of the bodies of the said *James* and *Bridget*, that then the said daughter or daughters should have, if but one, the sum of £4000 for her portion ; and if two or more, the sum of £5000 equally to be divided between them at their ages of twenty-one, or days of marriage, which should first happen ; and that if there should be but one daughter, that then she should have the yearly sum of £100 to be paid her half-yearly by equal portions for her maintenance ; and if there should be two or more, then the sum of £100 to be paid them half-yearly in equal shares, till their respective portions should be raised and paid ; and in case the portions were not paid, that then the trustees, their executors, &c., should, out of the rents or profits, or by mortgage or sale of the premises, or any part [32] thereof, during the term, raise and pay the several portions before limited, provided that if the father should in his life-time prefer them in marriage with portions equivalent to those herein limited, or that after his death the remainder-man should upon their marriage pay them portions equivalent, or that there should be no daughter or daughters who should live to attain the age of twenty-one or be married, that then the term should cease and be void. *Bridget* the wife died in her husband's life-time, leaving no issue male, but only three daughters, who are all unmarried. (In *Reg. Lib. A.* 1733, fol. 391, the daughters are stated to be married.)

Two questions were made : First, what estate *Charles Hebblethwaite* had ? Secondly, whether upon this trust the daughter's portions were raised in their father's life-time.

As to the first question the *Lord Chancellor* was clearly of opinion, that *Charles* took an estate tail : and that the words *hereafter to be begotten*, do not confine it to the issue born after, but will likewise take in that born before ; the words *procreatis & procreandis* being of the same import, according to 1 *Inst.* 20 ; and 24 *Ed.* 3, pl. 15, where the limitation was & *heredibus quos ille de corpore procreaverit*, held it should take in the issue born before. And this, he said, was to prevent the great (1) confusion which would otherwise be in descents, by setting in the younger before the elder, &c.

The precedents in raising daughters portions have gone both ways ; sometimes they have been decreed to be raised in the (2) parents life-time, and at other times not : which shews that the raising or not raising must depend upon the particular penning of the trust. In the case of *Brome versus Berkeley*, *Abr. Eq. Ca.* 340, 7, (3) the raising the portion in the mother's life-time was refused ; because the provision of maintenance was not to commence until the death of the jointress, and consequently the portion could not be raised till then ; for, the main-[33]-tenance must precede the portion : and if that which was to precede the portion must have waited the jointress's death, it follows clearly, that the portion, which was to come after, must do so likewise. And in that of *Corbett versus Maidwell*, 2 *Vern.* 640, and *Eq. Ca. Abr.* 337, 5, it was requisite that the daughter should be unmarried and unprovided for at his decease ; but here not only the term is not contingent, but absolutely vested in the trustees ; and all the contingencies in the declaration of the trust of the term precedent to the raising the portions have happened ; as that of not having issue male, the daughters marrying or attaining the age of twenty-one, &c. Indeed during the life of the father and mother, it was contingent, by reason of the uncertainty whether there would be any issue male between them : but immediately upon the mother's death it became no longer contingent, but absolutely vested, by reason of one of the parties death without issue male, which in this court is deemed a total failure of issue male between them. The case of *Greaves versus Maddison*, *Ch. Jus. Jo.* 201, was a stronger case than (4) this, and was at law ; yet there the portions were adjudged to be raised in the father's life-time ; though by the express words of the condition he was to be dead before the portions were

to be raised : but in our case the father's death is not at all made part of the condition ; it is only said, *that if there be no issue male between them, then the trustees are to raise out of the rents and profits, or by sale or mortgage of the premisses, &c.,* without any mention made of the father's death. Nor will the option given to the trustees of raising either by rents and profits, or sale or mortgage of the premisses, warrant the conclusion that has been inferred, that *James Hebblethwaite's* death must necessarily precede ; since it is impossible for the trustees to raise the portions out of the rents and profits during his life : for, in deeds it is usual to put in every way which may be made use of ; but it does not from thence follow, that the daughters are to wait till the trustees can make their choice which way they will raise their portions : that might be making them wait till their fortunes could be of [34] no service to them. And though the mortgage or sale is to be during the term which is not to commence in possession till the father's death, yet the portions may well be raised in his life-time ; it being no where said, that the portions shall not be raised till after such time as the term shall take effect in possession. Indeed had there been no express authority given to the trustees to sell or mortgage, there might be some difficulty ; but since they have the power of both, they may use that which best suits the interest of the daughters.

The next thing to be considered is the proviso, where the term is made void, in case the father should in his life-time prefer the daughters in marriage with portions equivalent with those provided for them by the settlement. The proviso has been objected to prove that the party's design was, that the portions might not be raised during the father's life, by reason of the power reserved to him of providing for them in his life-time by portions equivalent : and to prove this has been cited the case of *Corbet* versus *Maidwell* ; (5) but that case widely differs from the present one : for, there it was part of the description of the daughter that she should be unmarried and unprovided for at the time of the father's death ; which description gave the father time to perform it during his life, for the reasons before mentioned : but we have no such description here ; nor can it be thought from the nature of the thing, that a second marriage might be intended ; a portion upon a second marriage being not a portion equivalent to that provided by the settlement, it could only be a first marriage that was intended ; and upon that and no other were the portions to arise : not upon the distant and remote consideration of the second marriage.

And so (6) decreed the portions to be raised with interest from the mother's death, at which time they first vested.

(1) Vid. *Hewit v. Ireland*, 1 P. Will. 427. *Long v. Beaumont*, *ibid.* 231. But it has been held, that, where the words were in *posterum procreandis*, sons born before shall be excluded on account of the peculiar force of "*in Inst.* 20 ; *Adj. M.* 26 *Eliz. B. R.* ; 3 *Leonard*, 87 ; 1 *posterum*," *Harg. ed. in notis*, 3.

(2) *Greaves v. Maddison, Jones (Tho.) Rep.* 201. *Staniforth v. Staniforth*, 2 Vern. 460. *Bacon v. Clerk, Prec. in Chanc.* 500. *Gerrard v. Gerrard*, 2 Vern. 458. *Sandys v. Sandys*, 1 P. Will. 707. *Hall v. Carter*, 2 Atk. 355, & *Lib. Reg.* 248, *Ann.* 1742, were cases in which portions were decreed to be raised in the parents life-time. *E contra Corbet v. Maidwell*, 2 Vern. 640. *Butler v. Duncomb*, 1 P. Will. 448. *Pierpoint v. Lord Cheyney*, *ib.* 489. *Brome v. Berkely*, 2 P. Will. 485. *Evelyn v. Evelyn*, 2 P. Will. 659. *Stevens v. Dethick*, 3 Atk. 40, et *Lib. Reg.* 59, *Ann.* 1743. *Worsley v. Earl of Granville*, 2 Ves. 332. *Churchman v. Harvey*, *Ambl. Rep.* 335.

(3) In this case a settlement was made in the usual form, with a limitation to trustees, for want of issue male, to raise portions for daughters, to be paid at twenty-one or marriage, which should first happen, by and out of the rents and profits, or by mortgage and sale as they should think fit ; and in the mean time and until the said portion should become payable, the trustees to raise £100 per annum for the maintenance of each of them : the father died, and one of the daughters having married the plaintiff, this bill was brought to have the portion raised, but was dismissed, because the portion being to be raised out of the rents and profits, or by mortgage or sale, plainly shewed that it was not to be raised till such time as the trustees might make use of the election given them by the settlement, to raise it either out of the rents and profits, or by mortgage or sale ; but during the life of the mother, who had it in jointure, they could not raise it out of the rents and profits, neither by mortgage or sale, which were inserted in one and the same clause, and a discretionary power lodged in the trustees, to use either the one way or the other, and till they had the election of using

either of those ways, they had no power at all, besides that, the maintenance being to precede the raising of the portions, if there was no maintenance to be raised in the mother's life-time, the portions were not to be raised in her life-time, as they were not to take place till after the maintenance; and the *Lord Chancellor* and the *Master of the Rolls* both said, that the cases on this head had gone too far already, and mangled all estates, and that they would never decree portions to be raised in the father's life-time, where it could possibly bear any other construction; and the decree was confirmed in the House of Lords.

(4) A. made a settlement to the use of himself for life, remainder to the use of his first son in tail male, remainder to trustees for forty years, remainder to himself in fee; the term was declared to be a trust, that in case it should happen that the said A. should die without issue male of his body, then the trustees should raise £5000 for daughters' portions, payable at the age of twenty-one or marriage, with a provision for maintenance: in the mean time the wife died, leaving two daughters and no issue male; and it was resolved that the right to the portion was vested by the mother's death, without issue male in the life of the father; for otherwise the father might live so long that the portions might be of little service. *Greaves v. Maddison*, 2 *Jones*, 201.

(5) The trust of the term in this case being, "that in case *Thomas Maidwell* shall die without issue male, and there shall be one or more daughters, that shall be *unmarried or unpreferred at his death*; such daughter, if but one, to have £2000 for her portion, and for her maintenance £30 *per annum*, out of the profits, till her portion become due; the portion to be paid at eighteen or more; proviso, that the term shall be void, if the said *Thomas Maidwell* pay or secure to the daughters that shall be unmarried at his death the said portion of £2000." And note, in this case the daughter was married, and the bill for raising the portion was brought by her husband and her.

(6) Notwithstanding the judges of later times, have, in many instances, expressed their disapprobation of the selling or mortgaging of reversionary terms for the raising of daughters portions, yet they have thought themselves bound by the rule which has been followed in many precedents, *viz.* that if there be a term for years, or other trust estate limited to trustees for raising portions for daughters, payable *at a certain time*, which is become a *vested* interest, they shall not stay until the death of the father and mother without their portions, unless some intention appears to postpone the raising; and if there does, the court will always take notice of such intention, and indeed will lay hold of very small grounds, that speak the intention of the party, to prevent the raising of the portions in the life-time of the father and mother.

[35] DE TERM. S. TRINITATIS, 8 GEO. II. IN CURIA CANCELLARIÆ.

Case 9.—COOKE *versus* ARNHAM.(1)

June 22. [S. C. 3 P. Wms. 283.]

A. seised in fee of freehold and of copyhold lands, devises all his messuages and lands, whether freehold or copyhold, to C. who was his grandson and heir at law for life, remainder to his first and other sons in tail, remainder to his daughters in tail, remainder to his younger son the plaintiff in fee, and dies without surrendering to the use of his will. C. dies without issue, having first surrendered to the use of his will, and thereby devised the copyhold lands to his mother. The court supplied the defect of the surrender in favour of the plaintiff, although his father had made some other provision for him, and although this was only a remainder after an estate tail.

Upon a rehearing, the case was thus: *Robert Cooke* seised in fee of copyhold lands in *Lakenham* in the county of *Norfolk*, and of several freehold lands, by will, dated *April 28*, 1710, devised all his messuages and lands (whether freehold or copyhold) to his grandson *Richard Cooke* (who was his heir at law) for life, remainder to his first and other sons in tail, remainder to his daughters in tail, remainder to his younger son the plaintiff in fee, and died without making any surrender to the use of his will; *Richard* the grandson died without issue, but before his death surrendered the copy-

hold lands in *Lakenham* to the use of his will ; whereby he devised them to his mother and her heirs.

[36] The questions were, first, Whether the defect of the surrender should be supplied in favour of the plaintiff, not being a child unprovided for, but already provided for another way ? Secondly, Whether equity would supply the defect, it being in case of so remote a devise as a remainder upon an estate tail, which is of no (or at least very little) value in the eye of the law, and defects being never supplied where the heir is disinherited ? And here the heir at law has only an estate for life, with a remainder in tail.

It had been decreed at the *Rolls* against the plaintiff, that this being no present provision intended for him, the defect should not be supplied.

Lord Chancellor. There never having been any surrender to the use of the will, the legal estate descended to the grandson as heir at law ; and therefore the single question now is, Whether this court will supply that defect ? The rule is, that creditors are entitled to have a defect of a surrender supplied ; as are likewise younger children unprovided for ; and that from the circumstances of the persons who appear in a favourable light before the court. But the objection here is, that the plaintiff does not appear in that favourable light, he being otherwise provided for. As to that it has been often held here, that the father is the sole and only judge of the *quantum* of the provision ; and the defect of surrenders has been supplied even where the copyhold estate, intended to pass, has made but part of the provision ; and so not liable to the objection of leaving the child intirely unprovided for, in case the defect was not supplied : for the court has never yet entered into the consideration of the *quantum* that was proper for each child. And I do not find it insisted on by the counsel, that had the provision been in the same will, and not by any other act in the testator's life-time, that that would have taken away any equity he might have to get the defect supplied : and if it would not in that case, why should it in this ?

[37] The objection is, that this could not be intended as a present provision, being a remainder after several estates tail ; which being so remote, is of little or no value in the eye of the law. But this objection is of no weight : for, suppose the father had but a remainder upon an estate for life ; might not he have made a provision out of it for his children ? It is true, he could not make so good a provision as where he is in actual possession ; but it would be a provision still. And if after one life, why not after three or four ? And what difference is there between the cases where the court will supply a defect of a surrender upon a remainder depending on an estate for life, and where the whole is devised away, or is only a remainder after an estate tail ? That is, why should it be supplied where the whole is devised away from the heir at law, and not where but part ? Here is no intermediate disposal of the estate but to such persons as would have all been intitled to take as heir at law before the plaintiff : so his intent was, that for so long as his heirs at law continued, such as would be so before the plaintiff, that this should be a provision for him ; and when they fail, there is no heir at law to be disinherited, but he becomes heir at law himself. Nor can it be said, that there is an heir at law unprovided for : for, though he is made but tenant for life ; yet there are limitations to all his issue, who are all to take before the plaintiff.

And so reversed the decree, and ordered the defect of the surrender to be supplied. (At the plaintiff's charge ; but directed the account of rents and profits only from the time of *filing the bill*, *Lib. R. ante*, 3 P. Will. 288, S. C. ; 2 Eq. Cas. Abr. 235, S. C.)

The Case of *Burton* versus *Lloyd*, in Lord *Harcourt's* time, said to be in point.(2)

(1) In the register's book this case is stated thus : *Robert Cooke*, the plaintiff's late father, was seised in fee at the will of the lord according to the custom of the manor of *Lakenham*, in the county of *Norfolk*, of several copyhold lands held of the said manor, and surrendered the same to the use of his will, and afterwards, *viz.* about the 28th of *April* 1710, the said *Robert Cooke* made his will, and thereby gave and devised all his messuages and lands in the city of *Norwich*, and county of *Norfolk*, whereof he was seised in fee, whether freehold or copyhold, to his grandson *Richard Cooke*, for life, and after his death, to the first, second, third, and every other son and sons of the said *Richard Cooke*, lawfully to be begotten ; and to the heirs of the body and bodies of every such son and sons ; with remainder to the daughter and daughters of the said *Richard Cooke*, and the heirs of their several and respective body and bodies, remainder to the plaintiff his heirs and assigns for ever, and made the plaintiff his sole executor. About *Michael*

mas 1710, the said *Robert Cooke* died without revoking his said will, and seised in fee as aforesaid, and without having made any surrender to the use of the will, and leaving the said *Richard Cooke* his grandson and heir at law. The said *Richard Cooke*, by virtue of the said will, entered on the said premises and enjoyed the same for life, and about the year 1718, died without issue, whereby all the said premises devised by the said will, and particularly the said copyhold premises descended to the plaintiff. The defendant *Arnham* got into possession of the said copyhold premises, and refused to deliver up the same to the plaintiff, pretending that the said *Robert Cooke* did not surrender the said copyhold premises to the use of his will, and that the same upon his death descended to the said *Richard Cooke* in fee, and that he before his death surrendered the said copyhold premises to the use of his will, and that he afterwards made his will, and thereby devised the same to *Susannah Cooke* his mother, and her heirs; and that the said *Susannah Cooke* afterwards devised or surrendered the said copyhold premises to the use of the defendant *Arnham* in fee. The plaintiff insisted, that if a surrender by the said *Robert Cooke* to the use of his last will is wanting, the want of such surrender ought to be aided in a court of equity in favour of the plaintiff, who is a younger son of the said *Robert Cooke*. The defendant *Arnham* insisted, that the said *Richard Cooke* and himself having been above twenty years in quiet possession of the said premises, the plaintiff ought not to set up any title to the same after such length of time, and that a surrender should not be supplied in prejudice of an heir at law and those claiming under him, though the plaintiff was a younger son, for that the plaintiff's father, in his life-time gave him £5000, and at his death, by his will, gave him also £10,000 more, which far exceeded the fortunes either left or descended to the said *Richard Cooke*, as heir at law to the said *Robert Cooke*; and that after the said *Richard Cooke's* death, who died without issue, the plaintiff had, as heir at law to his father, estates of £100 *per annum*: and after the death of the said *Susannah Cooke*, the plaintiff had also, as heir to his father, other estates of inheritance, of the yearly value of £90, and that there was no want of assets to pay his debts. *Reg. lib.* 1733, fol. 480.

(2) It appears by the register's book, that in this case the bill was brought (inter al') to supply the deficiency of a surrender left in the hands of a customary tenant, and not presented at the next court. The uses of the surrender were to the testator's eldest son *Andrew Burton*, and the heirs male of his body; and for want of such issue, to the plaintiff, the second son, and the heirs male of his body, remainder over. The cause was heard before his Honor, 3d July 1712, who decreed for the plaintiff; and on the 14th November 1713, that decree was, on an appeal, affirmed by Lord Chancellor. *Vid.* 3 P. Will. 285.

[38] DE TERM. S. MICHAELIS, 8 GEO. II. [1734], IN CURIA CANCELLARIÆ.

Case 10.—BOSANQUETT *versus* DASHWOOD.(1)

11 Nov. [1734].

This court will decree money overpaid in pursuance of an usurious contract to be accounted for, notwithstanding the agreement of the oppressed party to allow such payments.

The plaintiffs being assignees under a commission of bankruptcy against the two *Cottons*, brought their bill against *Dashwood* the defendant, as executor of Sir *Francis Dashwood*, who had in his life-time lent several sums to the *Cottons* the bankrupts upon bonds bearing £6 *per cent.* interest (being the then legal interest); and had taken advantage of their necessitous circumstances, and compelled them to pay at the rate of £10 *per cent.* to which they submitted, and entered into other agreements for that purpose; and so continued paying £10 *per cent.* from the year 1710 to the year 1724.

It was decreed at the *Rolls* that the defendant should account; and that for what had been really lent, legal interest should be computed and allowed; and what had been paid over and above legal interest, should be deducted out of the principal at the time paid; and the plaintiffs to pay what should be due on the account: and if the testator had received more than was due with legal interest, [39] that was to be refunded by the defendant, and the bonds to be delivered up.

Mr. *Solicitor General* and Mr. *Fazakerley* insisted for the defendant, that it was hard to inquire into a transaction of so long standing. the parties having on all sides submitted to the agreement ; and that *volenti non fit injuria* ; which was the reason of the Lord *Holt's* opinion in the case of *Tomkins* versus *Barnet*, (2) 1 *Salk.* 22, why an action would not lie for recovery of money paid upon an usurious contract ; and that the bankrupts being *participes criminis*, should have no more advantage here than at law. Nothing was more common than to admit the party, after he had paid the money, to be an evidence in an information upon the statute of usury ; which shews he is, in the eye of the law, after payment, an indifferent person : and compared it to the case of gaming ; where, if the loser pays the money, and does not sue for the recovery within the time prescribed by the act, (3) he is barred. And cited the case of *Walker* versus *Penry*, 2 *Vern.* 78, 145. (4)

Lord Chancellor. There is no doubt of the bonds and contracts therein being good : but it is the subsequent agreement upon which the question arises. It is clear that more has been paid than legal interest. That appears from the several letters. which have been read, and which prove an agreement to pay £10 *per cent.*, and that from Sir *Francis Dashwood's* receipts ; but whether the plaintiffs be intitled to any relief in equity, the money being paid, and those payments agreed to be continued, by several letters from the *Cottons* to Sir *Francis Dashwood*, wherein are promises to pay off the residue, is now the question ?

The only case that has been cited, that seems to come up to this, is that of *Tomkins* versus *Barnet* (*supra*). *Vide* also *Jacques* and *Golightly*, 2 *Blackst.* 1073, in which this case is denied to be law ; which proves only, that where the party has paid a sum upon an illegal contract, he shall not recover it upon an action brought by him. And tho' a court of equity will not differ from the course of [40] law in the exposition of statutes ; yet does it often vary in the remedies given, and in the manner of applying them.

The penalties, for instance, given by this act, are not to be sued for here ; nor could this court decree them. And though no *indebitatus assumpsit* (5) will lie in strictness of law, for recovering of money paid upon an usurious contract ; yet that is no rule to this court, which will never see a creditor running away with an exorbitant interest beyond what the law allows, though the money has been paid, without relieving the party injured. The case of Sir *Thomas Meers*, heard by the Lord *Harcourt*, is an authority in point, that this court will relieve in cases, which, though perhaps strictly legal, bear hard upon one party. The case was this: Sir *Thomas Meers* had in some mortgages inserted a covenant, that if the interest was not paid punctually at the day, it should from that time, and so from time to time, be turned into principal, and bear interest : upon a bill filed, the Lord *Chancellor* relieved the mortgagors against this covenant, as unjust and oppressive. So likewise is the case of *Broadway* (*Broadways* v. *Morecroft*, *Moseley* 247 ; 2 *Salk.* 449 ; *Comyns Rep.* 349, 351. *Heathcote* v. *Paignon*, 2 *Bro. Cha. Rep.* 170, 176 (n.)), which was first heard at the *Rolls*, and then affirmed by the Lord *King*, an express authority, that in matters within the jurisdiction of this court it will relieve, though nothing appears which, strictly speaking, may be called illegal. The reason is ; because all those cases carry somewhat of fraud with them. I do not mean such a fraud as is properly deceit : but such proceedings as lay a particular burden or hardship upon any man : it being the business of this court to relieve against all offences against the law of nature and reason : and if it be so in cases which, strictly speaking, may be called legal, how much more shall it be so, where the covenant or agreement is against an express law (as in this case) against the statute of usury, though the party may have submitted for a time to the terms imposed on him ?—The payment of the money will not alter the case in a court of equity ; for, it ought not to have been paid : and the maxims of *volenti non fit injuria*, will hold [41] as well in all cases of hard bargains, against which the court relieves, as in this. It is only the corruption of the person making such bargains that is to be considered : it is that only which the statute has in view ; and it is that only which intitles the party oppressed to relief. This answers the objection that was made by the defendant's counsel, of the bankrupts being *participes crimines* ; for, they are oppressed, and their necessities obliged them to submit to those terms. Nor can it be said in any case of oppression, that the party oppressed is *particeps criminis* ; since it is that very hardship which he labours under, and which is imposed on him by another ; that makes the crime. The case of gamesters, to which this has been com-

pared, is no way parallel; for, there both parties are criminal: and if two persons will sit down, and endeavour to ruin one another, and one pays the money, if after payment he cannot recover it at law, I do not see that a court of equity has anything to do but to stand *neuter*; there being in that case no oppression upon one party, as there is in this. Another difficulty was made as to the refunding: but is not that a common direction in all cases where securities are sought to be redeemed, that if the party has been over-paid, he shall refund? (*Moore v. Batten*, Ambler Rep. 371.) Must he keep money that he has no right to, merely because he got it into his hands?—I do not determine how it would be, if all the securities were delivered up; this is not now before me: I only determine what is now before the court; and is the common direction in all cases where securities are sought to be redeemed.

And so affirmed the decree, &c.

(1) In *Reg. lib. A. 1734*, fol. 105, this case is thus stated, *viz. Samuel Cotton and John Cotton* (afterwards bankrupts) borrowed several considerable sums of money from the testator Sir *F. Dashwood*, for securing whereof, with interest, they gave him several bonds and notes under their hands; and about *December 1710*, accounts being settled between them, and all interest on the said bonds and notes paid, £10,000 remained due to the said testator, which was secured by several bonds; and the said testator soon after demanding immediate payment of the money due on the said bonds, and the bankrupts being unable to pay the same, the testator insisted that for the future they should pay him interest at the rate of £10 *per annum* for every £100 of the said £10,000, and sign an agreement for that purpose; and if they would not pay such interest, threatened to put the said bond in suit: whereupon the said bankrupts signed an agreement in writing to pay such interest; and pursuant thereto, from 1710 to 1714, inclusive; paid the said testator £1000 a-year for the interest of the said £10,000, besides the same interest for £1500 borrowed of him on the 11th *April 1711*, on their promissory note, and for £1000 borrowed of him on the 11th *December 1711*, on their promissory note: that the said bankrupt, about the year 1715, paid the said testator £500 in part of a bond debt, and soon after borrowed £500 upon a bond and promissory note, dated the 11th *May 1716*, whereby they became indebted to him in £10,000, for which they paid interest to him at the rate aforesaid, from that time to 1724. The said bankrupts, in *July 24*, paid the said testator £2000 in discharge of one of their bonds, and since his death paid the defendants, his executors, the further sum of £3000 in discharge of other of the said bonds; and it appeared by the schedule annexed to the plaintiff's bill, which contained an account of all the money borrowed of the said testator, and of the payments made in discharge thereof, that nothing remained due on the said bonds, and the plaintiffs insisted the same were considerably overpaid. The defendants admitted they had found a note or memorandum, dated the 10th of *January 1709*, whereby the bankrupts agreed that what sums of money should remain due from them on bonds from *Lady-day 1710*, should be paid as soon as might be, and to allow interest after the rate of £10 a-year for every £100 till the whole should be paid; and that the bankrupts, about *July 1724*, paid the testator £2000 in part of the £10,000 which they then owed him; and since his death they had paid the defendants, his executors, the further sum of £3000 in further part of the principal money owing to his estate; and said, that since the testator's death there were found amongst his effects, besides a bond from the bankrupts to the testator (which had been delivered up), five bonds, all executed by the said bankrupts to the testator, and believed the bankrupts were indebted to the testator at his death in £8000 principal and interest for the same, at the rate of £6 for every £100 from *Lady-day 1724*, and after his death, and before their bankruptcy at several times, paid the defendants the said £3000, part of the said principal, and £1350 on account of interest at £6 *per cent.* for every £100. And in *June 1728*, the said defendants made up an account of what was received on account of the said £8000 and interest after the said testator's death, computing the interest only to *Lady-day 1709*, and on the balance of such accounts £5000 appeared due for principal, and £705 for interest; and such account being then delivered to the bankrupts, they acknowledged such balance was justly due, and promised to pay the same; and the said defendants, the executors, insisted that if the said bankrupts paid their testator any greater interest for the money they owed him, than after the rate of £6 *per annum* for every £100, the same being actually paid by the bankrupts themselves, the plaintiffs could not

revoke such payments, which were voluntarily made, and admitted assets of their testator, sufficient to answer plaintiff's demands. *Reg. lib.* 1734, fol. 105.

(2) Lord *Mansfield* expresses his suspicions of the accuracy of this case, as reported by *Salkeld* in the following words, *viz.* "As to the case of *Tomkins v. Barnet*, it has often been mentioned, and I have often had occasion to look into it; but it is so loosely reported, and stuffed with such strange argument, that it is difficult to make any thing of it. One book says, it was determined by Lord *Holt*; another, by Lord *Treby*. Certain it is, it was only a *nisi prius* case. I think the judgment may have been right, but the reporter (*Salkeld*) not properly acquainted with the facts, has recourse to false reasons in support of it. The case must have been, as I take it, an action to recover back what had been paid in part of principal and legal interest, upon an usurious contract; and therefore the action would not lie: for so far as principal and legal interest went, the debtor was obliged, in natural justice, to pay, therefore he could not recover it back. But for all above legal interest, equity will assist the debtor to retain, if not paid, or an action will lie to recover back the surplus, if the whole has been paid. The reporter, not seeing this distinction, has given the absurd reason, that *volenti non fit injuria*; and therefore the man who, from mere necessity, pays more than the other can in justice demand, and who is called in some books the *slave of the lender*, shall be said to have paid it willingly, and have no right to recover it back, and the lender shall retain, though it is in order to prevent this oppression, and advantage taken of the necessity of others, that the law has made it penal for him to take." *Dougl. Rep.* 697, *in notes*.

(3) By stat. 9 *Anne*, c. 14, sec. 2, the loser may recover the money lost, within three months after the loss. If he does not sue for and recover it within that time, any person may recover the sum lost, and treble the value. But it has been held that the limitation of three months is confined to the case of money actually paid at the time; but that if a bond or other security is given, and the money, or part of it, afterwards paid, a court of equity will compel the re-payment of that money to the loser, after the expiration of three months. *Rawden v. Shadwell*, *Ambl.* 269.

The reason there stated to have been given by Lord *Hardwicke*, is, that the security being void by 9 *Anne*, c. 14, the payment under such security cannot be supported. But *qu.* because the contract also is not made void. By 16 *Car.* 2, c. 7, sec. 3, if the loss at one sitting is more than £100 the contract itself is made void; and in *Rawden v. Shadwell*, the bond was for £500.

(4) In this case, upon a re-hearing, the only question insisted on was, Whether a mortgagee having received interest upon an old mortgage after the rate of £8 *per cent.* after such time as the interest was reduced to £6 *per cent.* by the statute, should allow or discount the £2 *per cent.* towards satisfaction of the principal. The court confirmed the former decree, *viz.* that the £8 *per cent.* paid to the mortgagee for interest, should be retained by him as such; and that the £2 *per cent.* should not be discounted, nor applied towards satisfaction of the principal.

(5) *Sed vid.* *Smith and Bromley*, cited in *Jones v. Barkley*, *Dougl.* 696, where, in the words of Lord *Mansfield*, the following rule is laid down, *viz.* "If the act itself is immoral, or a violation of the general laws of public policy, there the party paying shall not have his action (*indebitatus assumpsit*); for where both parties are equally criminal against such general laws, the rule is, *potior est conditio defendentis*. But there are other laws, which are calculated for the protection of the subject against oppression, extortion, and deceit; and if such laws are violated, and the defendant takes advantage of the plaintiff's condition or situation, there the plaintiff shall recover." *Vid. also*, *S. P. Cockshot v. Bennet*, *B. R. M.* 29 *Geo.* 3, 2 *Term. Rep.* 763, 766. *Jacques v. Withy*, *C. B. T.* 28 *Geo.* 3, *H. Bl.* 65. *Nerot v. Wallace*, *B. R.* 20 *Geo.* 3, 3 *Term. Rep.* 17. *Astley v. Reynolds*, 2 *Str.* 915, where the plaintiff having pawned some goods with the defendant for £20, he refused to deliver them up, unless the plaintiff would pay him £10. The plaintiff had tendered £4, which was more than the legal interest amounted to; but finding that he could not otherwise get his goods back, he at last paid the whole demand, and brought an action for the surplus beyond legal interest, as money had and received to his use, and recovered. *Vid. also* *S. P. Fitzroy v. Gwillim*, *B. R. E.* 26 *Geo.* 4, *Term. Rep.* 153, the result of which cases, upon principle, and by analogy, seems to be, that a plaintiff may recover upon this action all money paid by him beyond legal interest, upon an usurious contract or loan. *Vide also* *Bellon v. Hyde and Mechell*, 1 *Atk.* 126 to 128. *Scott v. Nesbit*, 2 *Bro. Cha. Rep.* 641. *Ex parte Skip.* 2 *Ves.* 489.

Case 11.—PENNE *versus* PEACOCK & uxor.

12 Nov. [1734].

Husband and wife levy a fine of her trust estate : this shall bind the wife, unless there be proof of force or fraud : and this, altho' she by answer had sworn that she was compelled by *duress* to join.

The defendant *Jane Peacock*, before her marriage, conveyed (with her now husband's privity) the premises to trustees, in trust to pay the rents and pro-[42]-fits to her sole and separate use for her life; and after her decease, in trust for such uses as she, whether sole or covert, should by her last will limit and appoint; and for want of such appointment, then to her own right heirs for ever. She afterwards marries the defendant, who mortgages part of the lands to the plaintiff for £1000 for a term of five hundred years; and then a fine is levied by husband and wife, who both declared the uses of the fine, as to the mortgaged premises, to be to the plaintiff for securing the principal and interest.—The wife, by order of the court, answered separately; and insisted in her answer, that she had been forced to join in the fine by *duress*, insinuating the mortgage to be fictitious, and in trust for the husband, in order to defraud her. She further insisted, that there was no power reserved to her in the indenture of bargain and sale, to dispose of her real estate, or any part thereof, but by her last will; that she had no estate in the premises, but that the fine and mortgage were both void.

It was insisted for the defendant, that the legal estate being in the trustees, the parties to the fine had not such an estate in them whereof a fine could be levied to bar the wife's right; and that this being a mere naked power, without any interest, could not be barred by the fine, but remained still in the wife by force of the first conveyance.

Lord Chancellor. The suggestions of duress and fraud in the defendant's answer, do not appear upon the proofs; although it must be confessed, that the reserving the equity of redemption to the husband and his heirs, without any mention made of the wife, looks a little suspicious: but as the fraud is not made out to the satisfaction of the court, it is needless to determine how far so solemn an act as a fine might be affected by it. The next objection is, that the legal estate being in the trustees, the husband and wife had not such an estate in the land whereof a fine could be levied to bar the wife's right: but as to [43] that, it is very well known, that the operations of fines and recoveries is the same upon trust estates as upon legal estates. And if so, it must inevitably follow, that an estate for life limited to the wife, and the remainder limited to her own right heirs in default of any appointment made by her last will, are both disposed of by the fine. And if no such remainder had been limited by it, as the estate was the wife's own, and moved originally from her, whatever was not conveyed would have remained in her, and consequently been barred. This answers the objection of its being a naked power, or power in gross, and so not barred by the fine: for, how can that be called a naked power, which is to operate and take effect on the party's own estate? It is certainly a power coupled with an interest, and annexed to her inheritance, and so destroyed by the fine; since that a lease and release, or any other conveyance, will carry with them all powers that are joined to the estate: so a feoffment to the use of her last will, or the surrender of a copyhold to the use of one's last will, do still leave a power in the feoffor or surrenderor to dispose of their estate by a new feoffment or surrender.

And so decreed (*Reg. lib. A. 1734, fol. 42*) the trustees to convey to the plaintiffs the mortgagees, but without prejudice to any future bill that might be brought for discovery of the fraud or force.

For the defendant was cited the case of *Blackwood versus Norris*, heard some time ago at the *Rolls*, where the Lady *Shovell* had devised £4000 in trust for the separate use of a feme covert: and upon a bill brought by husband and wife against the trustees, though the wife was herself in court, and consented that the money should be paid to her husband; yet the *Master of the Rolls* would not decree it, but dismissed the bill.

N.B. This was the case only of a personalty. (See *Vin. Abr.* 4 vol. 202, S. C.)

[44] Case 12.—HOPKINS *versus* HOPKINS.

10 Nov. [1734].

[For subsequent proceedings see S. C. West. *temp.* Hard. 606; 1 Atk. 581; 1 Ves. Sen. 268. See *Nicholl v. Nicholl*, 1777, 2 W. Bl. 1162, note; *Vanderplank v. King*, 1843, 3 Hare, 12; *East v. Twyford*, 1853, 4 H. L. C. 556. Explained and corrected, *Bective v. Hodgson*, 1864, 10 H. L. C. 656. See *Abbiss v. Burney*, 1881, 17 Ch. D. 219.]

A construction in favour of executory devises, to support the intent of the testator, will be made either in the courts of law or equity, if it may be done consistently with the rules of law.

The testator Mr. *Hopkins*, by his will, devises his real estate to trustees and their heirs, to the use of them and their heirs, in trust for *Samuel Hopkins* (the plaintiff's only son; which plaintiff is heir at law to the testator) for life; and from and after his decease, in trust for the first and every other son of the body of the said *Samuel*, lawfully to be begotten, and the heirs male of the body of every such son; and for want of such issue, in case the said *John Hopkins*, the plaintiff, should have any other son or sons of his body lawfully begotten, then in trust for all and every such son and sons respectively and successively, for their respective lives; with the like remainders to their several sons; with the like remainders to the heirs male of the body of every such son, as before limited to the issue male of the said *Samuel Hopkins*; and for want of such issue, in trust for the first and every other son of the body of *Sarah*, the said *John Hopkins*'s eldest daughter, lawfully to be begotten; with like remainders to the sons of *John Hopkins*'s other daughters; and for want of such issue, then in trust for the first and every other son of his cousin *Anne Dare* (wife of *Francis Dare*) lawfully to be begotten; with like remainders to the heirs male of the body of every such son of the said *Anne Dare*; and for default of such issue, then in trust for his own right heirs for ever: then come two provisos; the one, whereby every person that should come into possession of his estate, was to take his name, and bear his arms: the other is in these words; *Provided also, and it is my will, that none of the persons, to whom the said estates are hereby limited for life, shall be in the actual possession thereof, and in the enjoyment of the rents and profits, or of any greater or other part thereof, than as hereinafter is mentioned, until he or they shall have respectively attained his or their [45] ages of twenty-one years; and in the mean time, and until his or their attaining to such age, my trustees and their heirs and executors shall make such allowances thereout, for the handsome and liberal maintenance and education of such person and persons respectively, as they shall think suitable and agreeable to his estate and fortune; and it is my will, that the overplus of the said rents and profits, over and above the annual allowances, or such part thereof as shall remain after all my debts, legacies, and funeral expences shall be first paid (with the payment whereof I have charged my real estate, in case my personal estate shall not be sufficient for those purposes), do go to such persons as shall first be intitled unto, or come into the actual possession of my said real estate, according to this my will.*

Samuel Hopkins died in the testator's life-time, without issue; and some time after, the testator died without any alteration made of his will; nor had *John Hopkins* any other son; nor were any of the other remainder-men in *esse* at the testator's (1) death, except ——— *Dare*, son of *Ann Dare*.

The first question was, Whether by *Samuel*'s death in the testator's life-time, the several limitations between him and *Dare* were not become void; there being no particular estate to support them as remainders, by reason of *Samuel*'s death in the testator's life-time, who was to take the first estate; nor nobody capable of taking at the testator's death but the son of *Anne Dare*, who thereby claimed the whole interest presently? or whether these intermediate limitations should not enure by way of executory devise to any other son he might hereafter have?

The second question was, in case the limitation to the other sons of *John Hopkins* was to be looked upon as an executory devise, What should become of the rents and profits in the mean time?

The cause was first heard at the *Rolls*, and there decreed to be an executory devise. (2)

[46] Mr. *Serjeant Eyre*, and Mr. *Peere Williams* argued, that the consideration of trust and legal estates being the same, this limitation to the other sons of *John Hopkins* was to be taken to be a remainder, and could not enure; the rule of law being never to construe that an executory devise, which may enure as a contingent remainder. They agreed the difference between deeds and wills; that in the former the first estate must be good, otherwise all the remainders depending thereon are void, and can never arise; but in the latter, the first estate may be void, and yet the remainders take place, as in 2 *Ro. Ab.* 415, pl. 6, 7; *Plow.* 414 a; *Cro. El.* 423; 2 *Vern.* 722. But they insisted, that devises of real estates were to relate to the time of the making the will; as if one devises all the land he has, or shall have at his decease, yet no after-purchased land shall pass, but such only as he had at the time of the will made: and that what was a limitation by way of remainder at the time of the will made, could not, by any (3) subsequent accident, become an executory devise, 1 *Salk.* 237; 1 *Sid.* 3; 2 *Ro. Abr.* 418; 2 *Saund.* 380, 388; 1 *Salk.* 226; and that this, being to arise after an estate tail, was too remote; the law not allowing of executory devises to arise after an estate tail.

Mr. *Attorney General*, Mr. *Solicitor General*, Mr. *Verney*, Mr. *Fazakerley*, Mr. *Bootle*, and Mr. *Strange* argued on the other hand, that *Samuel* being dead without issue in the testator's life-time, this limitation to the other sons of *John Hopkins* should enure by way of executory devise. They observed, that executory devises were not of a very long standing; yet that they are of the same nature with another thing which is very ancient; which is springing uses, which are as old as uses themselves. And that, if at common law such things were allowed, it was very well done of the judges to admit of executory devises to carry into execution, as far as possible, the intent of the testator. That the testator's [47] intent is clear in this case, that the first and every other son of *John Hopkins* should take; and that this intent may be carried into execution is likewise clear. Indeed, as a contingent remainder, it can never take effect; because remainders must take place *eo instanti* the particular estates determine; but in order to prevent that inconveniency, other ways have been found out to support wills; and the Lord *Hobart* commends the judges for being *astuti* to serve the party's intent. The rule laid down on the other side, that a limitation which may enure as a remainder, shall never be construed to be an executory devise, is true: but that is only a supposal that the party's intent was, that things should go according to the ordinary forms; but where they cannot, there extraordinary methods are used to serve the intent; and it is impossible to find out any set of words more proper to make an executory devise than those used here; nothing but the intervening estate to *Samuel* can make any difficulty; and that is answered by the cases put on the other side, 2 *Ro. Abr.* 41 b, of a devise to A. for life, remainder to B. and of a devise to a monk, remainder over; A. dies in the testator's life-time; B. shall take by way of executory devise; and in the latter case, immediately upon the testator's death, the remainder-man shall take: and yet if either A. had outlived the testator, or the monk been deraigned in the testator's life-time, in both cases the second limitation must have been a remainder. So in this case, the estate to *Samuel* never having taken effect, it must enure by way of executory devise, to the first and every other son of *John Hopkins*; whereas had *Samuel* outlived the testator, the limitation had been a remainder.—The case in 1 *Sid.* 3, widely differs from this; for, that was upon a settlement, which is complete upon the execution of it; whereas a will is ambulatory until death. Nor can any better comparison be drawn between this and the other cases that have been put, which are of contingent remainders, and so quite foreign to executory devises. And in that of *Purefoy versus Rogers*, 2 *Saund.* 380, 388, the particular estate was existing after the testator's death; which consequently supported the remainder; and [48] so plainly differs from this case, where is no particular estate in being. But *Cro. Eliz.* 878, (4) is a strong authority for the construction now desired; for, there the devise was of lands to J. S. from *Michaelmas* following, remainder over in fee; the testator died before *Michaelmas*; it was held by the court, to be a good executory devise: for, a remainder it could not be; because it could not begin until the particular estate did, which was not to commence till *Michaelmas* after; and a freehold cannot be in expectancy: it was therefore held, that the freehold should, in the mean time, descend to the heir at law, and vest in him; but if in that case the testator had lived to *Michaelmas*, then it had been a good remainder. And if an executory devise may, by a subsequent accident, become good as such, especially where the testator's intent is clear that it should (which was the reason of the resolution in the case of *Higgins versus Dowler*, 2 *Vern.* 600, where the limitation to the daughter

was allowed to be good, there being no son to take : so a devise to two and their heirs, one dies in the life of the testator, the survivor shall take the whole, 1 *Salk.* 238) ; and if courts of law do, much more will courts of equity mould the words so as to let in those whom the testator intended to take. Nor will the objection hold that has been made on the other side, viz. that this, being to take effect after an estate tail, is too remote, and can never arise ; for, here can never be any estate tail before this executory devise is to arise, *Samuel* being dead without issue : nor is there any danger of a perpetuity ; the longest time that this can subsist as an executory devise being only until the birth of a son to a person in *esse*, which is but nine months : whereas in the case of *Floyd* versus *Carey*, in the House of Lords, twelve months were allowed to be a reasonable time ; and in that of *Massenburgh* versus *Ash*, (5) 1 *Vern.* 234, 257, 304, twenty-one years were held to be good ; and where there is no danger of a perpetuity, it is just that executory devises should be carried as far as may be to serve the intent of the party. This court went a great way in that case of *Massenburgh* versus *Ash*.—And though the courts at law would not at first allow any executory devise to arise after the compass of a life or lives wearing out together, as appears by the case of *Scattergood* versus *Edge* (1 *Eq. Cas. Abr.* 189, pl. 14, 15), 1 *Salk.* 229, yet that of *Floyd* versus *Carey*, being subsequent to that, and in the House of Lords, has led the courts of law into carrying them as far as this court does.—The case of *Lord Glenorchy* versus *Bosville* (*Ante* 3) is another strong authority ; where the words were determined to carry an estate tail ; but the trusts being executory, and the intent of the parties clearly otherwise, they were restrained, and decreed to carry but an estate for life, with remainder to the first and other sons, &c.

Lord Chancellor. Two questions have been made upon this will : the first is, Whether this limitation to the first and every other son of *John Hopkins* can now take effect as an executory devise ? or, whether it shall be taken as a contingent remainder, and consequently void for want of a particular estate to support it, by reason of *Samuel's* death in the testator's life-time, and that *John Hopkins* had no son in *esse* at the testator's death, in whom the remainder might vest ? The next question is, in case the limitation be taken as an executory devise, what is to become of the rents and profits of this estate until *John Hopkins* has a son ? As to the first, I think it impossible to cite any authorities in point. None have been cited. It seems to be allowed, that if things had stood at the testator's death as they did at the time of the making of the will, the limitation in question would have been a remainder, by reason of *Samuel's* estate, which would have supported it : so is the case of *Purefoy* versus *Rogers*, 2 *Saund.* 380, 388, and limitations of this kind are never construed to be executory devises but where they cannot take effect as remainders (*vid.* also *Fearne's Contingent Remainders*, on Executory Devises, 242, 261, 262, 280, 299, 3 *ed.*, also 4 *ed.* 451). So on the other hand, it is likewise clear, that had there been no such limitation to *Samuel* and his sons, the limitation must have been a good executory devise, there being no antecedent estate to support it ; and consequently not able to enure as a remainder ; so that it must be the intervening accident of *Samuel's* death in the testator's [50] life-time, upon which this point must depend. And as to that, I am of opinion that the time of making the will is principally to be regarded in respect to the testator's intent. If an infant or feme covert make a will, and do not act either at full age or after the coverture determined, to revoke this will, yet the will is void ; because the time of making is principally to be considered ; and the law judges them incapable of disposing by will at those times. The same reason holds in the case of a devise of all the lands which a man has or shall have at the time of his death, no after-purchased lands shall pass without a re-publication : which was the case of *Bunter* versus *Cook*, 1 *Salk.* 237, because the time of the will made is chiefly to be regarded. Indeed it is possible that subsequent things may happen to alter the testator's intent ; but unless that alteration be declared, no court can take notice of his private intent, not manifested by any revocation of the former ; though these subsequent accidents may and must, in many cases, have an operation upon the will ; as in the case of *Fuller* versus *Fuller*, (6) *Cro. Eliz.* 422, and *Hutton* and *Simpson*, 2 *Vern.* 722.(7) And in the lord *Landsdown's* case, the first limitation did not expire by effluxion of time, but by the intervening alteration of things between the time of the will made and the testator's death ; and the words there, *for want of such issue*, were not construed to create another estate tail to postpone the limitation, but only to convert the second estate to the precedent limitation. So we see, that in these cases the method of the courts is not to set aside the intent because it cannot take effect so fully as the testator desired ; but to let it work as far as it can.

And if, in this case, we consider it as an executory devise, the intent will be served in case *John Hopkins* has a second son ; but if it is taken as a remainder, the intent plainly appearing that a second son of *John Hopkins* should take, is quite destroyed ; there being no precedent estate to support it as a remainder.—The very being of executory devises shews a strong inclination, both in the courts of law and equity, to support the testator's intent as far as possible [51] (vide *Doe v. Fonnereau*, *Douglas* 470, and authorities there cited)—and though they be not of ancient date, yet they are of the same nature with springing uses, which are as old as uses themselves. I can see no difference between this case and the others of like nature, that have been adjudged. And if such a construction may be made consistently with the rules of law, and agreeable to the testator's intent, it would be very hard not to suffer it to prevail. In *Pay's* case, *Cro. Eliz.* 878 (*Vid.* also *Noy* 43, S. C. but differently stated, *et ante* 48), had the testator lived to *Michaelmas*, the limitation had been a remainder ; and if a remainder in its first creation does, by any subsequent accident, become an executory devise, why should it not be good here, upon the authority of that case, where by the testator's death before *Michaelmas*, what would otherwise have been a remainder, was held to be good by way of executory devise ? I think, that in this case the limitation would operate as an executory devise, if it was of a legal estate ; and therefore shall do so as a trust, the rules being the same.

The next question is, what is to become of the rents and profits, in case this be taken to be an executory devise, until the birth of a son to *John Hopkins* ? And this must depend upon the wording of the proviso. The words are, *That none of the persons to whom the estates are limited shall be in the actual possession and enjoyment of the rents and profits until they shall respectively attain the age of twenty-one ; and that in the mean time the trustees shall make such allowance thereout as they shall think suitable ; and then he wills, that the overplus of such rents and profits do go to such persons as shall be intitled unto, and come to the actual possession of his estate, &c.* By which words none are affected but such as are to come to the estate under the limitations. It restrains them from having any thing to do with the estate till they attain the age of twenty-one, and provides the surplus (beyond their allowance) to be laid up for them : but here is no provision made what shall become of those rents and profits until a son be born. The words *in the mean time* have been differently construed : and it was said, that there was no [52] certain *terminus a quo* from whence they should begin. Had *Samuel* lived, the *terminus* must have been from the time of the limitation taking place ; and so it must be *toties quoties* any come to be intitled to this estate under the several limitation : but until somebody is *in esse* to take under this executory devise, the rents and profits must be looked upon as a residue undisposed of, and consequently must descend upon the heir at law (*Carrick v. Errington*, 2 P. Will. 361. *Bullock v. Stones*, 2 Ves. 521. *Harris v. Barnes*, 4 Burr. 2160) ; the case being the same where the whole legal estate is given to the trustees, and but part of the trust disposed of, as in this case ; and where but part of the legal estate is given away, and so the residue undisposed of, the legal estate descends upon the heir at law. So it was held by the Lord King in the case of Lord and Lady *Hertford* versus Lord *Weymouth* ; which shews that equity follows the law.

One objection indeed has been made, which is, that the testator having in this case devised another estate to *John Hopkins* his heir at law, can never be supposed to have intended him this surplus. And to warrant that objection, the case of *North and Crompton*, 1 Chan. Ca. 196, has been cited. I answer, that in these cases the heir does not take, by reason of the testator's intent being one way or the other ; but the law throws it upon him ; and wherever the testator has not disposed (be his intent that the heir should take or not take) yet still he shall take : for, somebody must take ; and none being appointed by the testator, the law throws it upon the heir.

And so affirmed the decrees, (8) and ordered the personal estate (which was of very great value) to be laid out in land, and settled to the same uses as the real estate, according to the direction of the will. (9)

(1) Which circumstance after the testator's death, occasioned the bringing two bills, one by *John Hopkins* and his daughter, to have an account and an execution of the trust ; and *John Hopkins* prayed, that as heir at law he might have the profits till some persons came *in esse*, capable to take under the will, *as part of the trust undisposed of* ; the other bill was brought by the trustees, that till a person was *in esse*,

capable of taking, the profits might be accumulated to increase the estate. 1 *Atk.* 582, S. C.

(2) The *Master of the Rolls* being of opinion, that the limitation to *Samuel Hopkins* was to be considered as if it had never been in the will, and therefore that the devise to after-born sons being by future words, in case his cousin *John Hopkins* should have any other son, it was now to be considered *H* the first devise, and might take effect as an executory devise. *Vid.* 1 *Atk.* 682, S. C.

(3) *Sed vid. Brownsword v. Edwards*, 2 *Ves.* 249. *Dos v. Fonnereau*, *Dougl. Rep.* 487 to 509, in which cases it was held and determined that a devise may operate either way, according to the event.

(4) One seised in fee devised lands to *J. S.* for five years from *Michaelmas* then next, remainder to *B.* in fee, and the question was, whether this was a good devise of the remainder in fee to *B.*, and adjudged that this was a good devise of the remainder in fee; for though it was admitted that a freehold could not expect or be in abeyance, yet in that case the freehold and fee-simple descended and vested in the heir at law till *Michaelmas*, and so was not in abeyance, and this made the devise after *Michaelmas* good. *Cro. Eliz.* 878.—*Pay's case*. In 1 *Lut.* 79, or *Clarke v. Smith*, this case is mentioned by the court, and admitted to be law: *A.* seised of land in fee, devises to *B.* in fee, to commence and take effect six months after the testator's death, this is plainly a good executory devise, and will take effect at the end of six months after the testator's death; but it is expressly held there, that during those six months the estate descends and continues in the heir at law of the testator.

(5) Which case was this: *A* term for years was assigned to trustees in trust for baron and feme during their lives, and the life of the longer liver of them; and if there should happen to be issue male of their bodies living at the time of the decease of the survivor of them, then in trust, that the eldest son of that marriage should be maintained out of the rents and profits, until he attained his age of 21 years, and then the whole term to be assigned unto him; and in case he should die before the age of twenty-one years, then in like manner for the maintenance of the second, third, fourth, and every other son of that marriage, in the same manner; but if no such son, or if all the sons die before twenty-one, then to *J. S.* Baron and feme die, and leave a son only, who dies whilst an infant of about five years old—and the question was, whether the remainder over to *J. S.* was good? and held that it was.

(6) Devise to *A.* and the heirs of his body, remainder to *B.* *A.* dies in the life-time of the testator; held that *B.* should take presently, although *A.* left issue.

(7) Devise of land to *A.* in tail, and after *A.*'s death without issue to *B.* *A.* dies in the life-time of the testator, leaving issue, the devise to *A.* held to be void, and that *B.* should take presently, though against the express words of the will, and the intent of the testator.

(8) And directed the trustees to deliver possession to the plaintiff *John Hopkins* (of particular estates), and of the estate purchased by the testator after the making the will, and to deliver the deeds and writings to him; and declared he was entitled to the rents and profits devised to the trustees, accrued since the testator's death, till some person should be in being, *intitled to an estate for life in possession* according to the limitation in the will, and was entitled to the surplus produce of the testator's estate, after payment of the annual sum charged thereon; and directed an account of both the real and personal estate, and a like direction as to the personal estate for investing it in lands; there was no direction given concerning a conveyance of the estate, but a general preservation, and liberty to apply to the court, as there should be occasion." 1 *Atk.* 582, S. C.

(9) Soon after the affirmance of this decree, *John Hopkins* had issue *William Hopkins*, a second son, who soon after dying without issue, *John* the eldest son of *Hannah Dare*, having attained twenty-one, brought his bill to have a settlement made to him by the trustees, either in tail or for life, as the court should think him entitled, and for also an account of the profits during *William's* life-time, and that the surplus profit may be paid to him, and upon the hearing it was argued for him, that the estate vested in *William* (the second son of *John Hopkins*) on his birth, and was no longer executory, and consequently all the subsequent limitations became remainders, either contingent or vested, according to their respective natures; and that those that were contingent not vesting, either during or *eo instanti*, that the particular estate of *William* deter-

mined, were void, and consequently the plaintiff *John Dare*, as having the first remainder vested in him, was entitled to the estate in possession.

For the defendant it was argued 1st. That there is no necessity to consider the limitations subsequent to that to the second son of *John Hopkins*, as contingent remainders, but that they may subsist as so many distinct executory devises, and if one did not take effect another might; 2d (and which was most relied on), that admitting, that by the estates vesting in *William*, the subsequent limitations were to be looked upon as remainders, yet such as were contingent, were not destroyed by their not vesting during his life, but that the legal estate in the trustees is sufficient to support them; 3d, That a determinable freehold in the equitable estate descended on the heir at law, and that is sufficient to suppose the contingent remainders of the trust estate. And decreed by Lord *Hardwicke*, chancellor (7th March 1738), that though by the vesting of the estate in *William Hopkins* the second son, the subsequent limitations were to be considered as turned into contingent remainders, yet that they are not destroyed by not becoming vested in the life-time of *William Hopkins*, but that the limitation of the fee of the legal estate to the trustees is sufficient to support them, and the bill was dismissed; but the chancellor said he would be understood to mean such of the remainders only as could be supported by the rules of law, and not the remote ones to the sons unborn of sons unborn, for the possibilities upon possibilities the law will not admit of. Vid. *Atk.* 581, S. C. 1 *Ves.* 269, S. C.

[53] Case 13.—LUTKINS *versus* LEIGH.

20 Novemb. [1734].

[See *In re Smith*, [1899] 1 Ch. 371.]

A. devises (as touching his worldly estate, after payment of his debts which he wills to be first paid) his lands (in mortgage) to B. his wife for life, and after her death to C. and directs the residue of his personal estate to be placed out at interest; B. to have the interest during her life, and after her death to C. and gives B. £1500 provided she accept the devises and bequests in lieu of dower; there is not sufficient personal estate to pay the debts and legacies; if the mortgagee take part of the personal estate, the legatee shall, for so much, stand in his place.

Benjamin Knight having mortgaged his freehold lands to Mr. *Ainscomb* for securing the sum of £2500 in 1729, made his will in these words; *As touching my worldly estate, after payment of my debts and funeral charges, which I will to be first paid, I give my freehold estate in Kent to my wife for life, chargeable with an annuity of £30 for life to Elizabeth Knight; and after his wife's death he devises his said freehold estate, so charged, to the children of his three sisters, and directs the residue of his personal estate to be placed out at interest; his wife to have the interest during her life, and after her death to be divided among the children of his three sisters; and gave his wife £1500, with a proviso that the devises and bequests in the will should be accepted by the wife in lieu of her dower, and in full satisfaction of her share of the personal estate.*

The question was, whether the personal estate should be applied in exoneration of the real, (1) so as to defeat the pecuniary legatees; there not being sufficient to pay the £1500 in case the personal estate should be applied in exoneration of the real. Mr. *Attorney General* insisted for the widow, that this legacy was to be looked upon as a charge upon the real estate, according to the Lord *Warrington's* case; and said, It was a great while before this court would favour the devisee of land (being but *hæres factus*) so far as to entitle him to have the personal estate applied in exoneration of the real. (2) 1 *Chan. Ca.* 271, and 2 *Vern.* 477, where it is said, That an express devise shall (*Hawes v. Warner*) not be defeated, even [54] for an heir, much less for a devisee of land, who is but *hæres factus*.

Lord Chancellor. This point has been so far determined, that it seems quite settled and clear; where a man leaves his real estate charged, the legatees and simple (3) contract creditors have a right to stand in the room of bond creditors, if these latter run away with the personal estate; and this in order to do justice both to the testator's intent, and likewise to the creditors. Indeed where the contest is between the heir and executor, and there is either a mortgage or bond wherein the heir is bound, the heir shall always prevail to have the personal estate applied; but that is only where no

prejudice is done either to a simple contract creditor or legatee : and had there been no devise of the land in this case, the widow and the other legatees would have had a right to apply to this court, and to stand in the room of the mortgagee if he fell upon the personal estate, that being the proper fund for their legacies, and to have so much of the real estate, as he had out of the personal : but here the real estate is devised away ; which gives the legatees rather a stronger claim than when they have to do with an heir at law ; since it was a long time before a devisee could prevail with this court to have the personal estate applied in exoneration of the real, as appears from many ancient cases, which distinguish in that case between a devisee and an heir at law ; though at last he has prevailed where there is no damage done to a third person : but it has been endeavoured here to put him in a better condition than the heir ; and to that end has been cited 1 *Salk.* 416. There is a great difference between that case and this ; for, a bond effects not the real estate in the testator's hands ; nor did it the devisee, until the statute of fraudulent devises ; nor, before the statute, did it affect the heir (3 & 4 *Will. & M. c.* 14), if he had aliened before the writ brought : but in case of a mortgage, that is a lien upon the land both in the hands of the testator and the devisees, and in whose hand soever the [55] land comes. Thus the court has gone as far as is reasonable, *viz.* to put the *hæres factus* in as good a plight as the *hæres natus* ; but not in a better. (4) So the legatees must have the legacies out of the personal estate in case the mortgagee keeps to the real ; and if he falls upon the personal, they have a right to stand in his room for so much out of the real estate as he shall take out of the personal ; that being a proper fund for their payment.

(1) The personal estate of a testator is the primary fund for the payment of all his *personal* debts, or general legacies. 2 *Eq. Cas. Abr.* 369, c. 4. *Eyre v. Hastings*, 2 *Cha. Rep.* 273. *Gower v. Mead*, *Prec. in Chanc.* 3. *Mead v. Hide*, 2 *Vern.* 120. *Cutler v. Cozeler*, *ibid.* 302, but this rule is to be understood with some exceptions ; for if there be an express clause to exempt the personal estate from payment of debts, there the load lies upon the heir, because it is the will of him who has the dominion over both estates, that the real estate should be charged in such manner. *Wainwright v. Bendlows*, *Prec. in Chanc.* 451 ; 2 *Vern.* 718, S. C. *Hall v. Brookes*, *Gilb. Eq. Rep.* 72 ; 1 *Eq. Cas. Abr.* 12, 271, S. C. *Bamfield v. Wyndham*, *Prec. in Chanc.* 101. *Heath v. Heath*, 2 *P. Will.* 366. *Stapleton v. Colville*, *post*, 202. *Walker v. Jackson*, 2 *Atk.* 264. *Duke of Ancaster v. Mayer*, 1 *Bro. Ch. Rep.* 456. But in order to exonerate the personal estate from payment of debts and legacies, it is necessary not merely to charge the real, but the will must exempt the personal, *French v. Chichester*, 2 *Vern.* 568. *Samwell v. Wake*, 1 *Bro. Chan. Rep.* 145. *Duke of Ancaster v. Mayer*, *sup.* in which last case all the authorities which apply either in affirmance or denial of the doctrine upon this subject are thoroughly considered ; but where the intention to exonerate the personal estate is *beyond all doubt*, such intention shall prevail, though no express words are used for that purpose, *Webb v. Jones*, 2 *Bro. Cha. Rep.* 60. So the personal estate shall not be liable in ease of the real, to the defeating of any legacy, *Tipping v. Tipping*, 1 *P. Will.* 730. *Oneal v. Mead*, *id.* 694. So where the real estate is *from the nature of the contract* primarily liable, *Countess of Coventry v. Earl of Coventry*, 2 *P. Will.* 222. *Freeman v. Edwards*, *id.* 437. *Evelyn v. Evelyn*, *id.* 664. So the personal estate shall not be applied where the debt (though personal in its creation) was originally the debt of another. *Cope v. Cope*, 2 *Salk.* 449. *Bagot v. Oughton*, 1 *P. Will.* 347. *Lawson v. Hudson*, *Bro. Cha. Rep.* 58. *Tweeddel v. Tweeddel*, 2 *Bro. Cha. Rep.* 101. *The Earl of Tankerville v. Fawcet*, 2 *Bro. Cha. Rep.* 57. But where the charge on the real is merely collateral, and auxiliary to the personal estate ; the latter shall be first applied so far as it will go, and the deficiency only made up out of the real. *Howell v. Price*, 1 *P. Will.* 294. *Bartholomew v. May*, 1 *Atk.* 487. *Gatton v. Hanock*, 2 *Atk.* 424. *Marchioness of Tweedale v. Earl of Coventry*, *Bro. Cha. Rep.* 240. In *Evelyn v. Evelyn*, *sup.* the reader will find all the general reasoning upon this subject.

(2) *Cornish v. Mead*, of this case Lord *Hardwicke* says, it is the last in which the court refused to apply the personal estate, in favour of an *hæres factus* ; and though this case was determined in Lord *Nottingham's* time ; Lord *Hardwicke* expresses his opinion that it must have been determined by the *Master of the Rolls*, or some judge sitting for him, because Lord *Nottingham* had determined the contrary expressly in a case prior, which was the first case where an *hæres factus* had this determined in his

favour, viz. that personal assets should be applied in exoneration ; but this was the case of an *hæres factus* of the whole estate. *Galton v. Hancock*, 2 Atk. 437.

(3) Vid. the principal cases upon this subject collected by Mr. Cox, in his note upon *Clifton v. Burt*, 1 P. Will. 679, 680, and arranged by him with his usual accuracy and judgment.

(4) In the old cases this diversity is found to have been held between *hæres factus*, and a devisee of particular lands, viz. that a devisee of particular lands should not have the benefit of the personal estate, but that the *hæres factus* of the whole should ; but in the case of *Pockley v. Pockley*, 1 Vern. 36, it was said by Lord Nottingham, that not only he, who is *hæres factus*, shall pray in aid of the personal estate to discharge thereby, but even an ordinary devisee shall have that benefit ; and Lord Hardwicke, in *Galton v. Hancock*, 2 Atk. 436, observed, that Lord Nottingham's opinion had been followed ever since.

Case 14.—SABBARTON versus SABBARTON.

22 Novem. [1734].

Joseph Sabbarton being seised of a real estate, and possessed of a personal estate in bank stock and orphans stock, by will dated April 21, 1710, devised his real estate and stock to trustees, and their heirs, executors, &c., in trust to pay the rents and profits to *Catherine Corr* for life ; and if she married *Benjamin Sabbarton*, then in trust, after her decease to pay the rents and profits to him for life ; and after both their deaths, in trust to the first and every other son of them two in tail male ; and for want of such issue, to their daughters, equally to be divided between them ; and for want of such issue, then in trust for the issue male or female of the survivor of them, equally to be divided between them ; and in default of issue of the said marriage, then in trust for the issue of the survivor of them ; and if neither of them leave issue, then in trust for his sister *Sarah Kidwell* for life, and after her decease, to the use of all and every the child and children of his brother *John Sabbarton*, which shall be living at his death, or his wife shall be *ensient* of, and shall attain the age of twenty-one, and to the heirs, executors, administrators and assigns of such child or children, share and share alike, as they shall respectively attain their ages of twenty-one ; and in default of such children, &c., then to his own right heirs. *Benjamin* and *Catherine* intermarried, but had no issue between them : *Catherine* survived, but had no issue, and devised to the defendant. The question was between the plaintiff, who was child to *John* [56] *Sabbarton*, and the defendant, who claimed under the devise of *Catherine*, Whether the limitation of the personal estate to *Benjamin* and *Catherine*, and the issue of the survivor of them, did not create an estate tail in *Catherine*, who survived, and consequently the limitation over, of a personality after an estate tail void.

Mr. *Solicitor General* for the plaintiff cited the case of *Atkinson and Hutchinson*, heard the second of May last, where the (before Lord Talbot, 3 P. Will. 259) devise was to trustees, in trust for his wife, so long as she should remain unmarried ; then in trust for such child and children as he should leave at his death, equally to be divided between them ; and if either of them die without issue, then his share to go to the survivor ; and if both die without issue, then in trust for the defendant *Hutchinson* ; he left two daughters, who both died without issue, under age : and there the words *dying without issue* were held to be *issue living at the death*, and so the limitation to *Hutchinson* allowed to be good. So in the case of *Donne versus Merrefield*, heard at the Rolls the 22d of October 1730, where the devise was, to his brother *John* for life ; then to such person as he should marry, for her jointure ; and after her death, to the heirs of the body of his brother *John*, and the executors, administrators and assigns of such heirs during the residue of the term ; and for default of such issue of his brother *John*, then to *Henry Donne* : This limitation to *Henry* was held good ; the words being taken to be heirs living at his death. *Forth versus Chapman* (1 P. Will. 663) heard by the Lord Macclesfield. *Higgins versus Dowler*, 2 Vern. 600.

Lord Chancellor. I do not see how it is possible to maintain this limitation to the children of *John Sabbarton*. Executory devises are favoured in order to support the parties intent ; but still they must not exceed the rules. The compass of a life is held to be a reasonable time for a contingency to happen in : So in the case of *Massenburgh versus Ash*, 1 Vern. [57] 234, 257, 304. Twenty-one years after a life were held to be a reasonable time ; but a contingency to arise after the determination of

an estate tail, is too remote : so that the question must be here, Whether the words mean a general failure of issue, or such a failure as is to happen within the compass of a life ? The real and personal estates are both devised to the same trustees ; and the limitations are the same. The estates are first limited to *Benjamin* and *Catherine* for their lives, remainder to their first and other sons, remainder to the daughters ; and for want of such issue, then in trust for the issue male or female of the survivor ; which latter words do clearly make an estate tail, according to *King* and *Melling's* case, 1 Vent. 214, 225, they taking in both sons and daughters, and grand-children in infinitum.

It has been endeavoured to confine this limitation to the issue living at the death of the survivor ; but it can never be imagined that these limitations to *John Sabbarton's* children were intended to take effect before the determination of the former ; and they plainly carry an estate tail ; these latter must be void. It has been also objected. That the words *leave issue* must be construed *issue living at the death* ; but still we must remember, that this is a complicated devise both of the real and personal estate ; and in case of the real, this limitation to the issue of the survivor makes *Benjamin* and *Catherine* tenants in tail ; and the personal estate being intended to go, and be limited in the same manner as the real, must likewise be an estate tail ; and so the limitations of it after that void ; the word *leave* being only to connect the clauses, and shew what is to become of the estate after the determination of the former limitation. The words in the case of *Forth* and *Chapman* (1) were different, and carried an intent in the testator different from the intent in this case. 'In that of *Atkinson* versus *Hutchinson* there was no precedent limitation in tail, as there is here. And in the other of *Donne* versus *Merrefield*. the contingency of the brother's having issue was to arise within the compass of a life ; and there were no [58] words carrying a general failure of issue, by reason of the words *executors, administrators and assigns*, which restrained the word *heirs* to immediate heirs : and that contingency never happening, the limitation over was allowed to be good.

And so dismissed the plaintiff's bill, &c.

See this case stated more at large, with the opinion of the judges of the King's Bench, &c., towards the latter end of this book. Post, 245.

(1) That case being this ; one *Walter Gore*, by will devises thus ; all his estate real and personal he gave to *J. Chapman* in trust, only the lease of the ground he held of the school of *Bangor*, for the use of his nephew ; *William Gore* and *Walter Gore*. during the term of the lease as hereafter limited, and having given several legacies, declared his will as to the remainder of the estate, as well as his freehold house in *Shaw's Court*, with all the rest of his goods and chattels whatsoever and wheresoever he gave to his nephew *William Gore* ; and if either of his nephews *William* or *Walter* should depart this life, and leave no issue of their respective bodies, then he gave the said (leasehold) premises to the daughter of his brother *William Gore*, and the children of his sister *Sibley Price* ; upon which the question arose, whether the limitation over of the leasehold premises to the children of the devisor's brother and sister, was void as too remote.

The *Master of the Rolls* (Sir *Jos. Jekyll*) was of opinion, and decreed, that the devise over was void ; but on an appeal, the *Lord Chancellor Parker* held it good, for that there can be no difference between the words *without leaving issue* (which is construed to mean issue at his death) and *leaving no issue* ; but what made it infinitely stronger, was, that the fact happened to be, that the testator had a real and leasehold estate, and devised all his estate, as well freehold, as goods and chattels to A. and if A. died leaving no issue, then to B. and then the same words in the same will were construed to make the several devises good, and to give the first devisee an estate tail in the freehold, and but an estate during his life in the leasehold. *Atkinson v. Hutchinson*, sup.

Case 14.—The Lord RAYMOND'S Case. [1734.]

This court will assist the testamentary guardian to prevent an improper marriage of the infant heir.

Upon a petition to the *Lord Chancellor*, the defendants set forth, That the late *Lord Raymond* had by his will appointed them guardians to the present Lord, his

only child, and trustees of his estate till he should come to age; that the plaintiff was but seventeen years old, and was seduced by Mr. *Chetwynd* in order to marry his daughter Mrs. *Mary Chetwynd*, who was much inferior to him in family and fortune; that it would be a great disadvantage to the plaintiff to marry at this time, by reason of his tender age and want of education; that the plaintiff had contracted such an acquaintance with the lady, that the defendants had been forced to keep him close in their custody for some time to prevent their marrying; wherefore they (in general terms) prayed the assistance of this court; and that his lordship would give such directions as to him should seem proper.

The petition was supported by an affidavit, setting forth Mr. *Chetwynd's* proceedings. And there was also an affidavit of Mr. *Chetwynd*, shewing that he did not give the plaintiff any encouragement; but that upon solicitation, and after he had been twice with the defendants about it, he had consented to the intended marriage.

[59] *Lord Chancellor*. It appears that the Lord *Raymond* is but seventeen years old, and is about contracting matrimony at an age when he is not capable of judging for himself; and unfortunate for him it is that he is of age to contract matrimony; it being most reasonable to have the guardian's counsel in all such cases; especially where they are appointed by the will (1) of the father, and have the same power over the infant as the father would have had: but here has been an application in time; and I am glad it has before the marriage was actually consummated; since it is most proper for the court to prevent it, if it be in its power so to do. There are many cases where application has been made to this court after the marriage had; and such have always been attended with a censure upon the parties privy to, and promoting such marriage, without the consent of the court. In the *Earl of Shaftsbury's* case (2 *P. Will.* 112, *S. C.*), *Eq. Ca.* 172, there was an order of court before the marriage had; and so the infant Lord was more immediately under the care of the court; and upon his mother's consenting to his marrying, and promoting it without the consent of the court or the guardian, a sequestration went against her; although the marriage was with the Lady *Susanna Noel*, a lady of equal family, and every way proper for my Lord *Shaftsbury*. In the case of Mrs. *Hand* (*S. C.* cited in 2 *P. Will.* 113), daughter to Dr. *Hand*, all the parties were committed; it being held a contempt of the court to marry a ward of the court without its direction. Indeed this is not the present case: but I infer from hence, that we are to take all the care we can to prevent this marriage. As to the inequality of fortune, it is not shewn what estate the plaintiff, the Lord *Raymond*, has: so that I cannot tell whether this be a *Smithfield* bargain or not. And as to the family, it is admitted that Mr. *Chetwynd* is of a very good family. But the age of the Lord *Raymond* is improper; and that is the consideration which weighs most with me, and upon which I think myself bound in duty to prevent the marriage if I can. In order therefore to strengthen the guardians hands, I order that the Lord *Raymond* shall continue in their care [60] and custody; and that they do not permit him to marry without the consent of the court. As to Mr. *Chetwynd*, the match not having taken effect, there is no necessity of looking so minutely into the affair in order to censure him. He would have done well not to have consented to this marriage, unless the guardians had done so too. But it has been said, That it would be cruel and unnatural in a father not to suffer his daughter to marry to her advantage; and she would have reason to blame him for it ever after. Now to prevent that charge upon Mr. *Chetwynd*, I order him not to suffer his daughter to marry the Lord *Raymond* without the consent of the court; (2) which prevents any imputation or charge upon Mr. *Chetwynd* from the lady or any body else; since, if there be any fault in it, it will fall upon the court; and I shall be very willing to bear it.

N. B. In this case there was no cause in court at the time the facts set forth in the petition were transacted. The bill was filed but the day before the petition was presented: and in the cases cited, there were causes in court at the time of the marriages.

(1) By statute 12 *Car.* 2, c. 24, a father has a right to dispose of the guardianship of his child, until he attains twenty-one years of age; and the right of a testamentary guardian takes place of a guardianship by nature; for by the express words of the act of parliament, the guardian by will takes place of all other guardians, and his authority by that law is a continuation of that parental authority. *Vid. Harg. Co. Litt.* 886, notes 11, 12, 13, 14, 15, 16, where the substance of the cases respecting the

several kinds of guardianship, and the origin and extent of the jurisdiction of the court of chancery, in the superintendence of guardians, is considered at large.

(2) *Smith v. Smith*, 3 Atk. 305, which was a petition preferred by Mrs. *Smith*, on behalf of her daughter Miss *Smith*, devisee of a very large estate, under her father's will, against Mr. *Barry*, fourth son of Lord *Barrymore*, that the court might restrain him from marrying her daughter, being an infant, and a ward of the court, or to make such other order as the court should think fit; when Lord *Hardwicke* (after noticing the superintendence exercised by this court over infants) ordered, that as Mr. *Barry* was likewise an infant, his guardian should not permit him to marry the young lady without the leave of the court.

[61] DE TERM. S. HILLARI, 8 GEO. II., IN CURIA CANCELLARIÆ.

Case 15.—COTTERELL *versus* PURCHASE. [1732]

A mortgage will not easily be presumed against an absolute conveyance; especially where possession has gone along with the conveyance, and an acquiescence for many years: altho' there be an incongruous covenant in the deed. A defeazance contained in a separate deed, is suspicious, and, ought to be discouraged.

The plaintiff and her sister being seised of an estate in *Yorkshire* as jointenants, the plaintiff by lease and release, in consideration of £104, conveys the moiety to the defendant and his heirs: but it was admitted, that the conveyance (though absolute in law) was intended by the parties as a mortgage, to be redeemable on payment of the money with interest. Sometime after, in the year 1708, those deeds were cancelled; and in consideration of a farther sum, which made up the whole £184, she conveys the estate in manner as before, but with this farther covenant, That she would not agree to any division or partition of the estate, or make, or cause to be made, any division or partition thereof, without the licence, consent, advice and appointment of him the said *Benjamin Purchase*. At the time of this conveyance the plaintiff's sister was in possession of the whole estate, and so continued till the year 1710, when the defendant turned her out of possession of the moiety by ejectment; and from that time he enjoyed [62] it quietly till 1726, at which time the plaintiff filed her bill to let into redemption; to which the defendant pleaded himself an absolute purchaser for a valuable consideration; and in 1732, the cause coming to be heard upon the merits, the *Master of the Rolls* was of opinion, that the deeds of 1708 amounted to an absolute conveyance; and dismissed the bill.

For the defendant were given in evidence several particulars, to shew, that by the deeds of 1708, the parties intended an absolute conveyance of this estate. And it was insisted, that as the deeds were an absolute conveyance in law; by the statute of frauds no trust or mortgage could be implied without an agreement in writing. And they insisted likewise, that as the defendant had been in possession ever since the year 1710, the plaintiff was barred of the redemption by the statute of limitations.

It was said on the other hand for the plaintiff, That the defendant's plea admitted the first conveyance made in consideration of the £104 to be intended but as a mortgage; and that the second conveyance was in the same form, excepting the covenant; and that it was therefore probably intended in the same manner. That as to the covenant, it made strongly for the plaintiff; since to suppose a person would absolutely sell away his estate, and then covenant not to make a division of it, is absurd. That the statute of frauds makes nothing against the plaintiff; this being in nature of a resulting trust, and so within the proviso in that statute. Nor can the statute of limitations affect the plaintiff; since in cases of redemptions the court always gives what it thinks a reasonable time. And though the general rule be not to exceed twenty years, unless it be upon extraordinary circumstances; (1) yet that rule cannot affect the plaintiff, who did not lose possession till 1710, and brought her bill in 1726.

[63] *Lord Chancellor*. The case is something dark. The first deed is admitted to be a mortgage; and the second is made in the same manner, excepting an odd sort of covenant, which is the darkest part of the case: for, to suppose that it is an absolute

conveyance, and to take a covenant from one who had nothing to do with the estate, makes both the parties and covenants vain and ridiculous. But then it will be equally vain and ridiculous if you suppose the deed not an absolute conveyance : so that it is of no great weight, and must be laid out of the question. Then as to the circumstances ; on one side has been shewed an account stated of money received ; and it is there said *so much received on account of purchase money*, and in another general account the sum of £184 is called *purchase money*. Then as to the agreement in 1710, that if the plaintiff had a desire for it, she should have her estate again upon payment of the money with interest, and the costs he had been at : this shews it was not redeemable at first. (*Barrel v. Sabine*, 1 Vern. 268.) There have been strong proofs on both sides as to the value : one has shewn the rent to be but £27 *per ann.* and then deducting one third out of it for the dower of the plaintiff's mother, a moiety of what remains is near the value of the money paid. The other side has shewn the rent to be £40 *per ann.* But I rather give credit to the first ; because it is certain the dower was but £9 *per ann.* So that, upon the whole, I am inclined to think this was at first an absolute conveyance. Had the plaintiff continued in possession any time after the execution of the deeds, I should have been clear that it was a mortgage ; but she was not. And her long acquiescence under the defendant's possession is, to me, a strong evidence that it was to be an absolute conveyance ; otherwise, the length of time would not have signified : for, they who take a conveyance of an estate as a mortgage, without any defeazance, are guilty of a fraud (*Bacon's Tracts*, 37) ; and no length of time will bar a fraud. Besides, here the bill was filed in 1726. And though the cause has lain dormant ; yet it is not like making an entry and then lying still : for, in [64] the present case, the defendant might have dismissed the bill for want of prosecution, or they themselves might have set down the plea to be argued.

In the Northern parts it is the custom in drawing mortgages to make an absolute deed, with a defeazance separate from it ; but I think it a wrong way ; and, to me, it will always appear with a face of fraud : for, the defeazance may be lost ; and then an absolute conveyance is set up. I would discourage the practice as much as possible.

Upon the circumstances of the case, affirmed the decree, &c.

(1) As the statute of limitations has, in the cases of lands, after twenty years possession, barred the plaintiff of his entry or ejectment, so a court of equity in imitation of that law, will not allow a mortgagor to redeem a mortgage, after the mortgagee has been twenty years in possession ; and the same length of time will bar a redemption in equity, as will bar an entry at law. *Ord v. Smith*, 2 Eq. Cas. Abr. 800, pl. 27. *Floyer v. Lavington*, 1 P. Will. 269. *Jenner v. Tracey*, and *Belch v. Harvey*, 3 P. Will. 287, note (13). *Mellor v. Lees*, 2 Atk. 494. 3 Atk. 313, *Anon.* *Baker v. Wrisd*, 1 Ves. 161.

Case 16.—JONES versus MARSH.

A settlement made after marriage, for valuable consideration, for advancement of the issue, may be considered as a purchase, and defeat a subsequent purchaser ; and the value paid is not to be too strictly examined ; there being room for bounty.

The defendant's father, sometime after marriage, in consideration of an additional portion of £100, paid by his wife's mother (a receipt whereof was indorsed on the deed) settles an estate of £100 *per ann.* upon himself for life, remainder to his first and other sons, &c., and the mother of the defendant's father, having an interest in this estate, joins with him in the conveyance ; the father, thirteen years after, mortgages this estate, with the usual covenants to the plaintiff, and dies ; the plaintiff brings his bill to foreclose. The question was, Whether the settlement should be looked upon as a volunteer and fraudulent against a creditor, who lent his money so many years after.

The case of *Parslow versus Weedon*, Eq. Ca. Abr. 149, was cited ; but the Lord Chancellor said that Mr. Vernon had always grumbled at the determination of that case, and never forgave it the Lord Macclesfield ; saying it was contrary to the constant practice of the court. There were also cited the cases of *Osbourne versus Strode*, and *Duranda versus Cooke*, in the late Lord Chancellor's time (Lord Chancellor King).

[65] Lord Chancellor. The question is, Whether this be a voluntary conveyance or not ? Here is plain proof that £100 was paid, the receipt being indorsed upon the

back of the deed, for a consideration for £100 *per ann.*, yet, in marriage settlements, things are not to be considered so strictly, there being room for bounty : and every man ought to provide for his wife and family. Besides, in this case there was an estate that moved from the defendant's father's mother ; and she may, in some respect, be considered as a purchaser of the limitations made to her grandchildren : so that it would be very hard to call this a fraudulent settlement ; since it is in consideration of a marriage had, and of an additional provision of £100 paid by the wife's relations ; which cannot be called voluntary against a creditor who lent his money thirteen years after.

How far this court will set aside a family settlement without any consideration, as fraudulent against a creditor who lends his money thirteen years after the settlement, I do not say. I need not at present determine that point.(1)

(1) *Ward v. Shallet*, 2 Ves. 18. *Hylton v. Biscoe*, *ibid.* 305 to 309 ; *Prec. in Chanc.* 101, *anon.* *White v. Thornborough*, *ibid.* 426 ; 2 Vern. 702, S. C. *Kirk v. Clark*, 276. *Stileman v. Ashdown*, 2 Atk. 478. *Russell et al. v. Hammond*, 1 Atk. 14. *Lord Townshend v. Windham*, 2 Ves. 11. *Stephens v. Olive*, 2 Bro. Cha. Rep. 90. Vide also *Hungerford v. Earl*, 2 Vern. 261. *Shaw v. Lady Standish*, *ibid.* 327 ; *Bacon's Tracts*, 310. *Beaumont v. Thorpe*, 1 Ves. 27. *Fitzer v. Fitzer*, 2 Atk. 511.

Case 17.—COLLET *versus* DE GOLS and WARD.

14 Feb.

A bankrupt whose estate is in mortgage, conveys the equity of redemption to a third person after an act of bankruptcy, but before the commission and assignment ; this shall not defeat the assignees. But where a *bona fide* purchaser for a valuable consideration, and without notice, has a contest with the assignees, this court will not take any advantage from him, therefore not compel a discovery. A commission issued is notice of the bankruptcy.

The plaintiff, as assignee under a commission of bankruptcy against *Tyssen*, filed his bill against *Ward* and others, to set aside several conveyances, which *Ward* and the other defendants in trust for him, had obtained of *Tyssen* after his bankruptcy, and also without any consideration. The defendant *Ward* pleaded himself a purchaser for a valuable consideration of all the estates in question ; and also that he had no notice of *Tyssen's* being a trader or of his having committed any act of bankruptcy. Whereupon an issue was directed ; and the jury found *Tyssen* a bankrupt, and fixed the day of the bankruptcy to the [66] 25th of December 1732. *Tyssen* being seised of a considerable real and personal estate, some part of which real estate was in mortgage to *Bradley* for £1000, and another part to *Harkshaw* for £500, which latter mortgage and some others, were by assignments vested in the defendant *Ward* ; and great part of *Tyssen's* personal estate being conveyed in trust for *Ward*, subsequent to *Tyssen's* bankruptcy, *Ward* got several mortgages, and also releases of equity of redemption of all the aforesaid estates ; which he now insisted upon against the plaintiffs, and the creditors under the commission.

It was argued for the plaintiff, that all things done by *Tyssen* subsequent to his bankruptcy, were as so many void acts ; and that *Ward* could have no advantage from them. The act of bankruptcy was, in itself, of such force as to put *Tyssen*, from that very time, under an incapacity of disposing of or affecting any of his real or personal estate to the prejudice of his creditors under the commission ; that the legal effect of the assignment avoided all intermediate acts between the bankruptcy and the assignment ; so as to give the whole to the assignees, according to the case of *Kidwell versus Player*,(1) 1 Salk. 111, and the case of *Phillips versus Thomson*, 3 Lev. 191, where an act of bankruptcy was committed after a *fi. fa.* delivered to the sheriff, and before seizure of the goods by him : and held that the execution was of no effect against the assignees : and the law is the same with regard to the bankrupt's disability over his real estate, by the statute 13 Eliz. cap. 7, and 21 James 1, cap. 19, the plaintiff there would be intitled to avoid an execution by *elegit*, if the act of bankruptcy was committed before the *liberate*, and the plaintiff would in such case be accountable for the profits intermediate to the bankruptcy and the assignment. It was further argued, that by

the Stat. 13 *Eliz.* a purchaser would be defeated although there should be forty years after an act of bankruptcy and before a commission ; and although the purchaser had no notice ; for, the words of the statute are general *after bankruptcy* ; and the proviso in the end of the statute makes it [67] still plainer, *viz. that assurances made by a bankrupt before bankruptcy, and bona fide, shall not be defeated.* This was hard doctrine against fair purchasers without notice ; but so the law was. And there is therefore a proviso in the end of 21 *Ja.* 1, *that no purchaser, for a good and valuable consideration, shall be impeached, unless the commission be sued out within five years after the bankruptcy* : and here the commission was sued out within three years. Wherefore they insisted that the incumbrance should be redeemed ; and that the plaintiff should have the residue of the real and personal estate ; and that *Ward* should not come in as a creditor for any money lent after the bankruptcy.

It was also further urged, that the equity of the redemption of the mortgaged premises was an interest transferred by the statute to the plaintiff ; and that the defendant's having no notice of the bankruptcy when he lent his money would therefore make no alteration. Besides all the conveyances after the 25th of *December*, 1722, are fraudulent for want of a consideration ; and therefore *Ward* had not the usual equity of a purchaser for a valuable consideration without notice ; and then as he had not paid a consideration, his not knowing of the bankruptcy will not avail him. It appears likewise that he had notice of *Tyssen's* absconding, and being often denied to his creditors : and though *Ward* might be ignorant of the legal consequence, yet *ignorantia juris non excusat*, according to the case of *Hitchcock* versus *Sedgwick*, 2 *Vern.* 156.

On the other hand, it was insisted for the defendant, that as he had the law on his side, and equal equity at least with the plaintiff, if not a superior one, in regard he paid a valuable consideration for all the deeds after *Tyssen's* bankruptcy, and besides had no notice of it, that the court (*Walker v. Bodington*, 2 *Vern.* 599) would not interpose to his prejudice : and the case of *Hitchcock* and *Sedgwick*, 2 *Vern.* 156, was cited, to shew how far purchasers without notice were favoured in courts of equity : as also 2 *Chan. Cas.* 72, (*Perrat v. Ballard*) 135, (*Anon.*) 136, (*Brown v. Williams*) [68] 156 ; (*Wagstaff v. Read*) 1 *Vern.* 27 ; (*Abery & Jones v. Williams*) 2 *Vern.* 599 ; *Walker v. Bodington*, *sup.* (These were all cases in which the court declared that equity will not compel a defendant to discover what goods he really bought of a bankrupt after the bankruptcy and before the commission sued out, where the party has no notice of the bankruptcy.)

N.B. There was no proof of a valuable consideration, but only some few scattering sums which *Ward* let *Tyssen* have at different times.

Lord Chancellor. The first consideration will be as to that part of the estate which is in mortgage to *Bradley* : and the question is as to that, Whether the plaintiffs, the assignees of *Tyssen*, are to redeem it, or the defendant *Ward* ?

The release of the equity of redemption, which *Ward* has obtained, appears to be a gross imposition ; for, the consideration is mentioned to be £2000, yet not a farthing appears to be paid. The statutes that have been mentioned concerning bankruptcy bind equitable as well as legal rights, and courts of equity as well as law. These statutes were founded on supposed frauds of the bankrupts ; and therefore intended to put them under disabilities to prejudice and defraud their creditors. In the present case, the equity of redemption of this estate was made over by *Tyssen* after his bankruptcy, though before the assignment. Nothing therefore passed by this conveyance : and if *Bradley's* mortgage had been out of the case, and the plaintiff would then have purchased of him, after an act of bankruptcy, and then a commission had issued within five years, the assignees under that commission must have prevailed. Creditors after bankruptcy are in the nature of purchasers, and have a prior equity to any other persons : and here *Ward's* is a prior conveyance, but from a person who had nothing to convey. *Ward* could not come in at law as a creditor for this sum of £2000. Besides, it is an imposition, the money never having been advanced ; yet if it had been actually paid, as the legal estate was in *Bradley*, it would not have been any benefit to *Ward* ; but he must have lost the money.

[69] Decreed therefore, as to this estate, that *Bradley* should re-convey to the plaintiff upon payment of principal and interest.

The next question is as to those estates which being incumbered by *Tyssen* before his bankruptcy, those incumbrances are since, by mesne assignments, vested in *Ward*. And here it appears that *Ward* has, after the bankruptcy, and before the plaintiff's

assignment, got a release of the equity of redemption of those estates from *Tyssen* for £3600.

Here the legal estate is in *Ward* : and the question is, Whether in a court of equity it shall be taken away without *Ward's* being paid all the money he advanced ? Though the rule be the same here as at law upon construction of statutes ; yet where an act is to be carried into execution here, there are certain rules to be observed which will bind equally in case of an act of parliament, as of the common law. One of those rules is, that a purchaser for a valuable consideration, without notice, having as good title to equity as any other person, this court will never take any advantage from him ; and consequently will not grant a discovery against him of the only equity he has to defend himself by ; which, if he should be obliged to discover, the other party would immediately take advantage of. And there certainly may be cases where a purchaser for a valuable consideration, without notice of an act of bankruptcy, shall not be obliged in this court to discover any thing (whether incumbrances that he has got in, or any other thing), but all advantages shall be left him to defend himself. Suppose two purchasers without notice, and the second by chance gets hold of an old term ; he shall defend himself thereby against the first, who still is as much a purchaser for a valuable consideration, as himself. I do not therefore think a purchaser for a valuable consideration, without notice of the bankruptcy, to be relieved against in this court [70] within 21 *Ja.* 1. The case of *Hitchcock versus Sedgwick*, 2 *Vern.* 156. is very different from this : for, a commission is a public act, of which all are bound to take notice ; but an act of bankruptcy may be so secret as to be impossible to be known : and therefore I think that *Ward* having the legal estate in him, shall by that be protected for so much as he really and *bona fide* paid *Tyssen's* bankruptcy.

And therefore directed an issue upon the point of notice ; to try whether *Ward* had notice of *Tyssen's* bankruptcy, and when ? And as to the other part of the estate, which (though not in *Ward* himself) was in others who were trustees for *Ward*, that must be considered as one and the same thing.

(1) Which case was this :—Assignees of commissioners of bankrupt brought trover on their own possession, *ut de bonis suis propriis* ; and that they came into the hands of the defendant ; and he converted them. And, upon evidence, it appeared the conversion was by executing a *fieri facias* on the goods in the declaration, after the bankruptcy, and before the assignment, and it was not proved that the plaintiffs had demanded them ; and this being made a case, it was agreed, that by assignment the assignee had a property, by relation, from the very time of the bankruptcy, and there was no mesne interval of time, as where one takes out letters of administration, he has a property from the death of the intestate, and may declare generally *ut de bonis propriis*, even before administration sued out. But *Holt* denied this, and said, he ought to declare specially, and so the plaintiff might have done in the principal case, and he relied upon the case of *Perry v. Bowyer*, and said the assignee was in by relation from the time of bankruptcy, so as to avoid all mesne acts, but not so as to be actually invested with the property. *Adjournatur*.

N.B. In *Salkeld* this case is called *Kiggill v. Player*. See also *Ryall v. Rowles*, 1 *Ves.* 348. *Ex parte Gulston*, 1 *Atk.* 193. *Worsley v. Demattos*, 1 *Burr.* 467.

[71] DE TERM. PASCHÆ, 8 GEO. II. [1735], IN CURIA CANCELLARIÆ.

Case 18.—UPTON *versus* PRINCE.(1)

[See *Taylor v. Cartwright*, 1872, L. R. 14 Eq. 176. Distinguished, *In re Peacock's Estate*, 1872, L. R. 14 Eq. 239.]

25 and 26 April 1735.

A father advances some of his children with portions in his life-time, and then makes his will ; and thereby recites he had advanced *B.* and *C.* but omits reciting *D.* (whom he had also advanced) and leaves to him a sum certain, and devises the residue equally among them. The money which *D.* had received shall go in satisfaction of the legacy left him.

The testator *William Prince*, a freeman of *London*, had issue two sons, *William* and *Peter*, and four daughters ; and in his life-time gave his two sons, in order to

settle them in the world, £1500 a-piece; for which he took two several receipts, each in the following words; *Received of my father William Prince the sum of £1500, which I do hereby acknowledge to be on account and in part of what he has given, or shall in or by his last will give unto me his son.* Sometime after the testator makes his will in the following words; *And whereas I have heretofore paid to, given or advanced with my children William, Elizabeth, and Sarah, the sum of £1500 a-piece: now I do hereby, in like manner, give and bequeath unto my three other children, Peter, Mary, and Anne, the several sums of £1500 a-piece;* and then gives the residue equally amongst all his children.

[72] The custom of *London* being waved on all sides, the question was, Whether *Peter* should have a new sum of £1500 upon the latter words of the will? or whether he should not be in the same case with *William*: they both being equally advanced by the father, and this seeming only a mistake in the testator?

Mr. *Fazakerley* insisted, that the receipt given to his father could not controul the express gift of the father subsequent; and the father's omitting *Peter* in the mention of the advancement, should be plainly intended a difference between them; the receipts given by both, and the case of both being the same.

But the *Lord Chancellor* decreed the £1500 received by *Peter* in his father's lifetime, to be a satisfaction for what the father gave him by his will; and that he should not have another £1500 upon the latter words.

(1) In *Reg. Lib. A. 34*, fol. 237, this case is stated thus; *William Prince* died leaving issue the defendants *William* and *Peter Prince*, his sons, and four daughters; the defendants *Elizabeth Grosvenor*, and *Sarah Dix*, widow, married in his life-time; and the plaintiffs *Mary Upton* and *Ann Eade*, unmarried at his decease. The defendants *William* and *Peter Prince*, soon after they came of age, desired the said *William Prince* to advance to each of them a sum of money towards setting them up in the world, and agreed that whatever he should advance should be part of what he should give them by his will; whereupon the said *William Prince*, on the 11th June 1724, advanced £1500 to the defendant *William Prince*, who gave the following note for the same;—"Received, June 11, 1724, of my father, Mr. *William Prince*, the sum of £1500, which I do hereby acknowledge to be on account, and in part of what he hath given, or shall in and by his last will give unto me his son."—And the said *William Prince*, the father, about the 31st March 1727, advanced £1500 to the defendant, *Peter Prince*, who gave the same note as the said defendant *William Prince*; and the said *William Prince* afterwards, on the marriage of the defendant *William Prince*, made a settlement on the said defendant of divers freehold and leasehold houses, of a great yearly value; and the said *William Prince* made his will, dated the 17th August 1730, and thereby ratified the limitations in the said settlement, and gave the residue of his term in his leasehold messuages, in the parish of *St. Magnus*, to the defendant *Peter Prince*; and taking notice that he had advanced with his children, the defendants, *William, Elizabeth* and *Sarah*, £1500 a-piece, he thereby gave his other three children, the defendant *Peter Prince*, and the plaintiffs *Mary Upton* and *Ann Eade*, £1500 a-piece; and he willed that the residue of his estate should be divided into six parts, and that one-sixth thereof should be paid to the defendant, *William Prince*, one-sixth to the defendant *Peter Prince*, one-sixth to the plaintiff *Mary*, to the plaintiff *Ann* one-sixth, to the defendant *Benjamin Grosvenor* and *Elizabeth* his wife, the remaining sixth part to the defendant *Sarah* and her late husband *Thomas Dix*; and he appointed the defendants *William* and *Peter Prince*, and *Benjamin Grosvenor*, and the said *Thomas Dix*, executors of his will. The testator afterwards made a codicil to his will, and thereby gave several particular legacies, and he afterwards died without revoking the said will and codicil. That it was the said testator's intention that the said two sums of £1500 paid to the defendants *William* and *Peter Prince*, should be deducted out of the legacies given them, and for that purpose he deposited the said two notes in a drawer with his will, and intimated that the said drawer should not be opened after his death by either of the said defendants, unless his other children, or one of his sons in law, were present; and shortly after his death the said drawer was opened in the presence of the said defendants and his other children, and the said will and codicil, and two notes, were found therein; and the defendants, *William* and *Peter Prince* insisted upon retaining the whole legacies given them, besides the £1500 a-piece given them, and although they had signed such receipts

as aforesaid. Whereupon his Lordship did declare that the sum of £1500 advanced to the defendant *William Prince*, in the life-time of the said testator, is not to be discounted out of any thing given to the said defendant *William Prince*; but as to the sum of £1500 advanced to the defendant *Peter Prince* by the said testator, his Lordship declared the same is in satisfaction of the £1500 legacy given to the defendant *Peter Prince*.

Case 19.—MENZEY *versus* WALKER.

(Reg. lib. A. 1734, fol. 327.)

26 April [1735].

The father by marriage settlement has a power to make an appointment of a sum not exceeding a sum certain, for portions and maintenance of younger children, in such manner and under such limitations as he shall appoint. He has several younger children, and by his will (taking notice that the rest were provided for by their grandfather) he appoints the whole sum to one. This is not a good pursuance of his power.

Mr. *Walker*, upon his marriage, settled his estate upon himself for life, remainder to his wife, remainder to trustees for a term of three hundred years, remainder to his first and other sons; and the trust of the term was declared to be for the raising such sum and sums of money for the portion and portions and maintenance of all and every child and children of that marriage (other than an eldest son) *in such manner, and at such time, and under such limitations as he the said Mr. Walker should appoint by his last will, or by deed, under hand and seal, attested by three credible witnesses, so as such sum or sums do not in the whole amount to above £2000, if but one younger child, or £3000 if more than one; and so as all the sums for such maintenance do not in the whole amount to above £120 per ann. [73]* and for want of such appointment, then in trust to raise such portion or portions equally to be divided amongst all his younger children share and share alike, to be paid to them respectively at the age of twenty-one, or day of marriage.

The testator had three younger children; and by his will duly executed, reciting that his two daughters were amply provided for by their grandfather, he appoints the whole sum of £2000 to his second son *Thomas Walker*. And the question was, Whether this appointment of the whole to one was a good appointment, and made pursuant to his power?

This cause was heard at the *Rolls*, where it was decreed to be not a good appointment; and now coming on to be heard before the *Lord Chancellor*,

Mr. *Attorney General*, &c., argued this appointment to be good; and said, that a difference was to be made where such powers are to be executed by a stranger, and where by the father himself, who is a proper judge of the merit of each child; and consequently that the court will not interpose to set aside this distribution, considering the particular circumstances of this case; where, by the words of the power, he was not bound to raise the whole sum of £2000, but might, if he had pleased, not have raised the tenth part of that sum.

The father in this case had a latitude; or else the providing how this sum should be divided, in case no appointment was made by him, would have been vain and idle; and if it was not necessary for him by the words, *to divide it equally*, this appointment made by him must be good. It is in proof here that the other children were provided for by their grandfather, and took good estates from him. Indeed where certain directions are given, that such and such sums shall be given to each child, there nothing is left either to the discretion of the party or of the court: but where this court has relieved against the [74] execution of powers merely discretionary in their creation, it has not been for inequality only, but for some other piece of injustice or hardship. In the case of *Wall versus Thorborn*, (1) 1 Vern. 355, 414, relief was given, because there was no reason that one daughter should be looked upon in a different light from the others, she having no particular provision: but even in that case the court said, that the circumstances must be very strong to take away the power which the wife had by the express words.—And in that case (2) another is cited of *Sweetnam versus Wolaston*, where relief was denied. In that of *Thomas and Thomas*, (3) 2 Vern. 513, it is said, that this court will relieve against an unreasonable, but not an unequal dis-

tribution upon a special or particular power ; which was the case of *Lister versus Robinson, Mich.* 1732, where a man gave a power to his wife, to devise such a sum to and amongst his child and children, and in such manner and proportion to each child as she should think fit ; there were two children, and the elder being provided for, the mother appointed the whole to the younger : upon which appointment a bill was brought here for an equal distribution, but was dismissed. So in that of *Austin versus Austin*, heard by the present *Lord Chancellor, March 2, 1733*, where the words of the trust were, that if *Robert Austin* the father dies leaving by *Jane* his wife a son, and other issue then living, then and in such case to raise a sum not exceeding £1500, as soon as may be, to and for the sole benefit and advantage of such child or children (other than the eldest son of that marriage) in such proportion, manner and form, in all respects, as the said *Robert* should, for such purpose, by his last will and writing, direct and appoint, and in default of such appointment, then to and for the sole benefit of such child, if but one ; and if more, other than the eldest, equally and in equal parts and manner, to all intents and purposes. *Robert*, by his will, directs the £1500 to be raised ; and gives £450 to his son *Robert*, £1050 to *Jane*, and nothing to *Edward*, who had an estate of 4 or £500 *per ann.* given him [75] by another ; and he coming into this court for a share of the £1500 his bill was dismissed : the power being discretionary, and nothing hard in the execution of it. The cases before mentioned will govern this ; for, here the manner, the time, the limitation, are all reserved to him by the power, whereby he might have given it to one sooner, to the other later ; to the one absolutely, to the other under a limitation ; in which cases there would have been an inequality as well as in the present one. Indeed in *Austin's* case, there are not the words *in such proportion* ; but there are words tantamount : and these powers being reserved to parents, in order to keep their children in due obedience, are highly reasonable, that parents may have a power of distribution, according to the merit or circumstance of each particular child.

Mr. Solicitor General, Mr. Pauncefort, and Mr. Fazakerley argued on the other side against the validity of this appointment ; and though they admitted, that perhaps where powers were general or discretionary, this court would not intermeddle ; yet they insisted, that here the power was particular, and consequently must be strictly pursued : the argument of this power being executed by the father himself will not alter the case ; for, by the words it is clear that a provision was intended for every child, and all the children are become purchasers of some provision under this power ; the words being *for all and every of them* ; and consequently, though the father be a better judge than a stranger, yet being disabled by the words from excluding any of them, this court will take care that he, as well as any other, shall follow the rules of reason and justice.

The discretionary power lodged in the father by this power, is first to be considered with relation to the eldest son, whose circumstances perhaps might not be able to bear so great a charge as £2000 or £3000, and therefore the father has a power to charge the estate with such a sum as he should think his son's estate could bear, provided it did not exceed [76] £2000 if but one younger child, or £3000 if more. It must next be considered with relation to the younger children ; and there three things are left to his discretion, *viz.* 1. The time, manner, and the limitation ; the time, whether it should be payable at the day of marriage, or at any other time ? 2. The manner, which must be understood the manner of raising, and not of distributing the sum ; this construction agreeing with the wording of the power in every clause, and the subsequent provisions making it clear, especially that which relates to advancement by the father in his life-time. 3. The limitations which he had power of making, but still for the children's benefit ; for, one might marry imprudently, or be guilty of some other piece of folly, which might make it necessary for the father to limit the share of such child in such a manner as might be effectual and advantageous to that child. And his having a discretion in these cases, cannot give it him in the other respect, of giving the whole to one, and nothing to the two others ; such discretion being neither given nor intended to be given to him by the words of this power : nor will the two children's being provided for by the grandfather alter the case ; the intent of the party's being to raise a portion for each by the trust. And it would be very unreasonable that a child becoming, by accident, able to do for himself by the bounty of some of his friends, should thereby lose the right he has of being provided for by his father. The case of *Wall versus Thorborn*, 1 *Vern.* 355, 414, is an express authority.

And in the cases of *Thomas versus Thomas*, 2 Vern. 513, and *Lister and Robinson*, there was an express power of giving it to one of the children ; and so not like this. So in that of *Austin and Austin*, the power was much more general, and entirely discretionary : but here is an unreasonable exclusion of two of the children, who have but a small provision, no way adequate to what their brother takes under this will.

Lord Chancellor. There are two questions : The first, Whether the power be pursued ? The second, Whether it be executed in a reasonable manner ?—[77] as to the first, I think the words are as plain as they can be, that the execution of this power should be for the benefit of all the children. Indeed it was discretionary in the father how much should be raised : but he had no such discretion as to exclude one or the other. The words *in such manner* do clearly extend only to the manner of raising ; there being several methods mentioned in the power ; which was to make it as convenient as might be for the eldest son. The time also was under his discretion ; whether it should be paid at marriage, or any other time ; and so was the limitation : but still that is to be understood of the manner in which the portions should be settled upon them ; whether it should be upon their respective marriage, or in what other manner he thought proper ; and if he makes no appointment, then he fixes it upon the express words, *to be equally divided between the children* ; and the time that it shall be paid. Now after all this, how can this partial appointment be called an execution of his power ? And is not that the present case ? If then it be clear that he has not purified his power, it is needless to enquire whether the provision made by him be reasonable or not ? a void appointment being as no appointment, and consequently a failure of the appointment he was enabled to make by his power. Whether there is a defective execution of a power, creditors or younger children are intitled to have that defect supplied : but where the execution is merely void, as in the present case, and when the court has interposed in such cases as this before us, it has always been where the execution, though perhaps within the words, was attended with some hardship or unreasonableness : so that if this depended upon the reasonableness or unreasonableness of the execution, I should not determine the point without some farther enquiry into the circumstances of these two daughters : but as a power *to all and every* can never be restrained to one only, I think the execution void, and so the second point is quite out of the question. In the cases of *Lister and Robinson*, and *Thomas and Thomas*, 2 Vern. 513, the words gave a general power ; which being so, the court had no [78] thing to do to restrain them. So in that of *Austin and Austin*, the father had a power with regard to the nomination of the child or children who should take, and there the execution was highly reasonable, the person excluded being provided for five times as greatly as the other children : and so it would have been unreasonable in the court to rescind what he had done upon so just a ground.

So affirmed the decree.(4)

Note Mildmay's case, 1 Co. 175 a, 177 a.

(1) Which case was this : Sir *George Crooke* by his will devised that his real estate should descend to his three daughters and heirs, provided that his wife should distribute it in such proportions as she should think fit. The mother, by deed executed in her life-time, appoints a very small proportion for the plaintiff's wife, who was one of the three daughters, and had appointed the rest for the other two daughters ; and the bill was to be relieved against this unequal distribution. Upon long debate, the court declared the case was proper and relievable in equity.

(2) *Wall & uxor v. Thorborn*.

And in the same case, the plaintiff cited the case of *Cragrave v. Penost*, where a man having two daughters, one by a former wife, and another by his second wife, devised his estate to his wife to be distributed between his daughters as his wife should think fit. And she gave £1000 to her own daughters, and but £100 to the others ; and the court there decreed an equal distribution.

(3) In this case the power was special and particular, that the wife might dispose to one or more ; and not like the cases of a general trust in the executrix to distribute amongst the younger children at discretion ; there an unreasonable and indiscreet disposition may be controlled by a court of equity ; but this is *casus provisos*, it is expressly provided, that she might give all to one. And decreed the appointment made by the wife to stand.

(4) *Gibson v. Kintren*, 1 Vern. 66. *Wall v. Thorborn*, *ibid.* 355 ; S. C. 414. *Thomas*

v. *Thomas*, 2 Vern. 513. *Chadwick v. Doleman*, *ibid.* 528. *Jermyn v. Fellows*, post, 95. *Tomlinson v. Dighton*, 1 P. Will. 149. *Astry v. Astry*, *Prec. in Chanc.* 256. *Dhaphman v. Brown*, 3 Burr. 1626. *Brownsmith v. Denny*, *Hill.* 29 Geo. 2 (cited 2 Will. 337). *Adams v. Adams*, *Cowp.* 651. *Maddson v. Andrews*, 1 Ves. 58. *Alexander v. Alexander*, 2 Ves. 640. *Macey v. Thurmer*, 1 Atk. 389. *Cavendish v. Cavendish*, B. R. *Hill.* 1782 (cited 2 Bro. Cha. Rep. 22). *Mallison v. Andrews* (cited 2 Bro. Cha. Rep. 22). *Pocklington v. Bayne*, 1 Bro. Cha. Rep. 450. *Robinson v. Hardcastle*, 2 Bro. Cha. Rep. 22; *Durnford and East's Rep.* 2 vol. 241, S. C. *Pitt v. Jackson*, *ibid.* 54. *Burleigh v. Pearson*, 1 Ves. 281. *Adams v. Adams*, *Cowp. Rep.* 651.

Case 20.—MALLABAR *versus* MALLABAR.

(Reg. lib. A. 1734, fol. 349.)

[See *Maugham v. Mason*, 1813, 1 V. & B. 410; *Taylor v. Taylor*, 1853, 3 De G. M. & G. 194. Approved, *Spencer v. Wilson*, 1873, L. R. 16 Eq. 507.]

6 May [1735].

Where a man devises his real estate to be sold to pay debts and certain pecuniary legacies ; and subject to his debts and legacies devises his personal estate to his sister : this court will not supply the defect of a surrender of the copyhold to the use of the will, if the other estates suffice to pay the debts.

The testator, *Thomas Mallabar*, by his last will devised as follows ; *Imprimis*, “ I devise, give and bequeath all and singular my messuages, lands and hereditaments whatsoever, and wheresoever, in the counties of *Norfolk*, *Suffolk*, and *Cambridge*, unto my sister *Esther Mallabar*, and to her heirs and assigns for ever, upon trust, that the same shall be sold by her or them, for the best price that can be gotten for the same, as soon as conveniently can be after my decease ; and that out of the monies arising therefrom, all my just debts, of what kind soever, be paid ; and after payment of my debts, I devise, out of the remainder of the money, the sum of £500 to my sister *Mary Bainbrigg*, and also £500 to my sister *Girt's* children, that shall be living at the time of my decease, to be divided equally between them ; and also £500 to my nephew *Nicholas Mallabar* ; and also £500 to be divided amongst the children of my late brother *James Mallabar*, which shall be living at the time of my decease ; *Item*, after my debts and legacies paid as aforesaid, and subject to the same, I give and bequeath all the rest and residue of my personal estate unto my said sister *Esther Mallabar* ; whom I do hereby constitute and appoint sole executrix of this my last will and testament.”

[79] The executrix brought her bill against *Nicholas Mallabar*, the heir at law of the testator, to prove the will, and to have the estate sold, and the debts and legacies paid according to the will ; and charged that the testator had not surrendered all his copyholds estate to the use of the will, but some part of it only. And suggested, that the testator's whole estate, real and personal, included such parts of the copyhold as were not surrendered ; and therefore insisted, that the defect of the surrender should be supplied. The defendant, in his cross bill, insisted, that there was more than sufficient, excluding the copyhold, which was not surrendered, to pay all the debts ; and therefore insisted, that the surrender should not be supplied.(1)

Both causes came to an hearing together ; and the plaintiff in the original bill having, in her second answer to the cross bill, confessed that the testator's estate, exclusive of the copyhold not surrendered, was more than sufficient ; the Lord Chancellor refused to supply that defect against the heir ; and dismissed the original bill with costs as to that point. The reason whereof was ; because she confessed the matter in her second answer to the cross bill, though she had charged the contrary in her original bill, and not disclosed the truth in her first answer to the cross bill, and therefore should be punished with costs.

Another point arose at the hearing, though not insisted on in the pleading ; which was, Whether upon the will there was not a resulting trust for the heir ? The plaintiff's counsel insisted, that here could be no resulting trust for the heir ; first, because the testator had given a legacy of £500 to the heir. Secondly, because the testator had directed his real estate to be sold for payment of his debts and legacies, and had therefore

considered it as a personal estate (*Cook v. Duckenfield*, 2 Atk. 566, 568-9): and after payment of his debts and legacies, and subject to the same, had given all the rest and residue of his personal estate to his executrix the plaintiff: but if it should be construed to be a resulting trust [80] for the heir, the testator's intent would be utterly defeated: for, then the personal estate must be first applied in ease of the real; and so the executrix would have but a troublesome affair, without any benefit or consideration; which could never be the testator's intent: and in order to shew clearly that was the testator's intent, they insisted upon giving parol evidence.

Lord Chancellor. If this was *res integra*, and I was at liberty to follow my own opinion, I should be very unwilling to admit such evidence: but as it has been done, and particularly in the cases of *Doxey versus Doxey*, (2) and *Littlebury versus Buckley*, 2 Vern. 677. I now admit it to be done. Then was read a deposition of a witness, who gave full evidence of the testator's declarations, that the plaintiff, after payment of his debts and legacies, should have all the rest of his estate.

But the *Lord Chancellor* decreed upon the will itself, independently upon the parol evidence, that here was no resulting trust for the heir; and that the executrix should have the whole residue, after the sale of the estate, both of the money arising by such sale, and of the personal estate. (*Coningham v. Mellish*, *Prec. in Chanc.* 31. *Rogers v. Rogers*, post, 268, and references.)

(1) *Drake v. Robinson*, 1 P. Will. 443; 2 Eq. Cas. Abr. 232, pl. 10, S. C. *Haslewood v. Pope*, 3 P. Will. 222. *Loombes v. Gibson*, 1 Bro. Cha. Rep. 273, the result of which cases seem to be, viz. that where the real estate generally is devised for or charged by will with the payment of debts, copyhold lands which are not surrendered to the use of the will, do not pass thereby, if there be freehold sufficient to answer the purpose; otherwise it shall, and the court will supply the surrender; but this is to be understood of the legal estate only, for a devise of a copyhold estate without a surrender, is sufficient to pass the copyhold, where the deviser had only the equitable interest; the surrender must be by the person who has the legal estate; and when there is no legal estate in the party who has the beneficial interest, that may pass by a will without a surrender. *Car. v. Ellison*, 3 Atk. 74. *Tufnall v. Page*, 2 Atk. 37. Vide also *Challis v. Casborn*, *Prec. in Chanc.* 407, in which case the *Lord Chancellor* would not supply the defect of a surrender, where there was a freehold estate, though the same was not sufficient for the payment of debts. *Eq. Cas. Abr.* 124, S. C. but in *Harris v. Ingledew*, 3 P. Will. 27, where one by will charges all his worldly estate with his debts, and dies seised of freehold and copyhold estates, which he particularly disposes of by will, the copyhold, though not surrendered to the use of the will, were directed to be applied to the payment of the debts *pari passu* with the freehold. [See *Cas. T. Talb.* p. 287.]

(2) *Rachfield v. Careless*, 2 P. Will. 159. *Duke of Rutland v. Dutchess of Rutland*, *ibid.* 210. *Petit v. Smith*, 1 P. Will. 7. *Lady Granville v. Dutchess of Beaufort*, *ibid.* 114. *Batchelor v. Searle*, 2 Vern. 736. *Hodgson, and Caldecot v. Hodgson*, *ibid.* 593. *Cuthbert v. Bencock*, *ibid.* 594. *Lake v. Lake*, 1 Wils. 313. *Brasbridge v. Woodroffe*, 2 Atk. 68. *Ulrich v. Litchfield*, 2 Atk. 373. *Blinkhorn v. Feast*, 2 Ves. 28. *Goodinge v. Goodinge*, 1 Ves. 231. *Hampshire v. Pierce*, 2 Ves. 216. *Hodgson v. Hitch*, *Prec. in Chanc.* 230. *Brown v. Selwyn*, post, 242. *Bacon's Tracts*, 99. *Fonnereau v. Poyntz*, 1 Bro. Cha. Rep. 474.

Case 21.—LECHMERE versus LADY LECHMERE

13 May [1735].

(3 P. Will. 211, S. C.)

[S. C. 2 Wh. & T. L. C. (7th ed.) 399. See *In re De Lancey*, L. R. 4 Ex. 359.]

Money upon a marriage is agreed to be laid out in land in fee, and settled on husband and wife, remainder to their sons in tail male, remainder to the husband, his heirs and assigns for ever: A covenant, that until the money be laid out in land, the interest to be paid to the persons who were to have the rents of the lands when purchased. The husband purchased several estates, but never settled any, and died intestate *sans issue*, leaving a considerable real estate to descend to his heir at law. The heir may compel

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the administratrix, the widow, to invest this money in the purchase of lands; and the lands descended upon him will not go in satisfaction of the covenant, except as to such as were purchased after the covenant.

The late Lord *Lechmere*, upon his marriage with the Lady *Elizabeth Howard* daughter to the Earl of *Carlisle*, and in consideration of £6000 portion, covenanted with the Earl of *Carlisle* and the Lord *Morpeth* his son, to lay out, within one year after the marriage, the said sum [81] of £6000, and likewise the farther sum of £24,000, amounting in the whole to £30,000, in the purchase of freehold lands in possession, which were to be settled upon the Lord *Lechmere* himself for life, without impeachment of waste, remainder to trustees and their heirs during the life of the Lord *Lechmere*, to preserve contingent remainders, remainder for so much as would amount to £800 *per ann.* to the Lady *Lechmere*, for her jointure, remainder of the whole to the first and other sons of the marriage in tail male, remainder to the trustees for five hundred years, for the raising a portion or portions for the daughter or daughters of the marriage, remainder to the Lord *Lechmere*, his heirs and assigns for ever: but if there should be no daughters, that the said term was to cease for the benefit of the Lord *Lechmere*, his heirs and assigns for ever. And the said Lord *Lechmere* farther covenanted, that until the said £30,000 should be laid out in lands as aforesaid, there should be paid interest for the same after the rate of £5 *per cent.* unto the persons intitled to the rents and profits of the lands when purchased.

The Lord *Lechmere*, after his marriage, purchased several estates in fee simple in possession, but which were never settled according to the covenant; as also several terms and reversions, &c., and in the year 1727, died intestate and without issue, leaving a considerable real estate, to the value of about £1800 *per ann.* to descend upon the plaintiff, his nephew and heir at law. The Lady *Lechmere* took out administration; and the plaintiff brought his bill against her for an account of the Lord *Lechmere's* personal estate, and to have this covenant carried into execution; his remainder by the death of Lord *Lechmere* without issue now taking effect; as also to have some purchases completed, which were left incomplete by the Lord *Lechmere's* death.

The Lady *Lechmere* insisted by her answer, That the plaintiff, being no way privy to any of the considerations within this covenant, could not compel [82] her to lay out the £30,000 in the purchase of lands for his benefit: but that if he could, the lands which Lord *Lechmere* had permitted to descend on him, being to the value of £1800 *per ann.*, ought to be taken in full satisfaction for all the benefit the plaintiff could be intitled to as heir at law to the Lord *Lechmere*, who designed these several purchases to be settled according to the uses specified in the covenant.

The cause was first heard at the *Rolls*, and there decreed (1) for the heir at law, Mr. *Lechmere*, upon both points; viz. That he was intitled to have a specific performance of this covenant; and secondly, That the several estates which descended upon him were not a satisfaction for this covenant, or any part of it; and now coming on to be heard before the Lord Chancellor,

Mr. *Pauncefort*, Mr. *Strange*, Mr. *Browne*, and others, argued for the plaintiff, That he could not in this case be considered as a mere volunteer, but was in some sort a purchaser; according to *Jenkins* and *Kemish's* case, *Hardr.* 395; *Lev.* 150, 237. But that though he should be taken for a volunteer, yet he must prevail against an administratrix: and this to serve the intent of the Lord *Lechmere*, who by his covenant has said, That his heirs at law should have an interest in the land, and in the money until the land be purchased. That the heir was in contemplation at the time of the Lord *Lechmere's* entering into this covenant, appears from the provision, that in case there should be no daughters, the term of five hundred years should cease for the benefit of him and his heirs. That wherever a man enters into a lawful engagement, and is prevented by death, or any other accident, from carrying his agreement into execution, the court will look upon it as performed. That the strength of this rule appeared from the case of *Sweetapple* versus *Bindon*, 2 *Vern.* 536, where the husband was decreed to stand in the same condition as if the money had been actually laid out in land; although no rule of law be clearer, than that the husband shall never be tenant by the curtesy but where he has reduced his [83] wife's estate into possession during her life. That though every tenant in fee has his heir in his power, yet, if the ancestor does nothing to divest the natural right which his heir hath to succeed him, and to have a specific execution of his covenant, he shall always prevail against the executor or administrator, even when the covenant was merely voluntary; as

appears by the case of *Holt versus Holt*, (2) 2 Vern. 322, the trustees neglecting to compel the Lord *Lechmere* in his life-time to perform his covenant, cannot prejudice either party who is entitled to have it carried into execution : for, if so, the doctrine of this court would be intirely overturned ; and trustees would become judges whether and how far men should be bound by their covenants : but by the known rules of this court trustees are bound to execute the trust in the manner the persons that made the conveyance have directed ; and have no latitude of judgment left to them, to distinguish whether the conveyance be made upon a valuable consideration or not ? or, whether the persons claiming under the trust be volunteers or purchasers ? If then the neglect of the trustees will not affect the case one way or the other, the whole must depend upon the equity of the heir and administratrix. And taking the heir even but as a volunteer, yet he is such a volunteer as is greatly favoured both at law and in this court ; and will always appear in a more favourable light than an executor or administrator : as appears from the several cases of *Kettleby versus Atwood*, (3) 1 Vern. 298, 471. *Knight versus Atkins*, (4) 2 Vern. 20. *Baden versus Com. Pembroke*, 2 Vern. 52. *Lancey and Fairchild*, 2 Vern. 101. *Lingen and Souray* (1 P. Will. 172, S. G. ; *Prec. in Chanc.* 400, S. C.), *Eq. Ca. Abr.* 175, and *Vernon versus* (2 P. Will. 594) *Vernon*, in the House of Lords in 1732, and *Kentish versus Newman* (1 P. Will. 234, S. G.), *July* 1713, where a feme being possessed of £200, the husband before marriage covenanted to join so much to her £200 as would purchase £30 *per ann.* to be settled on them two, and the heirs of their bodies, remainder to the husband in fee ; and until the settlement made, the £200 to be taken as part of her separate estate ; [84] and if no settlement made during the husband's life, and she survived, then to remain to her ; but if he survived, then to go to her brothers and sisters : the marriage took effect in 1688, and they had issue a daughter ; the wife died in 1711, before the husband, no purchase having been made : upon a bill brought by the daughter, she had a decree against the brother and (5) sister of her mother, though the money had not been laid out within the time provided by the articles ; the court looking upon the purchase as completed. This case not only fully proves the right of the heir, but likewise that he shall not lose that right through any accidents preventing the execution of agreements within the time prefixed. Here are no creditors, no want of assets, and consequently no equity, to prevail against the heir. They farther insisted, That if this covenant was to be carried into execution, it could not be done partially ; but being equally binding as to all parties, all are equally intitled to the benefit of the execution : that therefore it could not be confined singly to the purchase of lands of £800 *per ann.* for the Lady *Lechmere's* jointure ; but the whole must be carried through and limited to the heir in the manner it would have been limited to the Lord *Lechmere* himself, had he been alive. The Lady *Lechmere* cannot vary the execution of the articles ; and the covenant being to lay out the whole sum of £30,000, which is an entire covenant, cannot be restrained to a covenant for purchase of lands of £800 *per ann.* only for the Lady *Lechmere's* jointure. This method would be admitting the representative to contradict what the Lord *Lechmere* himself has said should be land, and land for the benefit of his heir : which appears from the provision, that until the lands purchased, interest at £5 *per cent.* should be paid to such persons as should be intitled to the rents of these estates. Many of the cases cited were not so strong as the present one, being founded upon voluntary agreements ; which nevertheless have been carried into execution for the benefit of the heir against the executor : and insisted upon that of *Vernon* (6) versus *Vernon*, as a case in point, and no way distinguishable from the present ; the matter [85] resting upon the covenant in that case as well as in this ; and the execution of that covenant decreed in favour of the heir against the wife, both in this court and in the House of Lords ; notwithstanding all the same objections made there in her behalf that can be made here for the defendant.

To the second point they argued, That the Lord *Lechmere* having not done any thing in his life-time to shew his intent that these late purchases should go in satisfaction of his covenant, in part or in the whole, no supposed intent could prevail against the heir for the administratrix, she not having so good an equity as he ; especially seeing that suppositions may be, as well one way as the other. That the cases of satisfaction depend upon the particular circumstances of each case, appears from the cases of *Duffield versus Smith*, and *Goodfellow* (7) versus *Burkett*, 2 Vern. 258, 298, and also from the intent of the parties ; as is most manifest from that of *Saville versus Saville*, where the only difference was between a descent of lands in fee, which by the settlement

were to be a satisfaction ; and that which happened, of a descent of lands in tail of equal value, of which the daughters might, by levying a fine, have made themselves tenants in fee ; and yet held there not to be a satisfaction ; because the intent was, that the fee simple lands should descend. In the present case it does not appear that the intent was, that those fee simple lands should go in satisfaction : for, if he had so intended, he would have acquainted the trustees with his design of performing so much of his contract by these purchases : and as no intent appears, it is no more than if the Lord *Lechmere* had given a bond to his heir, and had then permitted these lands to descend upon him ; in which case it cannot be pretended, that the descent would have been a satisfaction for the bond, or that the administratrix could have defended herself against this demand by such an argument. So if he had owed £1000 to his next of kin, the distributive share would never have been taken as a satisfaction for the debt. A less thing cannot go in satisfaction for a greater ; as in *Atkinson's* and *Webb's* (8) case, 2 *Vern.* 478 (*Blandy v. Widmore*, 1 *P. Will.* 324, and the cases and observations contained in note 1). But an equivalent must be given, which must appear to have been intended as a satisfaction. And in that of *Eastwood versus Vink*, (9) *Apr.* 1732, it was held that a devise, which was to go in satisfaction, must be of the same nature as the thing for which it was to be an equivalent ; and therefore held there that money could not go in satisfaction for land, nor copyhold for freehold, &c. How then according to these rules, can several of these purchases be called a satisfaction ? There are terms, reversions, &c., which are not only less in value, but from their nature cannot be limited according to the uses intended by the covenant, which was to purchase freehold lands, and lands in possession ; and it is therefore very strange to think that the Lord *Lechmere* should make purchases, and intend them to go in satisfaction of his covenant, which he very well knew, could not from their nature or their value answer any description of those he had agreed to purchase : such a construction, besides its absurdity, would go in direct contradiction to the well known maxim, that an heir is not to be disinherited by a constructive, but a necessary implication only.

Mr. Attorney General, Mr. Solicitor General, Mr. Verney, and Mr. Fazakerly argued for the defendant, that the consideration, upon which this covenant was made, extended no farther than to the Lady *Lechmere* and the children of the marriage, but not at all to the heir ; who therefore could be looked upon but as a mere volunteer, and as such had no claim to any equity. That the naming the heirs in the covenant, was only to shew what should become of the land when the other limitations should be spent ; and the provision, that the interest should be paid to such as should be entitled to the rents and profits of the estate, was no more than what must have been if it had not been inserted ; and so fall within the rules of *expressio eorum, &c.* That it was necessary to explain for what purpose the five hundred years term was raised ; and to provide that [87] in case of failure of daughters, it should sink in the inheritance, in order to prevent its becoming legal assets ; which it must otherwise have done. That there was a great difference between a limitation to the heirs of the body, and a general remainder to one and his heirs ; the heir being in the former case, under the immediate contemplation of the parties, but not so in the latter. And that this court considers even a covenant but as *nudum pactum* in the case of volunteers ; for, though it be a court of conscience, yet that is only to aid such as are in conscience intitled to a performance of the covenant, which cannot be said of a volunteer, unless he, by some particular circumstances, takes himself out of the general rule. Then as to the nature of the obligation, here are no trustees appointed, but the whole rests singly upon the Lord *Lechmere's* covenant ; which is but a personal lien, and must fail whenever he himself becomes intitled to the benefit of what was to be performed by that obligation. *The rule that what is covenanted to be done is looked upon as done*, holds only in cases where somewhat is vested either in trustees, or some other manner, whereupon the covenant may be a lien ; but not where it is a mere personal obligation, as in this case, the whole remaining in the persons own hands. This difference appears from the case of *Lingen versus Sowray*, *Eq. Cas. Abr.* 175 (1 *P. Will.* 172, *S. C.* ; *Prec. in Chanc.* 400, *S. C.*), where there was, as appears by the decretal order, an assignment of securities to trustees to be laid out in land, and to be settled ; the trustees did not actually receive the securities ; but sometime after the marriage the husband called in part of the money himself, and settled it upon the same persons as it was to have been settled upon by the marriage settlement : he afterwards made his will, and devised his personal estate to his wife, against whom a bill was brought by the nephew as heir at law ; and it appearing that

£700 remained upon the same securities at his death as at the time of settlement, it was decreed, that the £700 should be looked upon as land : but that the other part that was actually taken out by him should not be bound. And the court would not in that case admit the representative of the covenantor to say that his [88] ancestor had broke his covenant. The like distinction in the case of *Chaplin* versus *Horner*, (10) 18 *March* 1718, at the *Rolls* ; and in that of *Chichester* versus *Bickerstaff*, (11) 2 *Vern.* 295. It is held, that though money shall in many cases be considered as land, when bound by articles in order to a purchase made ; yet whilst it remains still money, it shall be deemed part of the personal estate of such person who might have aliened the land in case a purchase had been made. And in the cases of the Countess of *Warwick* and *Edwards*, *Knight* versus *Atkins*, *Lancey* versus *Fairchild*, (12) and *Sweetapple* versus *Bindon*, 2 *Vern.* 20, 101, 536, the sums were appropriated, and standing out in trustees hands ; and so not like this case. And in that of *Knight* versus *Atkins*, the plaintiff was both heir and executor ; as appears in 2 *Chan. Rep.* 400. Indeed the case of *Vernon* and *Vernon*, in the House of Lords, 1732, rested upon a bare covenant ; but there was an express provision that the brother should have the benefit of the covenant, there being an express estate limited to him, upon which he might have had remedy against Mr. *Vernon* himself in his life-time : but it cannot be pretended that the plaintiff could in this case have had any remedy against the Lord *Lechmere* in his life-time ; Lord *Lechmere* could have limited the remainder to any other of his relations, in bar of his heir at law. In the case of *Cann* and *Cann*, 1 *Vern.* 480, the court refused compelling the executrix to lay out the money in a purchase of lands whereof the husband would, by the articles, have been tenant in tail. The objection, that the covenant was entire, and consequently could not be partially executed, was endeavoured to be answered, by saying, that the Lady *Lechmere* did not come here to have the covenant carried into execution : but was ready to wave all the pretensions she had under this covenant, unless the court should think the heir intitled to have it carried into execution : and concluded this point by saying, The heir was as much a stranger to this covenant as the natural daughter was held to be to the covenant for farther assurance in *Foresaker's* and *Robinson's* case, *Eq. Cas. Abr.* 123, and that the Lord *Lechmere* having lived several years after his entering into [89] this covenant, and having never carried it into execution ; this long surceasing was to be taken as a change in his intention ; and consequently the heir not intitled to a performance.

As to the second point they argued, that if the heir was intitled to have a specific performance of this covenant, the descent of lands to the value of above £30,000, which he took from the Lord *Lechmere*, must be looked upon as a satisfaction. That wherever a thing is to be done either upon a condition, or within a time certain, yet if a recompence can be made which agrees in substance, though perhaps not in every formal circumstance, such a recompence shall be good, and shall go in satisfaction of the thing covenanted to be done. In the case of *Wilcox* and *Wilcox*, 2 *Vern.* 558, the descent of lands of the same value was held a satisfaction ; though in that case the son was a purchaser ; which the heir is not in the present case ; and in that of *Blandy* versus *Widmore*, 2 *Vern.* 709 (1 *P. Will.* 324, *S. C.*), the husband having covenanted to leave his wife £620 at his death, and dying intestate, whereupon her distributive share came to £1000, this was held to be a satisfaction ; and in case of portions, they are held to be satisfied either by a devise ; or where given by will, are likewise held to be satisfied by a gift in the party's life-time, though the will does not take effect till his death.

Lord Chancellor. The first question is, Whether the plaintiff, the heir at law to the lord *Lechmere*, be intitled to a specific performance of this covenant ? It has been considered by the plaintiff's counsel as an argument of the lord *Lechmere*, and an intent in him to lay out this whole sum of £30,000 in lands at all events ; on the other hand, the defendant's counsel have insisted, that the design went no farther than the providing for the lady *Lechmere*, and the issue of the marriage. The intent seems to me to be, that the £30,000 should, at all events, be laid out in [90] land ; the produce whereof was to be secured to the issue of the marriage, who in this case must have taken as purchasers ; but as to the remainder in fee, I do not think that the looking upon the Lord *Lechmere* either as a purchaser of it or not, will vary the case ; since, had the covenant been silent, the remainder must have returned to the person from whom the estate moved ; and I think it quite the same whether he is considered as a purchaser, or as a volunteer ; the dispute not being between the heir and a third person, but between the two representatives of the Lord *Lechmere*, the one of his real, the other of his personal estate ;

the heir's being but a volunteer in regard to his ancestor, will not exclude him from the aid of this court. But, though the question is between two volunteers, the court will determine which way the right is, and decree accordingly. We must therefore see whether the £30,000 is, upon this covenant, to be looked upon as real or personal estate?

It seems to be allowed on both sides, that had the money been deposited in trustees hands, it must have been looked upon as a real estate, and the heir intitled to the benefit of it. This, I say, seems to be granted; and no authority against it, but what has been collected from the case of *Chichester versus Bickerstaff*, 2 Vern. 295.(13) It is probable that in that case the court went upon some reason which induced it to think that Sir John Chichester looked upon that money as personal estate; for, otherwise the authority of that case is not to be maintained; being contrary to all the former resolutions, and to a late one in the House of Lords, by which I am bound, viz. that of the Countess of Warwick versus Edwards,(14) where the money was decreed to go as land, though to a collateral heir, who was not within the consideration of the settlement: so that it is now a settled point, that where the securities are appropriated, the money shall go as land, not only to the issue of the marriage, but likewise to a collateral heir or general remainder-man; unless there appears some variation in the parties intent. And indeed it is very reasonable that it should be so; for, otherwise the neglect [91] of trustees, or any other accident, might overthrow all men's agreements and contracts entered into upon the best and most valuable considerations. But it has been objected, that this case differs from all those; for, that the money was never deposited, but remained in the Lord Lechmere's own hands; and that he only was the debtor. So now the question is, Whether this will make any difference? An heir can no more be looked upon as a creditor against his ancestor, than he can be looked upon as a purchaser under him; he takes with the several burdens that his ancestor lays upon him. And as, on the one hand, the Lord Lechmere bound himself, by his covenant, to lay out this sum of £30,000 in land; he, on the other, acquired a right to an estate for life, and to a remainder in fee, which by his death are now severed, and the remainder only descends upon the heir. If a man articles for a purchase, and binds himself, his heirs, executors and administrators, he may as well be called, in that case, both covenantor and covenantee, as in the present one; but yet the heir is intitled to have the purchase completed, and may compel the executor to do it; because their rights are different; as appears from the case of *Holt versus Holt* (ante, 83), 2 Vern. 322. And wherever a man's design appears to turn his personal estate into land, this gives his heir an advantage which this court will never take from him. None of the cases cited warrant this present distinction that is endeavoured at; and in reason, I am sure, there is nothing to warrant it; the intent and agreement of the parties being the same in both cases; which if effectual in one case, I cannot see why it should not be so in the other. The only case, from which any thing like this distinction can be collected, is that of *Lingen and Sowray* (ante, 87); but I am no ways satisfied that that case was resolved upon that reason; for, in that case, the husband had altered the trust, and the limitations of it. Besides, in that case nobody had any interest in it but he and his wife; and the court, as appears by the decree, laid great stress upon the change of his intent, appearing by changing the trust: but here no change appearing, the intent remains as it was at the time of the [92] covenant entered into; and consequently a very wide difference between the two cases. In the case *Chaplin versus Horner* (ante, 88), the husband alone was to have the benefit of the articles; and therefore not at all like the present case. I therefore think that this case falls within the common known rule, that money articulated to be laid out in land is to be looked upon as land. The Lord Lechmere was bound at the time of his death to lay out this money in land; by which he gained a right to an estate for life, with a remainder in fee; and the estate for life being determined by the death, the right which he had to the remainder descends upon his heir; and as it comes by his death, nothing that has been done by the Lady Lechmere, either as to the waiver of her jointure, or any thing else, can alter or defeat that right. Indeed to suppose it, would be absurd.

The cases upon satisfaction are generally between debtor and creditor; and the heir is no creditor, but only stands in his ancestor's place. One rule of satisfaction is, that it depends upon the intent of the party; and that which way soever the intent is, that way it must be taken. But this is to be understood with some restrictions; as, that the thing intended for a satisfaction be of the same kind, or a greater thing

in satisfaction of a lesser (*ante*, 86, the cases cited in Note 8) : for, if otherwise, this court will compel a man to be just before he is generous ; and so will decree both. But these questions are no way material in this case, which turns entirely upon my Lord *Lechmere's* intent at the time of these purchases made. Those made before the covenant can never have been designed to go in performance of the subsequent covenant, his intent being clear, that the whole sum of £30,000 should be laid out from the time of the covenant. Then there are terms, with covenants to purchase the fee ; but terms are not descendible to the heir, and so no satisfaction. The like of reversions ; especially seeing the lives did not fall in during the Lord *Lechmere's* own life. But as to the purchases of lands in fee simple in possession, it is to be considered, that there [93] was no obligation upon the Lord *Lechmere* to lay out the whole sum at one time. Now here are lands in possession, lands of inheritance, purchased ; which though not purchased with the privity of trustees, yet it was natural for the Lord *Lechmere* to suppose that the trustees would not dissent from those purchases, being entirely reasonable ; the design of inserting trustees being not to prevent proper, but improper purchases : and though they were not purchased within the year, yet nobody suffered by it ; and so this circumstance cannot vary the intent of the party in a court of equity. The intent was, that as soon as the whole was laid out, it should be settled together ; and not to make half a score of settlements. In the case of *Wilcox and Wilcox*, (15) 2 Vern. 558, the covenant was not perfected ; nothing done towards it strictly, but some steps taken by the ancestor which seemed to be intended that way : and it is as reasonable to suppose these purchases to have been intended to satisfy this covenant in the present case, as it was to suppose it so in that. And so varied the decree as to this point only, *viz.* as to the fee simple lands in possession purchased since the covenant. (16)

(1) And for these reasons ; first, for that the Lord *Lechmere* was compellable in equity to lay out this £30,000 and settle it agreeably to the articles ; secondly, because the Lord *Lechmere* living after the year within which time the purchase was to be made and settled, had broken his covenant ; thirdly, for that in consequence thereof, the trustees might have brought their bill, and compelled his lordship in his life-time to make such purchase and settlement ; fourthly, for that the trustees not commencing their suit in equity, or at law, shall not prejudice any person entitled to have this settlement made ; fifth, in regard the land descended, and which was under the value of what the Lord *Lechmere* was bound to settle, shall not be taken for or towards satisfaction of the lands article to be settled. 3 P. Will. 214.

(2) In which case the father of A. article to a carpenter to pay him £1000 for the building of an house upon his land, and the carpenter article to the father to build the house. The father died intestate before the house was begun to be built, and the land on which the house was to be built, descended to the son and heir. Held, that the son might compel the widow and administratrix of the husband, to lay out the £1000 in building the house, although the son, who sought, and was allowed to take the benefit of this covenant, did not entitle himself thereto by any manner of consideration.

(3) In this case it was agreed by marriage articles, that the wife having £1500 portion, the husband should add £500 more to it ; and that the whole should be deposited in trustees hands, until a convenient purchase could be found for investing the same in land, which, when purchased, should be settled on the husband and wife for their lives, with remainder to their first, &c., son in tail, remainder to their daughters in tail, remainder to the right heirs of the husband. Before the making of the purchase the husband died, leaving issue by his said wife a daughter, who died about a month old. The wife administered to the husband and daughter ; and the heir of the husband brought his bill to have the money laid out in the purchase of land to be settled no the wife for life only, remainder to the plaintiff in fee ; and though the then Lord Keeper *North* refused to make a decree for that purpose, and dismissed the bill, but without costs, yet the party did not think to rest there, but reheard the cause before the Lord Chancellor *Jefferies*, who decreed for the heir, holding, that the money was bound by the articles, and should be for the benefit of the heir, as the land would have gone, if purchased. 1 Vern. 299, 471.

(4) Upon marriage articles £1500 was the wife's portion, to which the husband was to add £1500, the whole £3000 to be invested in land and settled on the husband

for life, remainder to the wife for her jointure, remainder to the heirs of their two bodies, stopping short there, and not expressing where the estate should go afterwards. The husband died without issue, upon which his collateral heir brought his bill to have the money laid out in the purchase of land to be settled on the wife for life, remainder to the plaintiff in fee, as heir at law to the husband. And accordingly the Lord *Jefferies* decreed the whole money to the heirs of the husband, on a presumption that it was so intended.

(5) This case seems to have been determined upon what was the intention of the parties to the articles; for they could not be presumed to provide for the wife's brothers and sisters, before the daughter who was the issue of that marriage; and therefore the court construed the meaning of the articles to be, that if the wife died before her husband, without issue, then, but not otherwise, the money should belong to the wife's brothers and sisters, from and after the death of the husband.

(6) 2 *P. Will.* 594, decreed first by Lord *King*, and afterwards in the House of Lords, which case was this. A. covenanted on his marriage to lay out £7000 in land, and settle it on himself for life, remainder to his wife for life, remainder to the first, &c., son of the marriage in tail male, remainder to the heir male of the body of A., remainder to A.'s brother for life, remainder to his first, &c., son. Now though this remainder seemed merely voluntary, and out of all the considerations of the marriage settlement, and though A., as was there urged, had the land been settled by him in his life-time, might have barred the brother by a common recovery, yet on A.'s leaving only a daughter, equally compelled a specific performance of the covenant.

(7) In this case a man on the marriage of his daughter, gave a bond to her husband for part of her portion, after which by his will he gave her land of much greater value, and yet this was held to be no satisfaction, although there were not assets to pay debts. And there it is laid down as a rule, that where a legacy has been decreed to go in satisfaction of a debt, it must have been grounded upon some evidence, or at least upon a strong presumption that the testator did so intend it.

However this case might be determined on another principle, *viz.* that money and land being of a quite different nature, the one shall never be taken as a satisfaction for the other. Vide 3 *P. Will.* 226, note; *Chaplin v. Chaplin*, *ibid.* 247.

(8) A. gives a bond to B. her servant to pay her £20 *per annum* quarterly, for her life, free from taxes; and by will, taking no notice of the bond, devised to her £20 *per annum*, for her life, payable half yearly, but not said to be free from taxes. Lord *Keeper*. The annuity devised not so beneficial, as that secured by bond; that which is less not to be presumed in satisfaction of that which is greater; and decreed the annuity additional, and not as given in lieu or satisfaction of the bond. Vide also *Duffield v. Smith*, 2 *Vern.* 258. *Masters v. Masters*, 1 *P. Will.* 423; *Chanc. Cases*, *ibid.* 408. *Cuthbert v. Peacocke*, 1 *Salk.* 155. *Thomas v. Bennet*, 2 *P. Will.* 343. *Crompton v. Sale*, *ibid.* 553. *Graham v. Graham*, 1 *Ves.* 262. *Nicholes v. Judson*, 2 *Atk.* 300. *Sparkes v. Robins and Cope*, *ibid.* 491. *Clark v. Sewell*, 3 *Atk.* 96. *Heather v. Rider*, 1 *Atk.* 426. *Haynes v. Mico*, 1 *Bro. Cha. Rep.* 129. *Jeacock v. Falkner*, 1 *Bro. Cha. Rep.* 295. *Devese v. Pontel* (reported by Mr. *Finch*, in a note upon the case of *Brown v. Dawson*, in his edition of *Prec. in Chanc.* p. 240), at the Rolls *Michaelmas* 1785. *Rickman v. Morgan*, 1 *Bro. Cha. Rep.* 63.

(9) 2 *P. Will.* 616, S. G. *Chaplin v. Chaplin*, 3 *P. Will.* 247. *Barret v. Beckford*, 1 *Ves.* 521. *Grave v. Earl of Salisbury*, 1 *Bro. Cha. Rep.* 425.

(10) 1 *P. Will.* 482, S. C., where money was covenanted to be laid out in the purchase of lands and to be settled on A. in fee, and A. himself having afterwards received part of this money, held to be a good payment, and not to be repaid by A.'s executor to his heir; but A.'s heir was decreed to be entitled to the remainder of the money not received by A.

(11) Where, upon Sir *John Chichester* marrying the daughter of Sir *Charles Bickerstaff*, Sir *Charles* article'd to pay £15,000 as part of his daughter's portion, which, together with £1500 more to be advanced by Sir *John Chichester*, was, within three years after the marriage, to be invested in land, and settled on Sir *John Chichester* for life, remainder to his intended wife for life, remainder to their first, &c., son in tail male, remainder to the daughter in tail, remainder to the right heirs of Sir *John*, the husband within a year after the marriage, and his lady, both fell ill of the small pox, the wife died first, and three days after Sir *John* died, without issue, having made his will, and appointed his sister *Frances Chichester*, his residuary legatee. Sir *Arthur*

Chichester, the brother and heir, brought his bill, claiming the money thus agreed to be laid out in land, the remainder in fee whereof, in case of failure of issue of the marriage, was to go to the heir of the deceased husband. *Sed per curiam* : this money which would have been land, as to the issue of the marriage, yet now the husband and wife are dead without issue, is turned into money again, and under the power of the husband, to dispose of it as he pleased. It should have gone to his administrator, had there been *no will*, a *fortiori* will it, in the present case, go to his residuary legatee. *Vide infra*, p. 90, note (a.)

(12) In this case, money by marriage articles was to be laid out in land, and settled on the husband and wife and their issue, remainder to the heirs of the wife ; the wife died in the life-time of the husband ; and decreed for the heir of the wife against her administrator.

(13) With respect to this case, it is remarkable, that the wife died within three years after the marriage, during which period the purchase was to be made ; so that the time was not come within which the money was to be laid out, and till then it continued money ; or possibly, the court had some evidence to induce them to believe Sir John *Chichester* looked on the money as personal estate. *Vid. ante*, 88, also *Note* 6, 3 *P. Will.* 221.

(14) 2 *P. Will.* 271, S. C. In this case money was articleed to be laid out in land and settled on the husband and wife, and the issue of the marriage, remainder to the heirs of the husband. There was issue, but such issue died without issue before the money was laid out ; and decreed, that the money was to be looked upon as land, and should go to the heir, and which decree was afterwards affirmed in the House of Lords.

(15) In this case a man upon his marriage covenanted to purchase lands of £200 *per ann.* and to settle them on himself for life, remainder to his wife for life, for her jointure, remainder to his first son in tail male, remainder to his daughters in tail ; and the father purchased lands of £200 *per ann.*, after which he made no settlement, but permitted them to descend. Whereupon this was decreed to be a satisfaction of the covenant. The book takes notice, that the lands were worth £200 *per ann.*, which imports, that they were just of that value ; and this plainly shews, that the lands were bought with an intention to satisfy the covenants, and the eldest son could not complain, when he had his £200 *per ann.* from his father, that it was another estate than what was covenanted to be settled upon him, *viz.* that it was a fee-simple instead of an intail.

Vide S. P. Tooke v. Hastings, 2 *Vern.* 97. *Roundell v. Breary*, 2 *Vern.* 482. *Deacon v. Smith*, 3 *Atk.* 322. *Attorney General v. Whorwood*, 1 *Ves.* 540. *Sowdon v. Sowdon* (reported by Mr. Cox in his note upon *Lechmere v. Earl of Carlisle*, 3 *P. Will.* 228), at the *Rolls*, Feb. 3, 1785.

Also *Pultney v. Earl of Darlington*, 1 *Bro. Cha. Rep.* 223, in which all the cases upon this subject were very fully considered.

(16) His Lordship declared that the late Lord *Lechmere's* covenant in his marriage articles to invest the sum of £30,000 in the purchase of freehold messuages, &c., of an estate of inheritance in fee simple in possession, to be settled to the uses therein mentioned, ought to be performed ; and did order the same accordingly. And it appearing that the said Lord *Lechmere*, after the said articles, and after his marriage, purchased some messuages and lands for £490, and other lands for £7100, making in the whole the sum of £7894, his Lordship declared that the same ought to be applied towards performance of the said covenant : and that the sum of £2210, 6s., being the residue of the said £30,000, over and above the said sum of £7894 invested in the said purchases, ought to be raised out of the personal estate of the said Lord *Lechmere*, and invested in the purchase of freehold messuages, &c., to be settled to such of the uses contained in the said marriage articles, as are still subsisting. And it was further ordered, that the lands before-mentioned to have been purchased by the late Lord *Lechmere*, and such other lands as shall be purchased with the said £2210, 6s., be conveyed to the uses following, *viz.* As to such and so much of the lands, &c., as shall amount to and be of the clear yearly value of £800, to the use of the said Lady *Lechmere* for her life, for her jointure, and in lieu of her dower ; and after her decease, to the use of the plaintiff *Edmund Lechmere*, and his heirs. And that the residue of the said estates be conveyed to the use of the said plaintiff, *Edmund Lechmere* and his heirs. And it was further ordered that the master do compute interest at £4 *per cent. per ann.* for the said sum of £2210, 6s. from the death of the said Lord *Lechmere* ;

and that the said sum of £800 *per annum*, to be paid thereout, to, or retained by the said Lady *Lechmere*, in satisfaction of the arrears of her jointure of £800 a-year, that the surplus interest over and above the said £800 a-year, be paid to the said plaintiff *Edmund Lechmere*; and that the growing interest of the said £2210, 6s. be applied in like manner, until the same is invested in the purchase of lands as before directed. And the Lady *Lechmere* was directed to account for the personal estate of Lord *Lechmere*; and all parties to be paid their costs out of the personal estate of Lord *Lechmere*, to be taxed by the master. *Reg. Lib. An.* 1734, fol. 487.

Case 22.—JERMYN *versus* FELLOWS.

16 and 17 May [1735].

Where there is a sum of money provided for younger children; one of the younger becomes eldest, he shall have no part of this money; but where the money was, by a private act of parliament, to be appointed among A. B. and C. (naming them), and A. afterwards becomes eldest, he is capable of an appointment in his favour.

By a private act of parliament, 13 Will. 3, intituled, *An act for enabling Stephen Jermyrn to make provision for his younger Children, and for the advancement of his eldest son*, it was enacted, that the sum of £3750 remaining in the chamber of London, and the interest thereof, should be vested in trustees named in the act, upon trust that they should, by and with the consent of the said *Stephen Jermyrn*, the father, in his life-time, by any writing under his hand, testified in the presence of two or more witnesses, dispose of the said sum unto and among *Stephen Jermyrn* the son, *Martha* and *Catherine Jermyrn* (daughters of *Stephen Jermyrn* the father), and the survivors and survivor of them, and such other child and children as [94] the said *Stephen Jermyrn* the father, should hereafter have, in such manner, proportion and proportions, and at such time and times as the said *Stephen Jermyrn* the father, by his last will in writing, or other deed under his hand and seal, testified by two or more witnesses, should limit and appoint; and in default of such appointment, or for so much of the said £3750 whereof no appointment should be made, then unto and amongst such and so many of the said *Stephen Jermyrn* the son, *Martha* and *Catherine*, and the survivors and survivor of them, and such other child and children as the said *Stephen Jermyrn*, the father, should hereafter have, and should not be provided for out of any part of the £3750, share and share alike; and in case any of them died before twenty-one or marriage, then his or their share to go to the survivor or survivors.

At the time of this act made, *Stephen Jermyrn* had five children; *John* his eldest son, *Stephen* his second son, *Mary*, *Martha*, and *Catherine*: *Mary* was provided for before the act passed, upon her marriage, and so recited in the act; *John* died soon after the act passed, under age and without issue, in his father's life-time; whereupon *Stephen* the second son became intitled to the provision made for the eldest son; *Martha*, upon her marriage, had £1050 appointed to be paid her by the father, in full of her share of the said £3750, and *Catherine* married the defendant *Fellows*, and died after having attained her age of twenty-one (no part of the £3750 having been appointed to her); and left several children; after her death, upon the 23d of June 1720, *Stephen Jermyrn*, the father, by deed duly executed, directed the trustees to pay the remaining £2700 to his son *Stephen Jermyrn*, his executors and administrators, and died soon after; then died *Stephen* the son, leaving issue the plaintiff, who claimed under this appointment made to his father: the defendant insisted, that *Stephen* becoming eldest son by his brother *John's* death, became intitled to the provision made for the eldest son; and ceasing to be a younger child, became thereby incapable of taking by force [95] of the appointment; and so he being disabled, and *Martha* having been fully provided for out of the £3750, the remaining £2700 belonged to him as administrator of his late wife; it being a part not appointed according to the direction of the act.—The question was, Whether this appointment to *Stephen Jermyrn* the son, being eldest son at the time of the appointment made, was a good appointment within the meaning of this act?

Lord Chancellor. It is clear from the words of this act, that the legislature intended to provide for *Stephen*, *Martha*, and *Catherine*, and for any other younger children which *Stephen Jermyrn*, the father, should have; and without doubt, *Stephen* was at that time considered as a younger child. The father, pursuant to his power, made an appointment to *Martha* and her husband of £1050, which was accepted by them in

full of *Martha's* share ; so that she is quite out of the case. And the only question is, Whether the appointment to *Stephen* the son of the remaining £2700 be a good appointment ?—And the intent of the act has been much relied on ; and it has been compared to marriage settlements ; when younger children are so called in opposition to him who takes the estates ; although that, in the strictly grammatical sense, the second born can never be called the eldest. The case of *Chadwick* versus *Doleman*, 2 Vern. 528,(1) was much stronger. For, there he was younger son at the time of the appointment made, and yet it was brought back again seven years after. That case arose upon a settlement ; this arises upon an act of parliament, in which the intent shall prevail against the very words ; but then that intent must be plain and clear : now *Stephen* is indeed called a younger child in the preamble ; (2) but when the power of appointment is given, it is not to appoint amongst the younger children generally, but to *Stephen*, *Martha*, and *Catherine*. And it is observable that the power might have been executed, part at one time and part at another, by one or more deeds, or by his last will : nor was there any thing vested until an appointment made, but all was uncertain until he appointed. And the legislature had in view that there might be a death in the father's life-time, by reason of the words *survivor* and *survivors*. *Martha* being out of the question, nobody is to be considered but *Catherine* and *Stephen* ; *Catherine* died long before the appointment, and consequently none in being at that time but *Stephen* : and I think it would be very hard to take it from him in favour of an administrator, who has no other right than she had ; and that is none at all, she dying before the execution of the power, which was ambulatory until the father's death. So that this case differs greatly from that of *Chadwick* versus *Doleman*,(3) where the question was between the eldest son, become so by his brother's death, and the other younger children ; all which had as good a right as *Sir Thomas Doleman* himself. Besides, the power in the present case is to appoint it to the *survivor* or *survivors* ; and if *Stephen* be incapable of taking, there is nobody left to take ; for, *Mary* was fully provided for before the act ; *Martha* had accepted of £1050 in full for her share, and *Catherine* died before the execution of the power ; so that unless *Stephen* can take, the appointment must be merely void : and then it will come to this, that *Stephen* is the only person left who can take. Indeed he was a younger child at the time of the act made ; but circumstances are since altered, there being nobody left but he : whereas in *Chadwick* versus *Doleman*, there were younger children capable of taking at the time, as well as *Sir Thomas Doleman* himself.

And so decreed the appointment to be good. (*Reg. Lib. An.* 1734, fol. 621.)

(1) In that case *A.* by marriage settlement was tenant for life, remainder to trustees to raise £4000 for younger children's portions, as *A.* should appoint ; remainder to his first, &c., sons in tail. *A.* appoints the £4000 among his younger children, and particularly £2600 thereof to *B.* his second son. The eldest son dies six years afterwards, whereby *B.* became eldest son, and entitled to the whole estate after his father's death ; and thereupon *A.* makes a new appointment of the £2600 to one of his daughters. Decreed the last appointment to take place ; the first being made to *B.* upon a tacit or implied condition, that he should not become the eldest son.

The Lord Keeper admitted the rule, that of voluntary deeds, and voluntary appointments, the fact is to take place, as well at law, as in equity ; and likewise admitted, that the defendant, at the time of the appointment, was a person capable to take, and was a younger child within the power of appointing ; but he considered this as a defeasible appointment, not from any power of revoking, or upon the words of the appointment, but from the capacity of the person. He was a person capable to take at the time of the appointment made, but that was *sub modo*, and upon a tacit or implied condition, that he should not afterwards happen to become the eldest son and heir.

(2) As to those who are to be considered as younger children, vide *Beal v. Beal*, 1 P. Will. 245. *Buller v. Duncomb*, *ibid.* 451. *Heneage v. Hunlocke*, 2 Atk. 456. *Duke v. Dodge* (cited), 2 Ves. 203.

(3) The case of *Chadwick v. Doleman* appears to have been fully considered and approved of by Lord Talbot ; for he does not object to, nor attempt to weaken it, but clearly distinguished it from *Jermyn v. Fellows*. Vide *Teynham v. Webb*, 2 Ves. 198, in which Lord Couper's judgment is relied upon, and governed the decision of that case. Also *Broadmead v. Wood*, 1 Bro. Cha. Rep. 77, S. P. and the cases there cited.

[97] DE TERM. S. TRINITATIS, 9 GEO. II., IN CURIA CANCELLARIÆ

Case 17.—BELLAMY *versus* BURROW.

14 June [1735].

A. being in possession of the office of clerk of the crown, &c., in the King's Bench, in which B. has also an estate for life, procures B. to surrender, and solicits a patent for himself and C., and takes a note from C. promising to declare a trust for A. The patent afterwards is obtained; A. dies in debt, and without calling for a declaration of this trust; this note was held to be a sufficient declaration of trust. (*Reg. Lib. An.* 1734, fol. 583.)

The late Mr. *Bellamy* (the plaintiff's father) was, by letters patent 4 G. 1, intitled to the office of *King's Coroner and Attorney in the King's Bench*, to hold by himself, or his sufficient deputy, during his life, after the death of *Simon Harcourt* and *William Bordrigge*: Mr. *Harcourt* died in the year 1724, and on the 9th of May in the same year, *Bordrigge* surrendered to the crown; whereupon Mr. *Bellamy* entered upon and enjoyed the office. About this time, Mr. *Bellamy*, being desirous to have another life in the office, obtained new letters patent, May 14, 1724, granting the office to Mr. *Burrow*, who was his near relation, to hold by himself or deputy, during his life, after Mr. *Bellamy's* death; Mr. *Bellamy* acquainting the defendant that he had inserted his name in a warrant from the King for a grant of the office, wrote a note in the following words, viz. May 8, 1724 (which was the day before the surrender by *Bordrigge*, and some days before the date of the letters patent), [98] "Whereas Mr. *Bellamy* has caused my name to be inserted in a warrant from the King for a grant of his Majesty's *Coroner and Attorney in B. R.* in order for the passing of a grant thereof, I do promise, at his request, to execute in due form any declaration of trust with proper and usual covenants that shall be reasonable; declaring my name is used in trust for the said Mr. *Bellamy*, his executors and assigns."

This note was then signed by Mr. *Burrow* the defendant, and delivered by him to Mr. *Bellamy*; no other declaration of trust was ever executed by the defendant: but in February 1732, Mr. *Strutt*, being employed in Mr. *Bellamy's* affairs, received orders from him to draw his will; and having received instructions from him for that purpose (but none particularly concerning the crown-office), and apprehending from his general instructions that Mr. *Bellamy* intended to devise his patent-office, and the profits thereof, in the same manner as he had directed all his other estate real and personal to be devised, inserted in the draught which he prepared the following clause, viz. *And as to the office commonly called the crown-office, whereof I am patentee, determinable upon my life, and the life of* — Burrow, Esq.; *I give the said patent, and all benefit arising therefrom to my executors, their executors and administrators in trust, to apply and dispose of the profits arising therefrom in the purchase of lands to be settled to the uses last above mentioned; and it is my will that my executors do not give up my right to appoint clerks generally to act in the said office, nor to the benefit of filing and copying affidavits; but to have recourse to all lawful means in the confirming my right in the said office, and to the profits arising therefrom, &c. And it is my will that the said Burrow do act in the said office as master thereof, for the benefit of my son, or appoint a deputy, as he shall think proper.* Mr. *Strutt* attending Mr. *Bellamy* soon after with the draught of the will, at the reading of this clause Mr. *Bellamy* was greatly surprised, saying he had given no such instructions; and directed the clause to be left out of the ingrossment of his will, it [99] being no part of his intention.—Some days after Mr. *Bellamy* being desirous to see the state of his affairs as drawn up by Mr. *Strutt*, directed him to make an alteration in relation to the crown-office in the following words, viz. *that Mr. Burrow might insure the crown-office for the first year, or until he should obtain a farther grant, and act in the same office himself, or appoint a deputy, as he should think proper*; and a day or two after he ordered this clause to be left out of his will, which accordingly was done, and his will duly executed by him; whereby he, after payment of his debts and legacies, devised his personal estate to his executors, in trust to invest the same, together with other monies arising from the sale of some lands, in the purchase of land, to the use of the plaintiff (his only child) and the heirs male of his body, remainder to his two sisters for life, remainder to the defendant *Burrow* in tail male, and made the defendant one of

his executors. The testator soon after died, leaving a great load of debts, far exceeding his real and personal estate. The question was, Whether Mr. *Burrow* was, upon this whole case, to be looked upon but as a trustee, or whether he should hold the office in his own right ?

The case was first heard at the *Rolls*, where the plaintiff's bill was dismissed, and the office decreed to Mr. *Burrow* in his own right, upon the following reasons :

Master of the Rolls. The ability of any person, to whom a patent is granted for the execution of an office relating to the administration of justice, is the foundation upon which the patent passes ; as appears from *Winter's case*, *Dy.* 150 b., which was a grant of this very office ; and from the Lord *Hobart's* opinion in the case of *Glover versus Bishop of Litchfield*, *Hob.* 143 ; and if it afterwards appears, that the person to whom such grant is made is unskilful and unable to execute it, such grant is void ; as it was held by all the Judges in *Winter's case* : the reason is, that an office relating to the administration of justice highly [100] concerns the public ; and is not considered as the private property of the person enjoying it, independently of his skill and integrity in the discharge of his duty ; and therefore grants of this kind being made upon this foundation, if there is any trust to be declared by the person to whom such office is granted, the crown ought to be privy to it ; and the ability and integrity of the person for whose benefit it is should be known and approved. Nor do I think that a private dealing between two persons concerning a public office (especially the crown-office, the due execution of which so greatly concerns the public), ought, for the reasons before mentioned, to receive any countenance in a court of equity : and there cannot, in this case, be the least pretence to determine it as a trust between the crown and the nominee ; since the crown is no way privy to any trust declared or intended between the parties. Perhaps indeed it might be too hard to say, that all trusts of offices of this kind, which are held by patent, are void ; and therefore the nature of this office, the circumstance under which the trust is declared, and the ability of the person for whose benefit it is declared to execute it himself, or appoint a proper deputy, are to be taken into consideration, and will, in some measure, govern the opinion of the court. But still, whatever may be the circumstances of any case relating to an office that concerns the administration of justice, I shall always be very careful how I sever the profits from the duty of it ; the reason of which is founded in the relation of things : since without the observance of this, the dignity cannot be supported, nor the attendance recompensed, which are necessary for the due execution of it ; by which means the public will suffer the more, in order to increase the gain of a private person.

The objections to Mr. *Burrow's* enjoying the office in his own right are, first, that he has given a *memorandum*, which in a court of equity will amount [101] to a declaration of trust. Secondly, that subsequent to this, and even shortly after the testator's death, he declared, that his name was used in the patent only in trust for Mr. *Bellamy*, or to that effect.—Thirdly, that the testator died insolvent ; and therefore the grant to Mr. *Burrow* ought to be declared a trust for the benefit of his creditors.

To support the first objection, it has been said, that although the declaration was but imperfect and executory, and imported in strictness a farther act, which was never demanded by Mr. *Bellamy*, and consequently never done by Mr. *Burrow* ; yet that part of it relating to the execution of a farther deed, makes it unnecessary ; since the words are, *I do promise, at his request, in due form to execute any declaration of trust, with proper and usual covenants, declaring my name is used in trust for him* ; from whence it was collected, that the words *is used in trust* were an immediate declaration, and in strictness took place when the paper was signed : but I do not think that any stress can be laid on this part of the *memorandum* ; since the words *is used in trust* do manifestly refer to a future, and cannot be therefore construed into a present declaration ; nor will any court strain or torture words to make them import what is evidently contrary to their plain meaning. Besides, the limitation in Mr. *Bellamy's* will in favour of Mr. *Burrow* does, *prima facie*, prove that he intended to provide for him ; and from Mr. *Strutt's* evidence it is plain that he declined, at two several times, ascertaining the trust, or explaining himself concerning the crown-office. From all which it seems plain to me, that the *memorandum* signed by Mr. *Burrow* was only taken to make such use of it as, from the future behaviour of Mr. *Burrow*, Mr. *Bellamy* might think proper with regard to this office ; and not as an actual declaration of trust : and Mr. *Bellamy's* conduct at last does pretty clearly explain what his meaning was at the first. As to the second objection, Mr. *Burrow* might possibly declare that he looked upon himself as a trustee for Mr. *Bellamy*, knowing that he had executed that *memorandum* : but this only shews

what Mr. *Burrow's* sentiments were, not Mr. *Bellamy's*, by which the present case must be governed.

As to the last objection, *viz.* the insolvency of Mr. *Bellamy*, it cannot affect a matter of this consequence relating to the execution of an office of so great a trust, in which the confidence of the crown, and the good of the public, must be considered before the case of creditors. And so dismissed the bill; expressing in a particular manner his approbation of Mr. *Burrow*, with regard to his skill and probity in the discharge of his duty; and declared, that he did not doubt that if the *Lord Chancellor* should, upon an appeal, be of opinion that Mr. *Burrow* was but a trustee for Mr. *Bellamy's* creditors; yet he would think (as his Honour should have done, had he been of that opinion) that Mr. *Burrow* was intitled to a very liberal allowance. This case was now re-heard by the *Lord Chancellor* upon the sole point of the trust.

Mr. *Attorney General*, Mr. *Solicitor General*, Mr. *Chute*, and Mr. *Daval* argued for the defendant, that there was a plain intention of kindness appearing by the will, from Mr. *Bellamy* to the defendant; and that such intentions have always, in construction of trusts of this kind, had a great weight with the court. That Mr. *Bellamy's* intent at the time of the grant obtained seems uncertain, and to be ascertained afterwards by his future choice. That the wording of the note given by the defendant, shewed clearly that it was not intended as a present declaration of trust; but only to secure a future declaration upon Mr. *Bellamy's* request, in case the defendant, who was then very young, should not behave to his satisfaction. Here was no demand ever made, nor the least pretence of misbehaviour in the defendant. And had Mr. *Bellamy* intended the profits of this office as an additional estate, he would surely have said somewhat of it in his will, wherein he is very particular in the disposition of all his estate, both real and personal: nor can he be said to have [103] forgot Mr. *Burrow*, having limited several estates to him in remainder, and made him executor of his will. That when the person who drew his will had officiously inserted a clause, whereby this was declared to be a trust, he blamed him, and ordered that before the will was engrossed this clause should be left out, and nothing of it to be mentioned; which was a strong presumption that he intended it solely for the defendant's benefit: it being very strange to suppose, that had he intended him to be but a bare trustee, he should make no provision for him, but make him execute the office without any consideration at all. That though the intent seemed so strongly with the defendant, it was also worthy the consideration of the court, whether such an office, so highly concerning the administration of justice, could be granted in trust, the public being very much concerned in the execution of it? and as it must, by law, be granted to a person who is fit and expert, otherwise the grant is void, whether it was not proper and reasonable that the officer should have the profits to his own use? That the office of marshal was held in Sir *George Reynold's* case, 9 Co. 95, not to be grantable for years, for many reasons which will weigh as strong against dealings of this nature; particularly that which says, that in offices concerning the administration of justice, the trust which the law reposes in the officer is individual and personal; and that the law will not repose confidence in matters relating to the administration of justice in persons unknown. And that this being the case of creditors who were likely to remain unsatisfied, could not vary the nature of this office, which was no more liable to become legal assets than an office in fee, or a stewardship of a manor granted for life, could be deemed so upon judgment obtained against the ancestor, either in the hands of the heir in the first case, or against the grantee himself in the second case. *Dyer*, 7 b, is an express authority that offices of trust are not assets; for, here the question was, Whether the profits of the *Philazer's* office could be taken in execution? and held they could not: for, execution can only be of such things as [104] are grantable or assignable; which an office of *Philazer* is not, it being a personal trust that cannot be assigned. This resolution likewise shews how careful the law is in not severing the profits of an office from the duty of it. And in the great case of the Earl of *Oxford*. Sir *William Jo.* 127, it is held by *J. Dodderidge*, that no use can be of an office at common law. There never was an instance of a trust of such an office being carried into execution in this court. That of a master of this court was never yet attempted to be granted upon a trust; nor if it had, is it likely that such a trust would be countenanced here; and yet the office now in question is of as great confidence in the court of *King's Bench*, as that of a master is in this court. Nor can the court of *King's Bench*, in case this should be construed to be a trust, get at the *cestui que trust* to make him answerable in case of any misdemeanor; the person executing the office being the only one that they can take notice

of. In *Sir George Reynold's* case, 9 Co. 97 b, it is said, that this very office of clerk of the crown, and other offices of other courts relating to the administration of justice, are to be granted in the same manner as they always have been granted : for, that otherwise good clerks will be deterred from applying themselves to knowledge, if such offices should become saleable, or transferrable from one to the other for lucre : and upon that also would arise corruption in the office, and extortion from the subject. If therefore this office is neither legal assets, nor liable to be taken in execution, because not assignable, according to *Dyer*, 7 b, nor saleable, nor grantable for money, by *stat. 5, 6 E. 6, cap. 16*, then the profits of it cannot be accounted for upon a trust ; the latter being as much within the *statute* as the former : for, there is but little difference whether I convey my office for a present sum of money, or upon condition that the grantee shall pay the profits of it to me ; and all corrupt bargains relating to the sale of offices being void by the *statute*, if such a proceeding as this was to meet with any countenance, that good and wholesome law might be entirely eluded : so that taking the *memorandum* to be even a [105] present declaration of trust, it is void by the *statute* of 5 & 6 E. 6, and consequently the office must be decreed to the defendant, to hold and enjoy it in his own right, discharged from any trust.

Mr. Verney, Mr. Fazakerley, and Mr. Strange, argued on the other hand, that Mr. Burrow was a mere trustee ; and that the *memorandum* he had signed was a clear and plain declaration of trust. And that a trust might well be annexed to a thing which is neither grantable nor extendible. But if this should be construed to come within the *statute* 5 & 6 E. 6, cap. 16, then not only the declaration of trust would be void, but likewise the grant itself to the defendant. But this office might well be granted in trust, notwithstanding the *statute* ; for, that only avoids corrupt agreements between the grantor and grantee of an office ; and cannot be construed to extend to such as come in nomination only to execute the office without having any thing to do with the profits of it, but only to such as are themselves the beneficial officers. Here is no corrupt agreement between the grantor and grantee ; but a grant of this office obtained at the sole charge of Mr. Bellamy, and no consideration at all moving from the defendant.—That though an office was not, strictly speaking, legal assets ; yet if an officer conveys the profits of an office to trustees for payment of his debts, this court will carry such a trust into execution ; as appears from the case of *Thynn versus Jacob*, June 16, 1656, where the Lord Goring having a grant of the offices of clerk of the counsel, and clerk of the signet of the court of the president and council of the marches of *Wales*, conveyed the profits to two trustees for the payment of his debts ; Mr. Thynn, a subsequent creditor, brought his bill against the trustees for an execution of the trust, and to have his debt paid, and so decreed by the then commissioners of the great seal ; and upon a re-hearing in 1661, before the Lord Clarendon, the decree was affirmed, the validity of the trust being never questioned. The like determination was in the case of *Powell versus Drake*, May 10, 1731, in this court ; where Mr. [106] Drake having a grant of the office of chirographer in the court of *Common Bench*, in the names of *Bennett* and *Champion*, who had declared the trust to be for the benefit of Mr. Drake, he devised it for payment of his debts and legacies, and decreed upon the master's report, that the office should be sold for satisfaction of his creditors ; and so it was afterwards for £3500. The arguments, that the profits of the office are not to be severed from the execution of it, are not warranted by any of the cases cited. *Sir George Reynold's* case was adjudged upon the great inconvenience that might ensue upon a grant for years ; as if the grantee should die intestate, there would be none to execute it until administration granted ; which perhaps might not be for a long time. And indeed if that doctrine was to prevail, it would overthrow all the benefit which the law gives to the grantee of an office, whose grant is to hold it by himself or sufficient deputy ; which words are so beneficial and strong, that in *Young and Fowler's* case, *Cro. Car.* 555, a grant of the office of register to an infant of eleven years of age, to be executed by him or his deputy, was held good ; for that he might appoint a sufficient deputy ; which if he did not, or if the deputy misbehaved, it is a forfeiture of the office : and there a difference is taken between such a grant, and where the grant is to the infant alone. Nor can any thing be inferred from the cases cited in *Dyer*, 7, 150, but that the public is concerned, that the offices that relate to the administration of justice be executed by proper persons ; which does not at all preclude the grantee from making a deputy : for, the office being executed by a sufficient person, the public weal is satisfied. In the case *Culliford and Cardonell*, *Salk.* 466,

a difference was taken between a bond for the payment of a sum in gross for an office, and a bond for accounting for part of the profits as his deputy ; which comes pretty near our case. And that the law will in some cases allow the profits of an office to be severed from the execution of it, appears from the common case of sequestration of the profits of a benefice for payment [107] of debts, where the benefice (*viz.* the cure of souls) is as much an office as that now in question.

Lord Chancellor. The first question is, Whether Mr. *Burrow* is to be looked upon but as a trustee for Mr. *Bellamy's* creditors, or whether he is to hold this office in his own right, discharged from any trust? It must be considered, that at the time of this grant, Mr. *Bellamy* was himself in the office for his own life, and also for the life of another who surrendered, in whose stead a grant was obtained to Mr. *Burrow* for his life ; upon which he gives such a paper as I think amounts to a declaration of trust : it has been said, that this related to a future act, and was not intended as a present declaration ; but I cannot think so : it seems to be quite proper for a declaration in present. There is an express promise, which would not perhaps have been so strong, if at that time the grant had been actually passed and perfected ; but it was not so at this time : and therefore the transaction was sufficient as things stood. Nor can I think it right to admit of Mr. *Strutt's* evidence to oust a construction which appears from the nature of the transaction itself. The intent must be collected from the words of the note, and from the circumstances appearing at the time of the note given. The not mentioning any thing of it in his will might be to leave the defendant at liberty to execute this office either by himself or deputy ; or for many other reasons, as well as those that are insisted on. And by the instructions given to *Strutt*, he had ordered his executors to insure this office for £2000, so that if these instructions were admitted to weigh any thing, they would rather weigh against the defendant than in his favour.

The next question is, whether by law there can be a trust of this office, if this case be within the statute of 5 & 6 *Ed. 6* ? I should do Mr. *Burrow* but little service in decreeing for him, if it be within the *statute*. In that case the whole is void, and the office vacant ; the *statute* disabling the party buying, as well as selling : so that it would lead us [108] farther perhaps than the defendant desires. The design of the *statute* was to restrain corrupt agreements between the grantor and grantee ; but here is no such thing ; this being a gratuitous grant from the crown of this office, without any consideration at all, either from Mr. *Bellamy* or Mr. *Burrow* ; here is a bare nomination of Mr. *Burrow* to act, but nothing at all to bring it within the *statute*, for want of a corrupt agreement between the trustee and the *cestui que trust*. Indeed the reason of the thing speaks itself ; for, where the officer is to have no part of the profits to his own use, but barely his name made use of, what inducement can he have to give a sum of money for an office, the profits of which he is to be no way benefited by ? The cases that have been cited for the defendant do not come up to the present case ; for, here can be no want of an office nor of a proper officer ; he being officer still, though not to his own use : so that this differs widely from the reasons in Sir *George Reynold's* case and the other cases. As I am therefore persuaded that here was a trust intended, I think it ought to be carried into execution. It has been objected by the defendant's counsel, that it was merely executory ; but I do not think it more so than any other trust : every trust is, in some sort, executory ; for, they all relate to some future act to be done ; and this does no more : and whatever may hereafter happen in case a deputy be made, and that he misbehave, the loss must be borne by the trust estate ; and consequently no damage to Mr. *Burrow*, who is but a nominal officer only.

And so reversed the decree ; but ordered, that after the account settled, the master should make a very liberal allowance to Mr. *Burrow* for the time he had actually executed the office, and also for the time to come.

[109] Case 18.—GIFFORD *versus* MANLEY.

21 June [1735].

[Approved, *Brook v. Harwood*, 1868, 37 L. J. Ch. 212. See *Holland v. Holland*, 1869, L. R. 4 Ch. 452 (n.).]

A. and B. are trustees under a deed, by which neither of them is to answer for the other. A. receives a sum of money under the trust, and gives a writing under hand and seal acknowledging it, and that B. had received no part of it; A. never placed out the money, and dies; this writing is a specialty and good against the executor, but not against the heir of A. he not being mentioned in it.

By articles previous to the marriage of *Anthony Gifford*, dated the 20th of September 1717, the sum of £400 was vested in two trustees, *Buckingham* and *Jones*, to be put out at interest; the interest to be paid to the husband and wife during their lives, and the life of the survivor of them; and after their deaths, then to such children of the marriage as should be appointed by the survivor, and in such share and proportion as should be appointed; and it was further agreed, that neither of the trustees should be answerable for the act of the other. The £400 was paid to *Buckingham* only, who gave a receipt for it, and by writing under his hand and seal, dated October 1, 1717, declared, That *Jones*, the other trustee, had received no part of the £400, but that he had received the whole. *Buckingham* dies intestate, having never placed out the £400 according to the trust, but having kept it in his hands till his death. The question was, Whether this was to be looked upon as a simple contract debt only, or whether as a specialty debt, being under hand and seal?

The *Master of the Rolls* had decreed it a specialty debt, to affect the executor only, but not the heir, he not being bound, nor the declaration under hand and seal extending to him; and that the plaintiffs should stand in the room of such other creditors as had been satisfied out of the personal estate, in case of deficiency.

It was now insisted on, that an acknowledgement, though without the words *teneri & firmiter obligari*, if under hand and seal, will create a specialty debt, because under hand and seal. And to prove it were cited *Dy. 20 a, Ro. Ab. 597, Bro. Dette, 187, Cro. Eliz. 644.* (2 *Blackst. Com.* 465, *Benson v. Benson*, 1 P. Will. 131; *Degg v. Degg*, 2 P. Will. 414.)

[110] *Lord Chancellor*. This without doubt is to be considered as a specialty debt; there being no other definition of such a debt but that it is under seal: the cases which have been cited prove it. There was one tried at *York*, before the *Lord Macclesfield*, where a man had given a note to a woman upon a consideration not proper to be mentioned, in the following manner, *viz. Borrowed and received from ——— £100, which I promise never to pay*, and he directed the jury to find for the plaintiff. (2 Will. 434.)

Here is a contract that the trustees shall lay out this £400, and that one shall not be answerable for the other: and as *Buckingham* has by a paper under hand and seal acknowledged that he received that estate, he is become answerable for the whole: and not having laid it out as he was bound to do, he has broke his covenant. I have no doubt but that this is a specialty debt: for, though breaches of trust are indeed in some cases considered but as simple contract debts; yet (*Vernon v. Vawdry*, 2 Atk. 119. *Strut v. Mellish*, *ibid.* 612) here it must be otherwise, by reason of the express acknowledgment under hand and seal, that he alone has received the whole money, and had received it as trustee for the particular purposes mentioned.

And so affirmed the decree. (*Reg. Lib.* 1734, fol. 383.)

Case 19.—HATTON *versus* NICHOL.

2 July [1735].

The testator devises, as to all his worldly estate, that his debts be paid within a year after his decease; and then devises his real estate to trustees for a term in trust for his wife for life, remainder to his sons successively in tail male; and gives several legacies. The real estate is chargeable with the debts in case the personal do not suffice.

Mr. *Nichol* made his will in the following words: "And as to the worldly estate, with which it hath pleased God in his abundant goodness to bless me, I give, devise,

"and dispose thereof as followeth : *Imprimis*, I will that the charges of my funeral, and all debts which shall be owing by me at the time of my death, be justly paid and satisfied ; especially that due to my [111] poor carriers, which I will shall be discharged out of the first money of mine that shall be received, of which I desire particular care may be taken ; and I will that all my debts be discharged within one year after my decease, or so soon after as can possibly be performed." (In the Register Book the testator is not stated to express himself so ; but he merely directs all his debts to be discharged within one year after his decease.) And then devises his real estate to trustees, in trust for his wife for the term of 99 years, if she so long live, and after her death in trust for his brother for 99 years, remainder to his first and other sons in tail male, and gives away several specific and pecuniary legacies. The question was, whether his real estate was, by these words, chargeable with the payment of his debts in the case of a deficiency of the personal estate ?

Mr. *Solicitor General* argued it to be a plain charge upon the real as well as the personal estate ; which appeared from the provision, that they should be paid within one year ; and cited the case of the Earl of Warrington versus *Leigh*, where the real estate was held to be chargeable, though the words were not so strong as in the present case.

Lord Chancellor. The debts are well charged upon the real estate, in case of a deficiency of the personal estate ; let an account be taken of the testator's debts, and also of his personal estate, not specifically devised, which is first to be applied as far as it will go. (*Reg. Lib. A. 1734, fol. 574.*)

Case 20.—PROOF versus HINES.(1)

3 July [1735].

The plaintiff, a poor man, suing for a considerable estate, gives a bond for a great sum of money to the defendant, a person who assisted him with small sums, and took some pains in the affair ; the defendant's wife had also intermeddled, with her husband's knowledge and approbation ; and the bond was obtained by pressing the plaintiff for payment of what was expended, and taking advantage of his insolvency. The bond decreed to stand only as a security for what was advanced and interest ; and the defendant left at liberty to bring his *quantum meruit* for pains, &c.

The plaintiff being intitled, in right of his wife, to some part the late Sir *Thomas Coleby's* estate, and being a very mean illiterate person, and in very poor circumstances, applied to the defendant (a brazier by trade), and his wife to assist him in making out his pedigree, and getting such proofs as were necessary to the making [112] out his title to this estate ; the defendant telling him, That such things could not be done without money ; and he answering, That he had none, nor did not know where to raise any without the defendant's assistance, desired him to advance it, and he would repay him : The defendant accordingly laid out several sums ; and the defendant's wife employed several persons to search registers, &c., for the plaintiff ; pending the suit the defendant's wife often declared, That she thought herself and her husband intitled to a good gratuity for their trouble and assistance of the plaintiff ; but was resolved not to trust to the plaintiff's generosity, but to bind him as fast as pen and ink could bind him. The plaintiff coming some time after to the defendant's wife, desired her to continue her and her husband's care for his affairs ; she thereupon pressed him very much for the payment of what money had been laid out by them ; whereupon he offered to give a bond for £1000, payable to the defendant in a year, for what services they had already done, and for such care as they would hereafter take of his affairs ; to which the defendant's wife replied, he might take what time he pleased for payment of the bond, but pressed him very hard for repayment of what had been laid out by her husband and her : the plaintiff gave her his bond for £1000, for the use of the defendant her husband after the recovery of some part of the estate by the plaintiff ; this bond was put in suit, and now the plaintiff brought his bill to have it set aside as unduly and unconscionably obtained, by taking advantage of the distress he was then under.

It was in proof in the cause, that at the time he gave this bond he was in the meanest circumstances, being reduced so low as to live upon what broken scraps of meat he could get from taverns and such places.

Mr. Verney, Mr. Fazakerley, and Mr. Mills argued for the plaintiff, that he appearing to be illiterate, and in such mean indigent circumstances, must naturally be supposed in the defendant's power; and that the necessity of his circumstances was the cause [113] of giving the defendant a bond for such an exorbitant sum. It can never be imagined that being *sui juris* he would have entered into a bond by which the defendant had it in his power to throw him into gaol, and keep him there all his life, whether he had the good fortune to recover what he was then suing for or not. And it can as little be thought that this bond was designed as a mere gratuity to the defendant, the plaintiff being at that time not worth £5 in the world, and it being very uncertain whether he should ever be in better circumstances than he then was. Bonds taken from young heirs, marriage-brochage bonds, though given quite voluntarily, and often too cheerfully, are set aside in this court upon the reason that the party is not a free agent, and that the free operation of the mind, which is necessary to give validity to every act, is wanting. This appears from the case of *Curwen versus Millner*, June 19, 1731, and from 2 Vern. 14, 27, 121, and the case of *Twisleton and Griffith* heard before the Lord Cowper, 1716. These cases indeed were upon contracts; where it may be said nothing was intended by way of gratuity: But there are cases where bonds merely voluntary, and not founded upon contracts, have been set aside, as being unconscionable. 1 Vern. 413; 1 Salk. 158; 2 Vern. 652, 764. In most of these cases there was a hazard run by the defendant, the whole money must have been lost upon a contingency; but here the defendant runs no hazard, nor can he have any other loss, than that of his advice. The case of *Bosanquett (ante, 38) versus Dashwood*, Nov. 11, 1733, is another very strong authority that where advantage is taken of either party's circumstances and necessities, this court will relieve. Nor will the consideration's moving partly from the wife, vary the case; for, her declaring that she would not trust the plaintiff's generosity, but would bind him as fast as pen and ink could bind him, and the husband's afterwards accepting the bond, make it to be his own act *ab initio*.

[114] Mr. Attorney General and Mr. Solicitor General argued for the defendant, that there were many cases where the court perhaps would not decree a performance of the condition of a bond; but yet upon application made by the obligor would not set it aside. That this case was very different from the cases of bonds given by young heirs, or for marriage brochage, where the whole rests upon contracts, but nothing is intended by the way of gratuity: as it is in the present case. The illegality of the consideration, fraud, accident, will entitle to relieve here; but it was never yet said, that a man's poverty, barely and merely without any other ingredient, would be a sufficient cause for setting aside any voluntary contract he may have entered into through his own carelessness, and which the other party may (through want of christianity perhaps) enforce a performance of.

Here the past services done to the plaintiff by the defendant, and expectation of future services, were the motives upon which the plaintiff gave this bond: and none of the cases cited will warrant the setting aside a bond merely voluntary as this is. The plaintiff cannot be said to be other than a free agent: only because he had a great mind to recover the part of the estate which he apprehended to be his due; which was the only influence he was under at the time he entered into this bond. The case of *Bosanquet versus Dashwood* (though one of the reasons for the decree was the unfair advantage that one party had taken of the other's necessity) was very different from this; for though the statute does not go so far as to make the party receiving the usurious interest liable to refund, yet having prohibited the taking beyond such a sum, and avoided the contract, the taking it is a breach of the statute, and the actual receipt of the money will (in a court of equity) make him liable to refund; the wrong being the same, whether the usurious interest has been actually paid or not. In the present case it is observable, that the bond was never put in suit, nor [115] payment of it demanded until after the plaintiff's recovery of what he was suing for; which takes off the objection, that he might have lain in prison all his life, whether he had prevailed in his suit or not.

Lord Chancellor. I have been a good deal doubtful in this case: for, as on the one hand it is intirely reasonable to leave people at liberty to dispose of their property as they think fit; so on the other hand, it is reasonable to prevent any imposition in such disposal: and if here has been no imposition on the plaintiff, and that all his defence be his poverty, or the inconveniency it may be to him to pay this sum; that will not be

a ground for relief. But as this case is circumstanced, the plaintiff's poverty is not to be omitted in the consideration of the transaction. His circumstances were as mean as can be imagined, and no certainty that he should be ever able to discharge any part of this bond; and yet he gives an obligation for £1000, to be paid, at all events, within the year. A poor illiterate man, who applies to the defendant and his wife for aid in pursuing his claim: they answer, that registers could not be searched, nor other things done without money: he thereupon replies, that he has none, but desires the defendant to lay it down for him. The cause goes on, and pending this suit, the defendant's wife presses for the money laid out; whereupon the plaintiff declares, that for the services they have done, and he hoped they would continue, he would give a bond; upon which the wife replies, he might take what time he pleased for the payment of the bond; but at the same time again presses for repayment of the money laid out by her husband and her, and then the bond is given. So that here is a plain contract between them: and how can I consider it as a gratuity, or otherwise than as a contract? Now though a mere voluntary contract is not to be set aside purely and simply because it is voluntary; yet that differs widely from the present case; which was not intended as a [116] bounty, but as an execution of an original contract for the services already done. Had an attorney, pending the suit, taken such a bond as this upon the same transaction, would not the court set it aside? or would it suffer it to stand any farther than as a security for what was justly and legally due? The rule, *That a mischief is rather to be suffered than a general inconvenience*, does not at all affect this case; for, it would be a much greater inconvenience to leave men under difficulties and distresses open to all the oppression that other people may please to make them undergo. This is the reason upon which the court relieves against bonds given by young heirs, (2) and marriage-brocade bonds; and will not suffer any advantage to be taken of the extravagance and want of judgment, in the one case, and of the strong bias to obtain what is desired in the other. The only difficulty that arose with me was, whether the defendant had any share himself in the transaction? and that where fraud is pretended it must be fully proved. Here indeed the husband was not present when the bond was executed; but still, I think, there is sufficient ground for relief: for, here the wife was party to all the transactions in searching registers, &c. The contract for the bond was for their joint service; and though she did not press for the bond, yet she pressed for what worked more strongly, *viz.* the repayment of the money which she and her husband had lain out at the time that he was not worth a shilling, and in the midst of the pursuit of his cause: and when this comes to be coupled with that other saying of her's, *That she would not trust to his generosity, but bind him as fast as pen, ink, and paper could bind him*, it makes it plain that it was obtained of the plaintiff when under force and necessity; the pressing for the repayment being almost as strong as if she had actually required the bond.

And so decreed the bond to stand as a security only for so much as had been actually laid out, with interest; and left the defendant at liberty to bring his *quantum meruit* at law for what he deserved for his pain and trouble. (*Reg. Lib.* 1734, fol. 289.)

(1) *Vide Newman v. Johnson*, 1 Vern. 45. *Beachcroft v. Beachcroft*, 2 Vern. 690. *Trot v. Vernon*, 2 Vern. 708; *Prec. in Chanc.* 430, *S. C.* *Bowdler v. Smith*, *Prec. in Chanc.* 264. 2 *Eq. Cas. Abr.* 371, c. 14; 504, c. 43, *S. C.* *Lumley v. May*, *Prec. in Chancery*, 37. *Harris v. Ingledew*, 3 P. Will. 91. *Davis v. Gardiner*, 2 P. Will. 190. *Leigh v. Earl of Warrington*, 4 Bro. P. C. 90 [2nd ed. 1 Bro. P. C. 511]. *King v. King*, 3 P. Will. 358. *Earl of Godolphin v. Penneck*, 2 Ves. 271. *Ellison v. Airey*, *ibid.* 569. *Huztap v. Brooman*, 2 Bro. Cha. Rep. 437.

(2) *Waller v. Dalt*, 1 Chanc. Cas. 276. *Barney v. Beak*, 2 Cha. Cas. 136. *Barney v. Pitt*, 2 Vern. 14. *Nott v. Hill*, 1 Vern. 167. *Knott v. Johnson*, 2 Vern. 27. *Wiseman v. Beake*, 2 Vern. 121. *James v. Oades*, 2 Vern. 402. *Earl of Ardglass v. Muschamp*, 1 Vern. 237. *Bill v. Price*, 1 Vern. 467. *Lamplugh v. Smith*, 2 Vern. 77. *Curwen v. Milner*, 3 P. Will. 292, in notes. *Twisleton v. Griffith*, 1 P. Will. 310. *Earl of Chesterfield v. Jansen*, 1 Atk. 342, 351, and 2 Ves. 144, 155, *S. C.* *Barnardiston v. Lingood*, 2 Atk. 133. *Sir Will. Stanhope v. Cope*, 2 Atk. 231. *Gwynne v. Heaton*, 1 Bro. Cha. Rep. 1. *Heathcote v. Paignon*, 2 Bro. Cha. Rep. 167, are cases in which this court has relieved against unconscionable bargains, and cancelled improvident contracts entered into by young heirs. See also *Sanderson v. Glass*, 2 Atk. 296, *Powell v. Knowles*, 2 Atk. 224.

[117] Case 21.—KING *versus* WITHERS. [1735.]

(3 P. Will. 414, S. C.)

[See *Remnant v. Hood*, 1860, 2 De G. F. & J. 413; *Davies v. Huguenin*, 1863, 1 H. & M. 743; *Henty v. Wrey*, 1882, 19 Ch. D. 503 (& S. C. on appeal, 21 Ch. D. 332); *In re Cresswell*, 1883, 24 Ch. D. 107.]

A. devises to his daughter *M.* £2500 at the age of twenty-one or marriage, and if his son *C.* die without issue male, then *M.* to have at twenty-one or marriage, the farther sum of £3500, and if the son's so dying do not happen before the age of twenty-one, or marriage of *M.*, then she is to receive it whenever it may after happen. Then devises his real estate to *C.* his son in tail male, remainder to his brother in fee: and declares his will to be, that his lands devised be liable to that payment whenever it becomes due; and directs, that in case of failure of issue of *C.*, *M.* her heirs and assigns, shall join in a surrender of some copyholds to the use of his brother: otherwise the legacy of £3500 to be void. The father dies; the daughter marries, having attained twenty-one, and dies in *C.*'s life-time; her husband administers to her; *C.* dies *sans* issue male. The £3500 shall not sink in the land, but shall be raised for the benefit of the administrator of *M.* if the personal estate be deficient. (*Reg. Lib.* 1734, fol. 565.)

Charles Withers, the testator, being possessed of a considerable real and personal estate, disposed of it in the following words. *viz.* "I give and bequeath unto my daughter *Mary*, at her age of twenty-one, or day of marriage, which shall first happen, the sum of £2500. And my will and meaning is, that if my son *Charles* should die without issue male of his body then living, or which may afterwards be born, that then my said daughter should have and receive at her age of twenty-one, or day of marriage, which shall first happen, the farther sum of £3500, over and above the said sum of £2500, but in case the contingency of my said son's dying may not happen before the said age of my daughter, or her day of marriage, that then she shall receive and be paid the sum of £3500 whenever it might after happen." Then he devises his real estate to his son in tail; and for want of such issue, remainder to his brother in fee; then goes on thus: "And my will and meaning is, that the lands and premises hereby devised shall be liable to, and chargeable with the payment of the said sum of £3500 whenever it shall become due and payable"; and directs that in case of failure of issue of his son, his daughter, her heirs or assigns, should join in a surrender of some copyhold lands to the use of his brother, otherwise the legacy of £3500 to be void.

The daughter marries, having attained her age of twenty-one, and dies in her brother's life-time, [118] leaving the plaintiff, her husband, who took out administration to her, and then her brother dies without issue male.

The question was, whether the legacy of £3500 should be raised out of the land, the personal estate being deficient? and whether it was such an interest in her as would go to the plaintiff her administrator?

Mr. *Solicitor General*, Mr. *Verney*, and Mr. *Fazakerley* argued for the defendant, that the case was become quite different by the daughter's death from what it would have been had she lived: in which case it might have been a consideration of marriage, and an advancement to her: that the husband was a mere stranger; and the same arguments that might be used for him, could, with as much reason, be used for the most remote collateral relation she might have left behind her: that had this sum of £3500 been intended to vest absolutely, there would have been no necessity for providing for the contingency of her marriage, or attaining her age of twenty-one before her brother's death; but if it did not vest absolutely, then this provision shews, that the testator thought it necessary to provide for that only; and when another contingency happens, no way provided for by him, it must follow, that the plaintiff is not intitled to have this legacy raised; that this was not to be compared to cases where a present interest subsisting is given to one for life, remainder to another upon a contingency; there the interest is subsisting in the donor himself, but not so here: for, it was never a subsisting interest even in the donor himself; and that there was a great difference where, at the time of the legatee's death it is absolutely uncertain whether the contingency will ever happen, as in the present case, and where the thing is certain, but only the manner or time of payment uncertain; that in the last case the legatee's

death will not alter the case, but the representative shall be intitled to it ; but otherwise in the former, according to *Domat, lib. 4, tit. 2, s. 9, p. 10, 11*. That this case [119] differed from that of *Cave versus Cave, 2 Vern. 508*, for, there the son being, by his father's will, intitled to the interest, was decreed the principal. In the case of the Earl of *Rivers versus Earl of Darby, 2 Vern. 72*, the contingency had actually happened by the Lord *Colchester's* having a daughter at his death, and consequently the portion was to be raised for the benefit of her representative. That of *Pinbury versus Elkein, 2 Vern. 758, 766*, was a demand out of a personal estate only ; and so not to be compared to the present case, where the real estate is chargeable as well as the personal. Nor can it be resembled to that of *Buckley versus Stanlake, Pasch. 1720*, where a man seised of a rectory for lives devised it to his wife for life, and after her decease to his daughter, her heirs and assigns, and if his daughter should happen to die unmarried, then to his wife, and her heirs and assigns, subject to and chargeable with two legacies of £100 each to two strangers, who died before the daughter ; then the daughter died an infant and unmarried ; the wife devised it to trustees for performance of her husband's will ; and upon a bill brought, decreed the legacies of £100 each to the representatives of the two legatees, although they both died before the daughter, upon whose death, without marriage, the estate was devised to the wife, chargeable with their legacies : for, there was a second will, *viz.* that of the wife, to intitle the legatees and their representatives to the several legacies bequeathed by the husband's will ; and upon that circumstance it is most probable the court went in decreeing the legacies. In the case of *Wilson versus Spenser, January 31, 1732*, it was a present bequest, and no contingency, the twelve months being given to the executor to get in the testator's estate, and to pay this legacy ; but not at all to create a contingency to arise within the year. There is nothing to warrant the distinction, that where the child marries and dies, the legacy or portion shall be raised for the benefit of her husband ; but not where she dies an infant and before marriage. The case of *Carter v. Bletsoe, 2 Vern. 617*, is directly against it : nor is it warranted from that [120] of *Jackson versus Ferrand, 2 Vern. 424*, for, there the £500 was to be raised out of the rents and profits as soon as might be ; so that whatever was raised before the daughter came to twenty-one, was then to be separated from the land, and remain as money in the executors' hands ; and consequently could never merge for the benefit of the heir, when once separated from the land : and though, as it appears from the decretal order (which was produced in court), debts came in so fast that the £500 could not be raised so soon as expected, yet the intent was the same, that it should be raised for her, and decreed probably upon that or some other circumstance not mentioned in the book. But besides the authority of *Carter versus Bletsoe, 2 Vern. 617*, the cases of *Smith and Smith, 2 Vern. 92*, and *Tournay and Tournay, Precedents in Chan. 290*, are express that the child must live until the time the legacy or portion becomes payable ; otherwise it shall sink for the benefit of the heir. *Snell versus Dee, 2 Salk. 415*. It was also said, that the words, *which may afterwards be born*, make this to be a legacy to take effect after a general failure of issue, and consequently too remote.

Mr. Attorney General replied for the plaintiff, that had this legacy been given to her, her executors and administrators, it would not have made the case any thing better for the representative ; for, if by her death the contingency be defeated, then the representative can never have it : but a contingency before it has happened, may well vest in the party, and consequently be transmissible to the representative : as if there be a devise of a lottery ticket to one in case it comes up a prize ; the devisee dies before the ticket drawn, then the ticket comes up a prize ; shall not the representative have it ? Many other cases which might be put prove it likewise. If this interest be compared to a grant of a rent *de novo* to commence at a future day, then it may be released or extinguished : and if so, it is immaterial whether it be assignable or not : and relied upon 2 Vern. 348.(1)

[121] Lord Chancellor. It has been made a question by the defendant's counsel, whether the words, *which may afterwards be born*, do not make this a void bequest, as being too remote ? Had it been after a general failure of issue, it would not have been good, because it would then have kept in suspense too long ; but now the nature of the thing confines the testator's intent ; for, though we should take it in the most general sense, yet the contingency must arise within nine months after the brother's death : so that the objection of its being too long in suspense, is, by this plain and natural sense, entirely removed.

The next and great question is, whether this sum of £3500 be now a subsisting charge upon the real estate? for, the personal estate being deficient, I shall consider it principally as a charge upon the land. Three things were, by the will, necessary to happen to entitle the plaintiff's wife to this legacy; death of her brother without issue male, marriage, or attaining her age of twenty-one; all three have happened: and now the question is, whether another implied contingency be necessary to intitle her to this additional portion. The words, whereby the particular contingency of her marriage, or attaining her age of twenty-one is provided for, have been construed both ways; but I do not think that any great stress can be laid upon them either one way or the other. The testator might throw it in naturally enough to manifest his intent, that his daughter should have this £3500, although she married or attained her full age before her brother's death: nor will the operation of the words, whereby the real estate is made chargeable, any way affect the present question. The other clause, whereby she or her heirs are to join in a surrender of the copyhold lands, has also been considered as influencing this question; but it does not follow from thence, that what has since happened was then in the testator's view; for, she might have died before she had actually received the money, although the [122] son had died without issue in her life-time; and therefore it was reasonable enough to secure the remainderman the better, by compelling her heirs and assigns to join, upon pain of forfeiture of this sum: the only thing therefore to be considered is her death, upon which the whole must turn. It has been said, that where portions, in cases of this nature, are chargeable upon land, they shall sink for the benefit of the heir. The leading case is that of *Lady Paulet versus Lord Paulet*, 1 Vern. 204, 321.(2) This and the like cases have gone not upon any provision of the party, but on the construction of this court; nor has the difference between the age being annexed to the body of the devise itself, or to the time of payment, ever held in these cases: the reason is, that if portions are given to be paid at eighteen, or marriage, and the party dies before that time, the occasion of raising it, viz. the advancement, ceases; and therefore the reason of giving it shall qualify the grant itself: as an annuity *pro consilio impenso & impendendo*, the counsel is the foundation of the grant: and so in these cases the provision for advancement being the reason of the portion, when that fails, the portion shall cease likewise. It may be compared to what is called in *Scotland*, *causa data & non secuta*, when the cause ceases: it shall never be raised for one purpose when designed for another. Indeed in the case of *Jackson versus Farrand*, 2 Vern. 424,(3) the court went somewhat farther: but the marriage of the child might be the cause of that decree, £500 being intended as a portion, although no express provision made that it should be paid upon the daughter's marriage. The case of *Carter versus Bletsœ* (4) seems to be contrary; and in both these cases there was the same circumstance, viz. the death of the daughter after marriage, but before the only time which was limited for the payment happened. In cases where the portion is to be raised out of the reversionary term after the tenant for life's death, and to be paid at twenty-one or marriage, the child marries, and then dies, it would be very hard to decree it to merge. In *Butler and Duncomb's case*, 2 Vern. 760 (1 P. Will. 448, S. C.), a sum was borrowed by the direction of the court to assist the husband in [123] his trade, the term being not yet come into possession. In the case of *Broome versus Berkley*, Abr. Eq. Ca. 340 (*ante*, 32), the Lord Trevor delivered his opinion in the *House of Lords*, that in all such cases as this, where the portion is contingent, and the child marries, and then dies, the representative shall have it. Indeed in cases where the child dies so young that the portion could never be wanted, the court will not decree it to be raised, because there is no occasion for it; as in *Bruen and Bruen's case*, 2 Vern. 439,(5) and in that of *Tournay versus Tournay*; (6) but there is no precedent where the court has dealt so hardly with a child who dies after marriage, as to take that away which was intended for its provision.

It has been said, that this being future, could not be intended as a provision for her. But is not a future interest an interest still, though not so good as an interest in possession? It is and may be a consideration of marriage. It does not indeed absolutely vest, because the contingency may never arise: but it is carrying it too far to say, that it does not vest at all. Why may it not vest in such manner as to be transmissible? There is no doubt but after twenty-one she might have released it, though not have assigned it at law; because but a mere possibility in the eye of the law. A condition may descend upon the heir, although no estate does actually descend from the ancestor; and when the condition is performed, he shall be in by descent, because of the condition

descending. And as this might have been released, I do not see why it should not be transmissible to the representative. But if I had any doubt about that, the several authorities that have been cited for the plaintiff would bind me; and particularly 2 Vent. 347 (where the interest was as contingent as it is here), is an express authority that a contingent interest is transmissible to the representative. The case of *Bulkeley versus Stanlake* is the same. It has been said indeed, that in this case the contingency was annexed, not to the legacy itself, but to the fund [124] only out of which it was to arise: but I apprehend that the contingency went to the whole. Nor can I help considering that case as another authority, that a contingent interest is transmissible to the representative. That of *Pinbury versus Elkin* (2 Vern. 758, 766, S. C.; 1 P. Will. 563, S. C.) was a devise of £80 to his brother, if his wife should die without issue (7) by the testator then living; the devisee died in the life-time of the wife; then the contingency happened, and the legacy decreed to be paid to the representative. The case of *Snell versus Dee*, 2 Salk. 415, weighs but little with me; for, first, I do not think it well reported; secondly, the reason seems idle; for, why may not an uncertainty be transmissible as well as a certainty, though perhaps not so beneficial? This, although to be raised out of land, cannot receive a different construction from the other cases: for, though it is to be raised out of land, it remains money still: and can any one say, that the contingency upon which this was left to her, has not happened? Has not she married? And although she has not lived to receive it, yet the contingency having happened, it must go to her husband, who is her representative, and who may well be thought to have married her in contemplation of this additional fortune of £3500, though depending upon a contingency.

And so decreed it to the plaintiff, the husband and administrator of *Mary*.

N.B. Upon the 16th of *March* 1735, this decree was affirmed in the House of Peers.(8)

(1) A. devises £4000 to his son, to be paid at his age of twenty-five, and interest in the mean time, and he to have a maintenance thereout; and directs the £4000 to be raised out of a trust estate. The son dies at his age of twenty-five: decreed it shall be raised, it being an interest vested in the son; for, although it was not payable until his age of twenty-five, yet it was to carry interest immediately. But the authority of *Cave v. Cave* is denied by Lord *Hardwicke* in *Boycott v. Cotton*, 1 Atk. 555, his Lordship saying, "that he had ordered the register to be searched, and as the case was there stated, it was impossible there could be any question in it."

It should, therefore, seem that where interest is given before the time of payment, it is evidence of an intention to vest the legacy, where the fund is merely *personal*, *Stapleton v. Cheeles*, 2 Vern. 673, and *Prec. in Chanc.* 318, S. C. *Collins v. Metcalfe*, 1 Vern. 462. *Hubert v. Parsons*, 2 Ves. 262. Lord *Teynham v. Webb*, 2 Ves. 207. *Van. v. Clarke*, 1 Atk. 512. *Fonnereau v. Fonnereau*, 3 Atk. 645. *Atkins v. Hiccocks*, 1 Atk. 501. *Hoath v. Hoath*, 2 Bro. Cha. Rep. 3, *secus* where the portion or legacy is charged upon, and is to arise out of lands, for in that case the portion shall sink, and not go to the representatives of the person so dying, and though it were limited to the party generally to be paid or payable at such an age, and whether with, or without interest. *Stapleton v. Cheales*, 2 Vern. 672; *Prec. in Chanc.* 318, S. C. *Boycott v. Cotton*, 1 Atk. 555. The same rule when the legacy is to arise out of a mixed fund. *Prowse v. Abington*, 1 Atk. 482.

(2) A term limited by a settlement to raise portions for younger children, payable at twenty-one or marriage. One of them dies under 21, and unmarried. Her portion shall not be raised for the benefit of the administratrix. And note, this decree was affirmed upon an appeal to the House of Lords.

(3) A. by will gives £500 to his daughter, to be paid by his executors at her age of twenty-one, out of his personal estate, and rents of the real; and if not raised by that time, the executors to stand seised and take the rents, till the £500 was raised, and after payment gives the land to his son. The daughter marries at eighteen, and dies under twenty-one. The husband takes out administration. Decreed the portion to be raised, and that by a sale, although the land, by reason of the incumbrances, would produce little more than £300. *Prec. in Chanc.* 109, S. C.; 1 Bro. Parl. Cas. 61, S. C., by which it appears this decree was reversed in part by the House of Lords, as to the sale of the intailed estate, but without prejudice to the general question. But in *Boycott v. Cotton*, 1 Atk. 555, the authority of this case is denied by Lord *Hardwicke*.

(4) 2 Vern. 617. A. devises lands to B. his son and his heirs, and declares that out of the lands, he shall pay £200 to his daughter at her age of twenty-one; she marries, and dies under age. *Per cur.* There is no vesting clause in the will: the direction, that the son pays to the daughter at her age of twenty-one, vests nothing until she attains twenty-one, and she dying before, it never arises.

(5) A term is created by marriage settlement to raise £3000 for daughters' portions within twelve months after the death of the survivor of husband and wife. There being one daughter, the father by his will devises the trust lands to make good his wife's jointure, and to raise £3000 for his daughter's portion. *Per cur.* It being for a portion to be raised out of the land, and the daughter dying when but five years of age, before she had occasion for a portion; although no time was appointed for the payment of it, it shall merge in the land for the benefit of the heir, and not go to her administrator.

(6) *Prec. in Chan.* 291. By marriage settlement a term is created for raising £400 a-piece for younger children, to be paid them within a year after the father's death, and with interest from his death; one of the children dies after the father, but within a year after his death, the portion not being raised, held *per cur.* that it should sink in the inheritance, and not be raised for the benefit of its representative.

(7) As to the effect of the words "dying without issue," *vid. Nicholas v. Hooper*, 1 P. Will. 198. *Target v. Gaunt*, *ibid.* 565. *Beauckerke v. Dormer*, 2 Atk. 313. *Saltern v. Saltern*, 2 Atk. 376. *Earl of Stafford v. Buckley*, 2 Ves. 181. *Bigge v. Bensley*, 1 Bro. Cha. Rep. 190.

(8) With costs, 3 P. Will. 418, S. C. *Req. Lib. A.* 1735, fol. 565. The cases upon this subject are extremely numerous, and difficult to reconcile, *Bond v. Brown*, 2 Cha. Cas. 165. *Pawlett v. Pawlett*, 1 Vern. 204, 321. *Smith v. Smith*, 2 Vern. 92. *Bruen v. Bruen*, 2 Vern. 439. *Yates v. Fettiplace*, 2 Vern. 416. *Carter v. Beltsoe*, 2 Vern. 617. *Tournay v. Tournay*, *Prec. in Chanc.* 291. *Stapleton v. Cheales*, *Prec. in Chanc.* 318. *Bradley v. Powell*, *post*, 193. *Gordon v. Raynes*, 3 P. Will. 134. *Duke of Chandos v. Talbot*, 2 P. Will. 613. *Jennings v. Lukes*, 2 P. Will. 276. *Hall v. Terry*, 1 Atk. 502. *Prowse v. Abington*, 1 Atk. 482. *May v. Andrews* (cited in *Dawson v. Kellett*, 1 Bro. Cha. Rep. 123). *Boycott v. Cotton*, 1 Atk. 555. *Van v. Clarke*, 1 Atk. 512. *Attorney-General v. Milner*, 3 Atk. 112, are cases in which it was held, that charges upon land, payable at a future day, could not be raised, where the party to be benefited dies before the time of payment, and that, whether the charge is created by deed or will, or provided by way of portion for a child, or given merely as a legacy by collateral relations, or others, and whether with, or without interest. However, there are several cases, which considering the rule as laid down in *Pawlett v. Pawlett*, to be too much strained, have aimed at a modification of it, by adopting in the construction of the rule, the following distinction, *viz.* "whether the time of payment refers to the circumstances of the person, or of the fund": where it refers to the circumstances of the person to take, as in the case of a portion, the court has construed a sum so given to be so connected with the purpose for which it was given, that it was not intended to be given for any other purpose; so that the purpose failing, the land ought not to be charged: but where a legacy is given out of a particular fund, with a reference to the time when it shall vest in possession, as for instance to B. with a charge to C., it is a distribution of the fund between the person to take in present, and him who is to take in future, and the gift to C. vests immediately. *Butler v. Duncombe*, 1 P. Will. 457. *Pitfield's case*, 2 P. Will. 513. *Hutchins v. Foy*, *Comyn's Rep.* 716. *Lowther v. Condon*, 2 Atk. 127. *Hodgeson v. Rawson*, 1 Ves. 44. *Sherman v. Collins*, 3 Atk. 319. *Godwin v. Monday*, 1 Bro. Cha. Rep. 191. *Thompson v. Dow*, cited *ibid.* 193. *Dawson v. Killett*, 1 Bro. Cha. Rep. 119. *Jeal v. Tickener*, cited *ibid.* 120. *Clarke v. Moss*, *ibid.* 120. *Kemp v. Davy*, *ibid.* 121. *Tunstall v. Brachen*, *ibid.* 124. For the cases where portions have been given out of land, and no time of payment expressed, *vide Earl of Rivers v. Earl of Derby*, 2 Vern. 72. *Cowper v. Scott*, 3 P. Will. 172. *Brewin v. Brewin*, *Prec. in Chanc.* 195. *Lord Teynham v. Webb*, 2 Ves. 209. *Lord Hinchinbroke v. Seymour*, 1 Bro. Cha. Rep. 395.

Case 22.—RUDGE versus BARKER.

18 July [1735].

A. bequeaths to his grandchildren, *B. C.* and *D.* £1000 a-piece, and the interest thereof to their use ; and if any dies, to the survivors or survivor share and share alike ; the interest to be paid to their father to be improved to their use ; *B.* dies an infant, then *C.* dies ; the share which *C.* took by the death of *B.* shall not survive to *D.* but go to *E.* the father ; who administered to *C.* The interest and principal are to receive the same construction.

Thomas Cole made his will as follows, viz. " I give unto my grand-daughters, *Elizabeth* and *Anne*, and to my grandson *Thomas* £1000 of my capital stock [125] in " the *East India Company*, and the interest thereof to them for their use. And if " any dies, to the survivors or survivor share and share alike ; and my meaning is, " that the interest shall be paid to their father my son *Howard*, to be improved to their " use." The grandson died an infant, by which his share survived amongst his two sisters ; then one of the sisters dies, and the question was, whether the share she had taken by survivorship upon her brother's death should survive to the other sister, as well as her original legacy of £1000 ? or whether that share taken by survivorship should go to the father, who was her administrator ?

Master of the Rolls. The first question is, whether the interest shall receive a different construction from the principal ? But I think it will not ; for, being both coupled together, they must receive the same determination.

The next question is, whether the share arising by survivorship, which the deceased sister took upon her brother's death, will survive to the next sister ; or, whether it will go to her father who is her administrator ? And I am of opinion that it does not survive, but goes to her administrator. Indeed, it may be, the testator intended the whole to go amongst his grandchildren, and nobody else to have any benefit : but whatever his intent might be, I must judge upon the words of the will ; and according to those, the limitation over relates to the legacy only. Had they not been distinct legatees, it might have been another question : but being intirely distinct, and not even so much as tenants in common, the case is the same as that of *Bearnes versus Ballard* (1) before the Lord King, June 1, 1727, where it was decreed for the administrator. And agrees with the Lord Holt's opinion cited in *Woodward and Glasbrook's* case, 2 Vern. 388 ; (2) the devise is several, and the question is not upon the original share, but upon the share that accrued by the survivorship, which goes to the administrator by reason of the words *share* [126] and *share alike*, which are tantamount to the words *equally to be divided*.

And so decreed (3) the share accruing by survivorship to the father, who was the administrator of the deceased. (*Reg. Lib. A. 1734, fol. 537.*)

(1) There was a devise to four children of £500 a-piece at eighteen or marriage, then to the survivors or survivor of such survivors ; one of the children died a minor, and then his share survived to the three remaining children ; another afterwards died a minor ; and the question was, whether the share which came by survivorship to the last deceased minor, should upon the minor's death survive again, and held it should not.

(2) The testator *E. G.* by his will (*inter alia*) devised several parcels of land to his several children in tail, and if any of them died before twenty, or unmarried, such child's part to go over to the survivor's children. In ejectment before Lord Holt, he was of opinion, that *Thomas* dying unmarried, though he attained his age of twenty-one, his moiety went over to the survivors ; and *John*, another son likewise dying unmarried, though after twenty-one, that his moiety went over to the survivors ; but that what went over to *John*, on the death of his brother *Thomas*, would not go over again a second time.

(3) *Vide ex parte West*, in the matter of *Scaise*, a bankrupt, 1 Bro. Chan. Rep. 577, from the report of which case it appears as if Lord Thurlow did not altogether coincide in opinion with Lord Talbot in the doctrine exhibited by him in *Rudge v. Barker* ; for he seemed to think it a very natural construction, that the word " share " (used by the testator in the last-mentioned case) meant all that the party took under the will,

which would take in the survived part as well as the original share ; and that it struck him forcibly that the whole ought to survive ; but as there were cases in point which expressly determined otherwise, he did not care, sitting in bankruptcies, to overturn them in the case before him.

The parties afterwards filed a bill, and the cause was set down before his Honour the *Master of the Rolls*, who decreed that the share did not survive a second time. *Vid.* also *Perkins v. Micklethwaite*, 1 P. Will. 278. *Pain v. Benson*, 3 Atk. 78.

Case 23.—MOOR *versus* BLACK & al'.

26 July [1735].

A. dies seized of lands, which descend upon B. and C. in coparcenary : B. before receipt of rent, or partition made dies ; his widow brings a bill to have dower assigned, suggesting that C. had all the title-deeds ; upon demurrer resolved, that this court will relieve in such case. The demurrer over-ruled.

The plaintiff by her bill charged, that Mr. *Rawlinson* died upon the 8th of July 1732, seized of several estates, which upon his death descended, as to one moiety, upon the plaintiff's husband in fee ; who died the 11th of March after, before any partition made ; and that the defendants had got possession of all the title-deeds ; whereby she was disabled from suing for dower at law, and therefore came into this court to have her dower assigned of what lands descended to her husband.

The defendants demurred, for that the plaintiff's right of dower was a right merely at law and triable by a jury ; and that no impediment was suggested why she could not recover at law.

Mr. *Attorney General* and Mr. *Forester* insisted for the plaintiff that she was proper to come into this court, both by reason of the deed being in the defendant's hands, (1) without which she could not prove her title at law ; and also for that the estate being in coparcenary, and no partition made, the sheriff could, upon recovery in a writ of dower, put her into possession but of a third of an undivided moiety ; and that still recourse must be had to this Court for a certainty, and not to set out a part to her. The judgment in dower not reducing it to more certainty than it was before ; according to 1 *Inst. sec.* 45, and that by bringing this bill, the plaintiff had only done at first what she must have done at last.

[127] Mr. *Fazakerley* insisted on the other hand for the defendant, that though the plaintiff might be intitled to a discovery, yet she could not be so to have dower assigned her ; that being a title merely at law, and for a detainer of which, damages were to be assessed by a jury ; and that she was not intitled to the possession of the deeds, but that they belonged to the defendant.

The *Lord Chancellor* over-ruled the demurrer upon both points, saying, that there was no possibility for the plaintiff (as appeared to him) to recover without the assistance of the deeds : for, the estate descending upon her husband in July, and he dying upon the 11th of March after, before any receipt of rent, or partition made, she could not prove a seisin at law to entitle herself to dower.

Secondly, that she lay under another difficulty, as her husband's estate was complicated, and that she must come here for a partition ; otherwise the consequence would be, that after judgment and execution, she must, at the end of every six months, be driven to her action against such as held jointly with her, and who received the profits, for her share, and also for her damages for the detainer ; which would be absurd and unreasonable. (So *Curtis v. Curtis*, 2 Bro. Cha. Rep. 620, which establishes the doctrine, that a widow may in all cases sue for dower in a court of equity.)

(1) For if there should happen to be a mortgage or term of years in her way, she would be defeated at law and liable to costs.

Case 24.—HUDSON *versus* HUDSON.

30th July [1735].

Administration is granted to two ; one of them dies, the administration survives.

The plaintiff brought his bill, as administrator, against the defendant ; who pleaded, that administration had been granted to the plaintiff and to another who died before the bill brought : and upon that plea the question was, whether, when an administration is granted to two, and one dies, the administration shall cease and be void ? or whether it shall survive to the other who is still living ?

[128] The Court doubted at first, and would hear civilians : and accordingly it was now argued by Dr. *Strahan* for the plaintiff, and by Dr. *Lee* for the defendant ; and he quoted the case of *Bowden versus Bowden*, the 30th or 31st of April 1734, where it was adjudged in the *Court of Arches*, that an administration does in such case determine and cease, and does not survive ; being but an authority, and no interest.

Lord Chancellor. There are authorities both ways in the present case, *viz.* that of *Adams and Buckland*, 2 *Vern.* 514, where it was held by the Lord *Cowper*, that an administration (1) would survive ; and that of *Bowden versus Bowden*, where the contrary was determined in the ecclesiastical Court. As therefore the precedents are not uniform, we must consider this case according to the general rules of survivorship ; which seem to be pretty much the same both by the common and civil law. If an estate for 99 years be granted to two, if they shall so long live, when one dies the estate is determined ; but if a grant be made to two for their lives, when one dies the survivor shall take the whole ; according to *Brudenell's* case, 5 *Co.* 9 ; but in Auditor *Curle's* case, 11 *Co.* 1, it is held, that if an office be granted to two, there shall be no survivorship of it without special words. We must now consider which of these cases resembles the present one most. It cannot properly be said that there was any such thing as an administrator before the *statute* 31 *Ed.* 3, *Cap.* 11. Before that *statute*, where one died intestate, the king, as *pater petrice*, was to take care of his estate ; and this did, in process of time, devolve from the king to the ordinary. And the *statute* of *Westm.* 2, *cap.* 19, which was made to compel the ordinary to pay the intestate's debts, looks as if they had not been very forward in it before. But by the 31 *Ed.* 1 the ordinary is to grant administration : and therefore the administrator is the creature of that *statute*, and is to be considered accordingly. The express words of the *statute* enable him to sue and be sued as an executor : and since that time [129] it has never been doubted but that the property of the goods was well vested in him, since he now represents the intestate in every thing. By the wording of the 21 *H.* 8, *cap.* 5, one would imagine, that somewhat beneficial is intended to the administrator, by reason of the persons there mentioned, to whom administration is to be granted, *viz.* the most lawful friend : for, had no benefit been intended to him, why might not the administration be granted to any other as well as to the nearest of kin ? The spiritual courts did indeed take bonds of the administrators to oblige them to distribute the estate ; but as often as they did so, they were prohibited by the temporal courts. Nor does the *statute* of distributions alter the nature of the office ; it makes him only to be as it were a trustee for the persons intitled to a distribution, and usually for himself as one of them ; and then if a joint estate at law will survive, why shall not an administration, when they both have a joint estate in it ? A trust will survive though no way beneficial to the trustee ; and the administrators being appointed by the *statute* to come in lieu of executors, the *statute* has therefore made a will for him who is dead intestate : and the office of administrator is every way to be compared to that of an executor. (Bacon's Law Tracts, 82, ed. 1741. *Burn's Eccles. Law*, 233.) It has been said indeed, that one executor may do many acts which one administrator cannot do without the other administrator ; but that is nothing to the survivorship either for or against it. I have all due regard for the determinations in the Ecclesiastical Court ; but have likewise a great deal for those of a noble person who sat here with as much honour as any man ever did ; and he having determined this point in *Adams and Buckland's* case, I think it safer for me to follow that authority than any other which may have passed in the Ecclesiastical Court *sub silentio* ; especially when the question arises upon the construction of several acts of parliament, the construction of which belongs to the temporal courts.

And so over-ruled the plea. (*Reg. Lib. A.* 1735, fol. 468.)

(1) Upon the ground that administration is not a bare authority, but an office ; for administrators are enabled to bring actions in their own names, come in the place of executors, and therefore the office survives.

[130] Case 25.—HERVEY *versus* Sir EDWARD DESBOUVERIE and Others.

8 August [1735].

[Distinguished, *Bruin v. Knott*, 1842, 12 Sim. 448.]

By the custom of *London*, a freeman cannot devise either the orphanage part, or the contingency of the benefit of survivorship, among orphans. Neither can an orphan devise his orphanage part, or the part which accrued by survivorship. But such freeman may give, by will, to his children, legacies inconsistent with the distribution under the custom ; and then such children must make their election, whether they will abide by the will, or by the custom ? But they cannot abide by the will in part only, and take the benefit of the custom also.

This cause came on by consent, and was thus : Sir *Christopher Desbouverie* (a freeman of *London*) being seised of a very considerable real estate, and possessed of a personal estate of the value of £60,000, by his will dated *January* 21, 1730, gave to *Anne* his eldest daughter (now the wife of Mr. *Hervey*, one of the plaintiffs) the sum of £12,000, and to his daughter *Elizabeth* (another of the plaintiffs) the sum of £7000, and to the defendant *John Desbouverie*, his younger son, £14,000, and devised all the rest and residue of his personal estate to his executors, in trust for his eldest son, *Freeman Desbouverie*, until he should attain his age of twenty-one : and in case his eldest son should die before that age, he gave all the residue to the defendant *John*.

By a codicil dated *July* 17, 1732, he gave his daughter *Elizabeth* £3000 more (which made her fortune £10,000), and thereby taking notice that his daughter *Anne* had been some time married to Mr. *Hervey*, instead of £12,000 he gave her but £10,000, and desired that Mr. *Hervey* should immediately, upon his decease, give the rest of his executors (Mr. *Hervey* himself being one) a bond, renouncing all farther claims and demands of and from his estate. The testator died soon after, leaving no wife, and only the four children above named. About two years after Mr. *Freeman Desbouverie* died at the age of eighteen, having made his will ; whereby, after some pecuniary legacies given, he made his brother *John* residuary legatee.

[131] The plaintiff's bill was, to be let into a share of *Freeman's* orphanage part, as distributable amongst the surviving children by the custom, *Freeman* dying before twenty-one, who could neither devise his orphanage share before that age, nor could his father devise it, upon the contingency of his dying before twenty-one, to one child in bar of the rest ; the custom being paramount to the will, and not to be controlled by it.

Mr. *Attorney General*, Mr. *Fazakerley*, Mr. *Moreton*, and Mr. *Forrester*, argued for the plaintiffs, that according to the custom nothing stood in the way of the plaintiff's claim ; for, that the orphan himself could not devise his share, nor could the father devise it over upon the contingency of his son's dying before twenty-one ; according to *Pate and Hatton's* case, 1 *Chan. Cases*, 199, and that of *Wilcox versus Wilcox*, 2 *Vern.* 558, (1) and according to the constant course of the city ; which appeared from the following precedents taken out of the city books, *viz. Saturday*,—*April* 1570. " This day it was put in question, whether *William Offley*, merchant, who married " *Anne* the daughter of *William Beswick* of *London*, draper, and was advanced in " the life of the said *William* her father, should or justly ought to have any part or " portion of the orphanage share of *Arthur Beswick*, one of the orphans of the said " *William Beswick*, which *Arthur* is deceased, amongst other the orphans of the said " *William*, after the decease of the said *Arthur*, or not ? Whereupon the ancient " and old records were seen and considered ; and for that it appeared, by the ancient " custom of this city, that the said *William Offley*, in the right of the said *Anne* his " wife, ought to have, amongst other the orphans and children of the said *William Beswick*, his part of the orphanage and portion of the said *Arthur* after his decease ; " it was ordered, that the surety's bond for the said orphan shall be sent to for the " payment of the same to the said *William Offley*.

[132] *Note* : the custom was, that if the orphanage shares were not brought into the chamber of *London*, securities were given for the payment.

" Another to the same purpose, *Friday, June 20, 1572.*

" *Cur. Specialis Tent. die 24 Maij 1625.*

" According to the order of this honourable court of the 10th of this instant *May* " we have sundry times met together, and considered of the matters thereby referred " to us ; and upon examination, perusal and consideration had of ancient and later " books and records of this city, we find that the custom is, and so hath been taken, " declared and adjudged by the court, that the orphanage part and portion of an orphan " of this city, dying in his or her minority, within the age of twenty-one years, whether " son or daughter (if such orphan daughter, so deceasing, be unmarried at the time " of his or her decease) by the custom of this city ought to come and be to and amongst " his or her brethren or sisters by the father surviving, *as well advanced as not advanced* " in the life of the father ; although the father of such orphan, by his last will, should " otherwise dispose of the same, or should die without a will. This 24th day of *May* " 1625. *Heneage Finch* recorder, *Thomas Middleton, Edward Barkham, &c.* And upon " the certificate a judgment given."

" Another judgment of the same nature, *February 28, 1672, 25 Ch. 2,* and the " same certificate to the Court of *Chancery, February 18, 1702, 1 Ann. in Jesson* " and *Essington's case, Precedents in Chancery, 207.*"

" *Martis 8 Octobris 1639.*

" Whereas in the cause, at the suit of *George Combe* and *Anne* his wife, one of the " daughters of *Walter Burton* deceased, late citizen and freeman of *Lon*-[133]-*don,* " complainant against *John Burton* and others, depending in the court of requests, " the said court finding the question to depend upon the custom of this city, whether " thereby any orphan of this city, under age, may by will devise his orphanage part " or not ? or, whether the same ought not to be distributed among the rest of the orphans, " notwithstanding the devise by will ? did think fit that the plaintiff's counsel make " their case concerning the said point, and that Mr. *Recorder* and Mr. *Common Serjeant* " shall be attended therewith ; and that after consideration had, to certify the afore- " said court the custom of this city in the said point : now this day the case was pre- " sented unto this court under the hand of counsel on both sides ; and upon advice " and counsel taken thereupon by this court, it was agreed and ordered by this court, " that Mr. *Recorder* certify according to the truth and custom of this city, that an " orphan, before his full age of twenty-one years, cannot by will devise his orphanage " part ; but that the same ought to be distributed amongst the rest of the surviving " orphans, according to the laudable custom always approved of."

A certificate of the same purport to the Court of *Chancery, January 17, 1655.*

The plaintiff's counsel insisted, that by these precedents it plainly appeared, that neither the father nor the orphan (during the minority) could make any disposition of the orphanage share in bar of the right of the surviving orphans ; and that being established, nothing could bar the plaintiffs in the present case but the pretended satisfaction given by the father's will for their several orphanage shares ; which although indeed not so considerable as the legacies left by the will, yet these legacies could never be taken as a satisfaction for this contingency ; but as to the £2500 devised to each above their or-[134]-phanage share, must be taken as a mere bounty from the testator. That this case differed from that of *Kitson* versus *Kitson, Mich. 1712, Precedents in Chan. 351,* and *Eq. Cases, 28 (vid. also 1 P. Will. 533, S. C.),* where the wife was obliged to take either by the will or the custom ; for, that upon the husband's death there was a present right vested immediately in the wife, which the will (if she chose standing to that) should be a satisfaction for ; but here was no right in the plaintiffs, upon the father's death, to any thing but their own orphanage shares. This was a mere contingency to arise, not out of their father's, but out of their brother's estate, and is to be considered only in that light ; that the cases upon satisfaction are generally between debtor and creditor ; as is held in *Lechmere* and *Lady Lechmere's case (ante, 80) ;* but here was neither debtor nor creditor, but a mere chance which the custom gives to every child of a freeman to take his brother's or his sister's share if dying under age ;

and consequently the rules of satisfaction did not reach this case. That had Sir *Christopher Desbouverie* advanced the plaintiffs in his life-time, it would never have barred them from this right of survivorship; as was clear from the above precedents; and if so, if was hard to take it from them, because the advancement was by will, and not by act executed in the father's life-time.

Mr. *Solicitor General* insisted for the defendants, that the testator's intent was manifest, that the plaintiffs should have no more than £10,000 each; and that he had this very contingency in view which has happened: so that the question is, whether the will shall be complied with, or whether the plaintiffs shall be at liberty to drop that which makes against them, and take up that which makes for them, relying upon the operation of the custom? The defendants do not pretend that the father had power to devise the orphanage share, that is, the share of any of the children that should die before twenty-one, in bar of the custom; but what they insist upon is, that if the plaintiffs will take advance of the additional bequest beyond the orphanage share, they must comply in the whole with the will, and not comply with one part and waive the other. The objection that this was a future contingent right, and therefore not within the will, cannot alter the case; for, although it was but a contingency at the time of the testator's death, yet the release of that contingency might as well be the consideration of this additional bequest, as if it had been a present right immediately upon Sir *Christopher's* death.

Lord Chancellor. The question here arises upon the will compared with the custom. It is clear that the testator intended by his will to make a disposition of his personal estate: he has given his daughter *Elizabeth* £3000, in case his son *Freeman* should die before twenty-one; and by the codicil gives some additional legacies to his children; but makes no alteration, as to the devise over to his son *John*, the eldest son dying before twenty-one. Had this stood upon the custom alone, there must have been a distribution of his orphanage share: but now it is to be considered, whether the custom shall prevail against the express limitations of the will? The custom is clear that children advanced, as well as those who are not advanced, are intitled to a distribution: and the reason is, that when the father advances his child in his life-time, it is supposed to be done with regard to his present circumstances; and if it do not appear how much he was advanced with it, it is a bar; otherwise, if the *quantum* appear; for, the father shall not have it in his power to advance one more than the other upon presumption that the other may be more fully provided for by the death of a third; and therefore it is very reasonable that a child advanced, as well as one not advanced, shall be intitled to a share upon the death of a brother or sister. It is clear therefore that neither the freeman nor the orphan can devise against the custom; nor can they any more devise what accrued by survivorship than the original share: but still the father may make a disposition by his will, and leave [136] it to his children's option, either to take by the will or stand by the custom. If they choose the former, that will be a waiver of the custom; for, it would be unreasonable to admit a latitude of taking by the will, as far as that makes for the party, and likewise by the custom, as far as that will go, and waive the other part of the will which makes against him. The case of *Noys versus Mordaunt*, 2 Vern. 581, goes upon that reason: and the city precedents prove only, that the father cannot by will dispose of the orphanage share in bar of the custom; but do not prove, that where a will is made, and legacies given by that will, which the child accepts of, that he shall notwithstanding have recourse to the custom for his share; and so, by taking both under the will and the custom, defeat that provision intended by his father for others. The bond that the plaintiff was to give, is to me a strong proof that the testator had the custom in view, and intended notwithstanding to make this provision for his children; for, it does not appear that either the plaintiff, Mr. *Hervey* or his wife had any other claim or right to any part of the testator's estate but what the custom of *London* gave them: nor can I ever think that this contingency will give them a right to take both by the will and the custom: for, even supposing it to be the orphan's estate, it is clear that the testator considered it as his own; and in that view, and upon that consideration, gave the plaintiffs the additional sum of £3500 beyond what was due to them by the custom. And indeed, in propriety of speech, the orphanage shares are so many demands upon his estate; so that his expression is not so improper as may be thought. But however, his intent is clear; and that must take place, although his expressions be not so correct as might be; and £10,000 being better than £7500 (which was the amount of the shares of each of the plaintiffs),

with contingencies of increases by the death of the other children, this bequest of £10,000 must be taken as a bar to what may happen by the contingency. I am therefore of [137] opinion, that his intent was to dispose of his personal estate in such a manner as that if the plaintiffs choose to take by the will, they should be barred of what was due by the custom. And so decreed an election (*Reg. Lib. A. 1735, fol. 592*), and if they took by the will, then to take nothing by the custom; reserving to the plaintiff *Elizabeth* her election until twenty-one or marriage; and that Mr. *Hervey* and his wife should make theirs before the first day of *Hilary Term* next.

(1) So *Jesson v. Essington*, *Prec. in Chanc.* 207. *Vid. also Pusey v. Desbouverie*, 3 *P. Will.* 318, *note.* *Leoffes v. Lewen & al'*, *Prec. in Chanc.* 272; 7 *Vin. Abr.* 213, *pl. 3.* *Fouke v. Lewen*, 1 *Vern.* 88.

[138] DE TERM. S. MICHAELIS, 9 GEO. II. IN CURIA CANCELLARIÆ.

Case 26.—ATTORNEY GENERAL *versus* SCOTT.

Nov. 12 [1735].

A. devises a trust estate to B. and his heirs, and dies. B. dies. The wife of B. cannot be endowed of it.

Anne Ratford being seised in fee of lands in *London* and in *Essex*, she and her husband levied a fine, and by lease and release, *February* 18, 1711, conveyed the premises in *London* to *Thomas Barker* and his heirs, to the use of him and his heirs, in trust to permit the said *Anne* and her husband to receive the profits during their lives, and the life of the survivor of them, with power to *Anne* to charge the premises with £400; and subject to such power, *Barker* to stand seised to the use of the heirs of the survivor of *John* and *Anne*. And by another deed, *April* 2, 1712, the *Essex* estate was conveyed in the same manner; *Anne* died in 1713, *John* the husband died in 1723, having by his will devised this trust estate to *Locklay* and his heirs (who was married to his now wife in 1713), and afterwards, in 1724, and in 1727, mortgaged several parts of the premises to the defendant *Scott*. The estate being now to be sold, the question was, whether *Locklay's* wife had any title of dower to this trust estate, which [139] might hereafter affect the purchasers, she having insisted upon it in her answer.

For the wife were cited *Fletcher versus Robinson*, *Precedents in Chan.* (1) and *Banks versus Sutton*, at the *Rolls*, *March* 1733, where dower (2) was decreed of the trust-estate; because there was a direction that the trustees should convey, and therefore looked upon as an actual conveyance.

Lord Chancellor. The question is very considerable, and very proper to be settled. Dower is properly a legal demand; and here the estate is limited to the trustees and their heirs, to the use of them and their heirs: so that it is actually executed in the trustees; and whatever comes after can be looked upon only as an equitable interest: for, there cannot be an use upon an use. The question therefore is, Whether the *feme* of the devisee shall be intitled to dower at law? No dower was of an use before the statute, it being intirely a legal demand; as appears from *Vernon's* case, 4 *Co.* 1. And then how can she be dowable of a trust after the statute since no difference can be assigned between a trust now, and an use before the statute? And courts of equity must follow the same rules now as to trusts, as prevailed before the statute as to uses. How the difference now received, between tenant by the curtesy and tenant in dower, ever came to be established, I cannot tell; but that it is established is certain. Nor have I heard any case cited to the contrary, but that of *Fletcher versus Robinson*, which was determined upon another reason, that does not affect the present case. That of *Bottomly* versus *Lord Fairfax*, *Pasch.* 1712, *Precedents in Chan.* 336, is an exact authority that a woman shall not be endowed of a trust; and the received practice of inserting trustees to bar dower would otherwise be of no signification. For me therefore to do a thing merely upon the authority of an obscure case (*viz.* *Fletcher versus Robinson*), which does not seem to have been determined upon that point neither, and that might perhaps shake the settlements of five hundred families, is what I cannot

answer to my [140] conscience. I do not think it necessary to say any thing as to the cases where terms are standing out, as *Lady Dudley versus Lord Dudley*, *Precedents in Chan.* 241, and that of *Countess of Radnor versus Vandebendy*, 1 *Vern.* 356, and *Show. Parliament Cases*, 69. For they are different, and are to be considered in another light. Nor is there any greater necessity, at this time, of determining the question where the legal estate is first in the husband, and consequently the wife intitled to the dower, and then is conveyed to trustees by the husband; for, in the present case, it was originally a trust-estate, and could not be any inducement to her in her marriage; for, she married in 1713, and the trust-estate was not devised to her husband until 1723, ten years after her marriage. (*Reg. Lib. An.* 1735, fol. 84.)

(1) Cited in *Lord Dudley and Ward v. Lady Dowager Dudley*, *Prec. in Chanc.* 250; 2 *P. Will.* 642, S. C. (cited). Of this case, *Lord Talbot* in *Chaplin v. Chaplin*, 3 *P. Will.* 234, expresses himself thus, "it seemed a strange case, and a most extraordinary trust, and was probably a short note of the case for the private use of some gentleman, and could be of service to no other; for if the father the *cestui que trust*, should have come for a performance of that trust, he could never have recovered; but the son should have held the land discharged, it being a fraudulent trust, made to protect the estate against a forfeiture."

(2) In *Banks v. Sutton*, 2 *P. Will.* 715, *Sir Jos. Jekyll* seemed to intimate an opinion, though with considerable diffidence, of a distinction, whether a wife should be entitled to dower out of a trust of inheritance, where it is created not by the husband, but some other person, and no time limited for conveying the legal estate; but it is to be observed, that he rested his decision of that case chiefly upon another point of equity, viz. "that as in that case, there was a time limited for conveying the legal estate, and that time had arrived in the life-time of the plaintiff's husband, the widow was therefore entitled to dower, upon a principle well known and established in a court of equity, that where an act is to be done by a trustee, that is to be looked upon as done, which ought to be done." However *Lord Talbot* decided the *Attorney General v. Scott*, without any regard to the distinction intimated by *Sir Jos. Jekyll*; and it seems now to be clearly settled, that a wife cannot be endowed of an equity of redemption in fee, or of any other trust-estate of inheritance, wherein the husband had not, nor has the legal right to the estate, *Chaplin v. Chaplin*, 3 *P. Will.* 229. *Godwin v. Winsmore*, 2 *Atk.* 525. *Burgess v. Wheale*, 1 *Black. Rep.* 138, 161. *Dixon v. Saville*, *Bro. Cha. Rep.* 326.

Case 27.—LAW versus LAW.

14 Nov. [1735].

(3 *P. Will.* 391, S. C.)

A bond given to pay money for procuring the office of collector of excise, is within the *Stat.* 5 & 6 *Ed.* 6, against sale of offices; and falls within the reason of marriage-brocage bonds. Wherefore decreed it to be delivered up to be cancelled, and perpetual injunction.

Edmund Law, the plaintiff's late husband, gave his elder brother a bond, reciting, That whereas the said *Edmund Law* had been for many years an officer and supervisor of excise, by the procurement of his brother *Richard Law* the defendant, and that the said *Richard Law* had promised to use his utmost endeavour and interest to procure him to be advanced to the office of collector of the excise, upon condition that the said *Edmund Law* shall pay to the said *Richard Law* £10 *per ann.* so long as he shall continue supervisor (his then office), and £20 *per ann.* as long as he should be collector: the condition therefore was, That if *Edmund* should pay the said £10 and £20 *per ann.* &c. *Edmund Law* paid one sum of £10 and died intestate; and the defendant *Richard Law* brought an action upon the bond against the plaintiff, the widow and administratrix of *Edmund*; and she thereupon brought her bill to set aside this bond, and to have the £10 refunded.

[141] *Lord Chancellor*. It is agreed on all hands that this bond is good at law: wherefore the representative of the obligor is obliged to come hither for relief. The general head of relief goes upon fraud and imposition; of which there is nothing

suggested in the present case, but the whole consideration appears in the condition. The question is, Whether this be such a bond as a Court of Equity ought to relieve against ?

This is but one agreement although respecting two periods, *viz.* That of having obtained the office of supervisor, and that of procuring the collectorship : and then the condition is to pay two several sums. It relates to an office which is certainly within the *Statute 5 & 6 Ed. 6.* For, it concerns the King's revenue, and cannot be executed by deputy ; and nobody can say but that the sale of offices within that *Statute* is a public mischief ; the Legislature has adjudged it to be so. And although this be not directly a sale within the *Statute*, yet it is in effect the same ; there being little or no difference between a commissioner's taking a sum of money, and another person's taking it to influence the commissioner : the inconveniencies are the same ; since thereby the persons appointing are deceived, and so is the public ; and there is a very strong presumption that the person so giving is not duly qualified for the execution of the office : and in this very case it appears that the obligor was suspended. The objection, That this being a penal law, is not to be extended in equity, is easily answered ; for, though penal laws are not to be extended as to penalties and punishments ; yet if there be a public mischief, and a Court of Equity sees private contracts made to elude laws enacted for the public good, it ought to interpose. Here is a bond given for future acts, as well as for such as are passed ; and which is the same as if given to a commissioner for a direct sale. And indeed had there been no precedent of the same nature, I should have had courage enough to have made one in the present case : but I shall be abundantly warranted by what [142] the Court has done in cases within the same reason. Bonds of resignation are not entirely parallel ; for, the relieving or not relieving against them, depends upon the use made of them *ex post facto* ; (1) and bonds given in fraud of marriage are relieved against, by reason of the extortion and imposition which attends them ; as in the Duke of *Hamilton's* case, 2 *Vern.* 652. But marriage brokerage bonds fall directly within the reason of this case, being intirely a voluntary act : nor does the Court interpose therein for the particular damage to the party only, but likewise from a public consideration ; marriage greatly concerning the public. And it is no objection, that the point of relieving against them has been settled but lately : for, it was settled upon very great consideration, and there are now many precedents of it : if therefore in this and the like cases, this Court does interpose and regulate things of a public nature, as in the case of a young heir's entering into unreasonable contracts during the life of the parent ; why shall it not do the like in the case before us, the inconveniences of winking at such practices being plain and obvious to every man's understanding ? Some cases have been cited for the defendant, none of which come up to our present case ; as *Lawrence versus Brazier*, 1 *Chan. Ca.* 72, where it does not at all appear what the office was, and the only question there is, Whether the party should pay for the time he was dispossessed ; that of *Beresford versus Done*, 1 *Vern.* 98 (*Ive v. Ash, Prec. in Chanc.* 199, *S. P.*), related to a commission in the army : and no law prohibits the sale of such, no more than it does that of a purser of a ship ; which was *Symmonds versus Gibbons*, 2 *Vern.* 308 (*vid. Purdy v. Stacey*, 5 *Burr.* 2698). That of *Lockner versus Strode*, 2 *Chan. Ca.* 48, had nothing illegal in it ; for, the payment was not to be absolute, but only in case the profits amounted to £400 or more, besides the whole profits belonging to the sheriff himself, that was but a reservation of what was his right, *viz.* the profits of the office. And in that of *Bellamy versus Burrow*, the sole question was, Whether that office was capable of a trust ? So that none of those cases come near to the present one ; which [143] is clearly within the mischief of 5 & 6 *Ed. 6.* and therefore not to be endured.

And therefore decreed (2) the bond to be cancelled, and a perpetual injunction. (*Reg. Lib. An.* 1735, *fol.* 86.)

(1) *Durston v. Sandys*, 1 *Vern.* 411. *Hawkins v. Turner, Prec. in Chanc.* 513. *Hesketh v. Gray*, 2 *Burn's Eccl. Law*, 341. *Peel v. the Earl of Carlisle, Sho.* 227, 534. *Bishop of London v. Fytche*, 1 *Bro. Cha. Rep.* 96, in which case the illegality of general bonds of resignation was determined upon an appeal to the *House of Lords*, 30th *May* 1783, vide a full report of this case, with the arguments of the judges, in *Cunningham's Law of Simony*.

(2) *Harrington v. Du Chatel*, 1 *Bro. Cha. Rep.* 125, in which case a perpetual injunction was granted against a bond for the purchase of an office, upon the public policy

of the law, and being similar to marriage-brocage bonds, although the office was admitted not to be within the *Stat.* of 5 & 6 of *Ed.* 6. *Morris v. M'Culloch*, *Ambl. Rep.* 433. *Dehenham v. Ox*, 1 *Ves.* 276 ; 3 *Bac. Abr.* 735, 6.

Case 28.—*Ex parte* LYNE, a Lunatic.

14 *Novemb.* [1735].

A custody of a lunatic's estate granted to baron and feme (the feme being next of kin) determines on her death.

The custody of the lunatic's estate was granted to husband and wife, the wife being next of kin to the lunatic : the wife died, and the *Lord Chancellor* held, that the husband's right to the custody of the lunatic's estate was determined, it being a joint grant, and a mere authority without any interest ; and said, it had been so determined in the *Lord King's* time.

Case 29.—KENSEY *versus* LANGHAM.

18 *Novemb.* [1735].

[Discussed and explained, *Crompton v. Jarratt*, 1885, 30 Ch. D. 298 ; 54 L. J. Ch. 1109 ; 53 L. T. 603 ; 33 W. R. 913.]

A. seised in fee, devises his lands and tenements in B. to trustees, to apply part of rents for charitable uses. The testator dies ; the church of B. becomes void ; the heir at law shall present.

Sir *Edward Nichols* being seised in fee of several lands in *Northamptonshire* and elsewhere, August 12, 1708, made his will ; whereby he devised his manor of *Faxton*, and lands lying there, and other lands in the will mentioned, to trustees and their heirs, in trust for the plaintiff *Jane Kensey*, and the Lady *Susanna Danvers* her sister, and all other his messuages, cottages, closes, woodlands and tenements (1) whatsoever in *Faxton*, *Haslebitch*, *Subby* and *Hardwicke*, in *Northamptonshire*, and all other his lands and tenements not therein after devised, upon trust that his said trustees, and the survivor of them should, out of the rents, issues and profits, yearly for ever, pay the sum of £30 a-piece, without any deduction, to the several vicars, for the time being, of eight several vicarages in his will named, for the augmentation of their vicarages ; and that whenever the profits of those lands amounted to more than the yearly payment, and his trustees' expences, that then the surplus should be disposed of in such charitable uses as his trustees should think fit : the testator died, leaving the plaintiff [144] and the lady *Susanna Danvers* his heirs at law : which latter died soon after, without issue ; and now the church of *Hardwicke* becoming void (which was full at the time of the testator's death), the plaintiff brought her bill to have the presentation : for, the advowson not passing by the devise to the trustees, did belong to her as heir at law.

The trustees and vicars insisted in their answer, that by the general devise the advowson passed ; and that the testator intended it to pass to make up what deficiency might be in the estate.

Lord Chancellor. The question is, Whether the advowson passed to the trustees by the will ? And I rather incline to think, that by the first words it does not pass, there being lands *lying and being at Hardwicke* to satisfy these words ; and an advowson being but a right of presenting, cannot be said to be *situate* (*Co. Litt.* 17 ; 2 *Black. Com.* 21-2 ; 1 *Burn's Eccles. Law*, 8). Nor am I clear that the word *tenements*, (2) which has been said to carry the advowson, does extend to incorporeal inheritances : but I do not think it necessary to enter into that question at this time. And I shall consider it a devise to the trustees, so far as it may be beneficial to the charity, but not where it cannot be any way beneficial to it : as in the present case, the church being actually void, and consequently cannot be beneficial ; for, no money must or can be taken for the filling it ; and if so, the rule, *That whatever is not disposed of remains in himself*, must take place, and the heir at law consequently be intitled to this presentation, there being no provision that either the trustees or the charity should have it. It has been said indeed, that this might be a beneficial devise, by the trustees selling

the next avoidance ; but as he has made no such provision, I do not think it proper by such a construction to advance a thing which would be much better if intirely prohibited ; especially in the present case, where it cannot be proved that he intended any such thing. In cases of mortgages, the mortgagor presents to every [145] avoidance before foreclosure : (3) for, the lands being but a pledge in the mortgagee's hands for the payment of his debt, he can receive nothing but what may be accounted for in its nature ; which a presentation cannot be ; and therefore he shall not have it. (4) So in *Atherton versus Sir Walter Calverley*, the trustees having no interest, only a bare power of nomination, the right of presentation was decreed to be in the infant. As therefore this particular turn is not to be given away by the will, and since nothing is intended for the trustees but a reimbursement of their charges, and this cannot be applicable to the charity, I think this turn belongs to the heir at law, and that her presentee must be admitted. (5)

A case was made for the opinion of the judges of the *B. R.*, Whether the word *tenements*, in the will, would pass the inheritance of the advowson to the trustees ? (Note, The judges afterwards certified, that the advowson did not pass by the devise in question, from a manuscript note of the late Mr. Cox of *Lincoln's Inn*, contained in No. — fol. — in the library of that society.)

(1) The words of the devise, as stated in *Reg. Lib.* are, "all other his messuages, lands, tenements, and *hereditaments* whatsoever, in *Faxton, Haslebitch, Subby* and *Hardwicke*, and all other his lands and tenements," &c.

Note, the word "*hereditaments*," seems much stronger than any of the other words used.

(2) *Sed Vid. Co. Litt.* 6, 19, 20, 374b ; *Vin. Abridg. Title Assets*, p. 145, pl. 28. *Westfaling v. Westfaling*, 3 *Atk.* 460 ; 2 *Black. Com.* 16, 17, where it is said, that, "as lands and houses, are tenements, so, is an advowson, a tenement ; and a franchise "an office, a right of common, a peerage, or other property of the like unsubstantial kind, are, all of them, legally speaking, tenements."

(3) *Vide Amhurst v. Dawling*, 2 *Vern.* 401. *Jory v. Cox, Prec. in Chanc.* 71. *Gardiner v. Griffith*, 2 *P. Will.* 404. *Gully v. Selby, Strange*, 403. *Mackensie v. Robinson*, 3 *Atk.* 559.

(4) Upon the same principle it is, that a guardian in socage shall not present to an advowson, because he can receive nothing for it, and by consequence he cannot account for it ; and by the law, he can meddle with nothing which he cannot account for. *Co. Litt.* 17.

(5) *Reg. Lib. A.* 1735, fol. 333. by the name of *Kemsey v. Earl of Hallifax*. From which it appears that the Lord Chancellor directed, that a case should be made for the judgment of the Court of King's Bench, on this point, viz. whether the advowson in question, passed by the will of Sir *Ed. Nicholas* to the defendants, the trustees, or not : and the consideration to whom the right of presentation belonged was reserved, until the cause came on to be heard on the certificate of the judges.!

Case 30.—CHAPMAN versus BLISSETT.

22 Nov. [1735].

A. devises his freehold, copyhold and leasehold, all his real and personal estate not before devised to three trustees, their heirs, &c., in trust to pay his son B. an annuity ; and if he should have any child or children, the residue of the rents, during B.'s life, for the education and benefit of such child or children ; and after B.'s decease, a moiety of the trust estate to such child and children as he shall leave, their heirs, &c., the other moiety to the child and children of his grandson C., and every other child and children of his daughter S., their heirs, &c. And if B. die without issue, the first moiety to C. and other child and children of S. and their heirs, &c., and directs an annual payment to such wife as B. shall marry. The testator died ; B. married, and had issue a son and daughter, and died ; afterwards C. married, and had issue a daughter, and died ; the limitation to the daughter of C. is well supported by

the estate in the trustees ; or, if not, is good as an executory devise ; and the profits, &c., shall go to the children of *B.*

Joseph Blissett devised all his freehold, copyhold and leasehold, and all his real and personal estate not therein before devised, to three trustees, their heirs, executors and assigns, in trust to pay his son *Isaac Blissett* £37 quarterly ; and if he married with consent, then double the sum ; and if he should have any child or children, he gives the rest and residue of the yearly rents and profits of his said trust-estate, over and above the said yearly payment, to be applied, during the life of the said son, for the education and benefit of such child or children : and then he goes on in these words, *viz.* "After my son's decease, I give one moiety of the said trust-estate [146] to such child and children of my said son as he shall leave, their respective heirs, executors and assigns, and to the survivor ; and the other moiety I give to the child and children of my grandson *Joseph Dickenson*, and every other child and children of my daughter, their heirs and assigns, and the survivor of them. Then in case *Isaac* die without issue, the first moiety to *Joseph Dickenson* and other child and children of *Sarah* and their heirs, &c." Then by another clause he appoints £100 *per ann.* as a jointure to any wife his son *Isaac* should marry, in case he married with consent ; and gives to his said grandson *Joseph Dickenson* £30 *per ann.* for his maintenance, until his age of fifteen, and then £200 to put him out apprentice : soon after the testator died. In the year 1712, *Isaac Blissett*, the testator's son, brought his bill for a discovery, and it was decreed (*inter alia*) by Lord *Harcourt*, That the surplus of the profits of the testator's real estate (over and above the several payments directed by the will) and the produce of the personal estate should be improved for the benefit of such child or children as the said *Isaac* should have ; and that after *Isaac's* death, and upon his having a child, all parties interested should apply to the Court. Soon after *Isaac* married with consent ; and having issue a son and daughter, applied to the Court for farther directions : whereupon it was decreed by the Lord *Cowper*, that the produce of the surplus of the testator's estate to the time that *Isaac* had a child, should go in augmentation of the said surplus ; but that the produce of such surplus, from the birth of *Isaac's* first child, should be paid to him for the maintenance of his children during his life ; and that at his death the estate should go according to the limitations in the testator's will. *Isaac Blissett* continued accordingly to receive the surplus profits until his death, which was upon the 10th of *October* 1728, leaving a son and two daughters, the now defendants. About two years after *Isaac's* death, *Joseph Dickenson* married, and had issue the plaintiff his only daughter, and died soon after.

[147] This cause was first heard at the *Rolls*, where it was decreed for the plaintiff ; and that the produce of the surplus of the testator's real and personal estate incurred after his death, and before *Isaac* had a child born, should not go to such child, but should go in augmentation of the *residuum* of the testator's estate.

And now coming on to be reheard, two questions were made : First, Whether the children of *Joseph Dickenson* took by way of executory devise or contingent remainder ? for, if they took by the latter, then the plaintiff could never take, she being born three years after *Isaac's*, the particular tenant's death. The second question was, What should become of the surplus of the real and personal estate of the testator from his death until the birth of *Isaac's* first child ? Whether it should go to the children of *Isaac*, or whether it should go to the augmenting the *residuum* ?

Mr. Attorney General, Mr. Verney and Mr. Fazakerley argued for the defendants, that the rules of trusts vested, were the same as those of estates limited to uses at law ; and that no rule was better known than that the remainder must vest *eo instante* the particular estate determines. That the danger of perpetuities was equal in trusts and legal estates ; and that executory devises were no more to be favoured here than at law. That where nothing goes to the heir at law as undisposed of until the contingency happens, upon which the devisee's interest is to arise, then it is a contingent remainder. That here was no descent to the heir in the mean time, the whole being disposed of during the life of *Isaac*. And though part of the profits were to be laid out, during his life, for the benefit and education of his children, and there were children born before his death, that did only vest their interest in them in their father's life-time ; and there being a compleat disposition of the profits during the life of *Isaac*, makes it a freehold of the trust in being, as to the [148] whole trust, *viz.* part to himself, and part to his children. Besides, no more is executed here in the trustees than is

sufficient to serve the purposes specified during the life of *Isaac*; and both the trust-estate and interest determine with his life: for, the trustees cannot have a greater estate by implication than what the express words give them, unless the purposes directed necessarily require it: the Court never extending the construction against the vesting of uses. Now, after *Isaac's* death, the legal estate is devised, part to his children, and part to the children of *Joseph Dickenson*; and is devised by *verba de praesenti*, which are only proper for a remainder, and to make an use executed: for, whenever the devise is *in verbis de praesenti*, and the testator intends a present devise, no fact can alter it: and if it cannot take effect as such, it shall rather be void than be construed a future devise; the consequences being no ingredient in the construction. This appears from the case of *Scattergood* versus *Edge*, 1 *Salk.* 229, where it was agreed, that if the words had been to a child to be born, it would have been good by way of executory devise; but being to trustees for eleven years, and then to the first son of *A.* in tail, who had no son at that time, that it was void; there being no person *in esse* capable of taking at that time. The same determination was in *Goodright* and *Cornishe's* case, 1 *Salk.* 226, in both which cases it was impossible to support the devise but as a future one; yet the testator having devised by *verba de praesenti*, the Court would not make a construction in favour of the party not born. What has been said for the plaintiffs, that this was not too remote a contingency because confined to arise within the compass of a life, is agreed; but the question is, whether it was the testator's intent to pass it in that manner? and if it was not, then it must be a contingent remainder; and as such, by its not taking effect in due time, upon the determination of the estate of freehold in *Isaac*, is void, and can never arise.

Mr. *Solicitor General* replied for the plaintiff, That although the devise was *in verbis de praesenti*, [149] yet considering the whole frame of the will, it was evident that the testator's intent was to extend it to the children born thereafter, the words being used promiscuously, and making no difference between the children already born, and those to be born. And in *Scattergood* and *Edge's* case, there was nothing to shew the intent to be to take in the children unborn: whereas the clause in the will, whereby, upon the death of *Joseph* and his daughter without children, he gives their moiety to *Isaac's* children, shews plainly that he must mean children to be born, since he knew that *Joseph* had no children at that time; and that he, by another clause, provided a particular maintenance for him until his age of fifteen: nor was it more reasonable to construe this to be an use executed in the trustees only during *Isaac's* life, and then to determine; for, there are many other purposes in the will to be served by them, which do not any way depend upon *Isaac's* life, as the annuity given to his wife, the direction about putting out boys to apprenticeship, and others which are quite distinct from, and have no dependency upon *Isaac's* life, but can arise no way but from the trust estate: and surely it could never be his intent to make such a disposition as would be liable so soon to be defeated by the determination of the trustee's estate, but rather to continue the uses for the benefit of all that were named; which could only be done by the continuance of the trustee's interest: and the words being well able to bear that construction, it is the most reasonable way of taking his intent.

Lord Chancellor. The first question is, whether this limitation to the plaintiff be good or void? It has been said, that the trust estate determining upon *Isaac's* death, the limitation to *Joseph's* children was of a legal estate, and being by *verba de praesenti*, could enure only as a contingent remainder; and consequently the plaintiff could never take, because not *in esse* at the determination of the particular estate by the death of *Isaac*. The whole depends upon the testator's intent, as to the continuance of [150] the estate devised to the trustees, whether he intended the whole legal estate to continue in them, or whether only for a particular time or purpose: if an estate be limited to *A.* and his heirs, in trust for *B.* and his heirs, then it is executed in *B.* and his heirs: but where particular things are to be done by the trustees, as in this case the several payments that are to be made to the several persons, it is necessary that the estate should remain in them so long, at least, as those particular purposes require it. (1) No authority has been cited to warrant the doctrine, that, in case of such a general limitation to trustees as the present case is, that they should have but a particular interest, and then that interest to determine; such a case might indeed be framed, but was never intended here; there being many purposes to take effect, which might endure longer than the life of *Isaac*; and the taking it in so con-

fined a sense, would be making a second construction to disappoint the testator's intent, which was to make an intire disposition of the legal estate to the trustees.

Considering it therefore as a trust-estate, the question is, whether this limitation to the plaintiff shall enure by way of executory devise or contingent remainder ? and I think no objection against its taking place as an executory devise, that it is limited by *verba de praesenti* : for, it appears that *Joseph* was very young at the time of the devise, and the testator's providing a maintenance for him until he should attain to the age of fifteen, is a proof of his knowing that *Joseph* had no children at that time ; it being intirely improbable that he should have any in being, when he was himself of so tender an age at the time of the devise : so that although the words be *in praesenti*, they must be taken in a future sense, in order to serve his intent ; which appears manifestly to be, that the children of *Joseph* should take in its creation ; therefore it was executory. But then it has been said, that when *Isaac* had a son born, the remainder vested in him, and consequently, the limitations to the other became vested remainders likewise ; and the remainder-men not being *in rerum natura* at the time of *Isaac's* [151] death, this remainder can never arise. But in regard to trusts, the rules are not so strict as at law ; for, the whole legal estate being in the trustees, the inconveniency of the freehold's being in abeyance, if the particular estate determines before the contingency (upon which the remainder depends) does happen, is thereby prevented ; there being always a sufficient tenant to the *praecipe* ; the defect of which was the sole mischief the law provided against. And even the reason is not now so strong, as when real actions, which can be brought against the tenant of the freehold only, were more in use. The whole therefore being in the trustees, supports the several uses that are to arise out of their interest, which continuing in them until the birth of the plaintiff, whether it be taken as a future limitation, or as a contingent remainder of a trust, is good either way. (2)

The next question is, what shall become of the intermediate profits from the time of the testator's death, until the birth of *Isaac's* son ? Upon this head, and in this very case, there have been two different decrees : the first by the Lord *Harcourt*, who thought those profits should belong to the children of *Isaac* when born ; the other by the Lord *Cowper*, who was of opinion, that the children had no right to them, but that they should go in augmentation of the trust-estate. I am at a loss how to determine between two as great men as ever sat here : but the whole being open before me, I must give my judgment in the manner which seems to me most reasonable. He gives, in case *Isaac* should have any children, the *rest and residue* of the yearly rents and profits for the education and benefit of such children. Now the words *rest and residue* are words of relation (*Rogers v. Gibson*, 1 *Ves.* 491, 495), and part of somewhat that went before ; the preceding disposition being of yearly rents and profits, the words *rest and residue* must be applied to them, and not to the capital, which was not given away before. Indeed had those children never been born, then they could never take ; but when they are born, how can I determine that they shall not take what is expressly [152] given them without any distinction between profits before and after their birth ? The words *benefit and education* make it plain that they are intitled to them all absolutely and intirely.

And so varied (*Reg. Lib. A. 1735, fol. 298*) the decree at the *Rolls* as to this last only.

(1) Accordingly it has been determined, that trustees shall have a fee without words of limitation, where the purposes of the trust require it, and the intention of the testator cannot otherwise be effectuated and carried into execution. *Collier's case*, 6 *Co.* 16. *Willis v. Lucas*, 1 *P. Will.* 472. *Ackland v. Ackland*, 2 *Vern.* 687. *Shaw v. Weigh*, 2 *Strange*, 798. *Oates lessee of Markham v. Cooke*, 3 *Burr.* 1685. 1 *Black. Rep.* 543, *S. C.* *Rogers v. Gibson*, 1 *Ves.* 491. *Fearne's Conting. Rem.* 231.

(2) It seems therefore from this determination, that in cases where the legal estate is devised to, and vested in trustees in trust, there is no necessity for any preceding particular estate of freehold, to support contingent limitations : for that the legal estate in the trustees, will be sufficient for the purpose ; and consequently in such cases, it is not necessary, that a contingent remainder should vest by the time the preceding trust limitation expires. So *Hopkins v. Hopkins*, ante, 44, 1 *Ves.* 269, and 1 *Atk.* 581, *S. C.* *Fearne's Conting. Rem.* 231.

Case 31.—ASHTON *versus* ASHTON.

24 Novemb. [1735].

[S. C. 3 P. Wms. 84. See *Page v. Young*, 1875, L. R. 19 Eq. 507.]

A. devises to his nephew B. £6000 *South Sea* annuities to be laid out in land, and settled on the plaintiff, &c., and by codicil taking notice of it, gives £1200 to the same uses; and made B. his executor, and dies possessed of a large personal estate, but had only £5360 in *South Sea* annuities: this is a specific legacy; and this Court will not decree the deficiency to be made up out of the other personal estate.

Joseph Ashton, by will, gave to his nephew *Henry Ashton*, and two other persons, the sum of £6000 *South Sea* annuities; upon trust, as soon as conveniently might be after his death, to sell and lay out the same in a purchase of lands, to be settled on the plaintiff for life, remainder to his issue; and afterwards by a codicil, dated three days after, taking notice that he had given his trustees such a sum, gives £1200 to be laid out in land to the same uses, and made his nephew executor: the testator died, leaving a very considerable personal estate; but had only £5360 in annuities at the time of the will made. The question was, whether it should be made up £6000? or, whether only the testator's specific fund passed by the will? It had been decreed at the *Rolls* to pass nothing but what the testator had in *South Sea* annuities?

Lord Chancellor. This is a specific legacy: the testator has given £6000 *South Sea* annuities stock, having at that time but £5360. And if a man devise a thing which he hath not, it is not such an estate as a court of equity can relieve against. If in this case he had actually had as much as he devised, but before his death had sold a part, it had been an ademption for so much: but here is no ademption; for, he having no more than £5360, no more can pass. Specific legacies are different in their nature from all others; for, if there be a deficiency of assets, there shall be no abatement of the [153] specific legacy: and on the other hand, if the testator (so *Partridge v. Partridge*, *post*, 226) alien any part of it, or the whole, the legatee has no claim on any other part of the estate; and in this case, this being a specific legacy, and the testator not having so much at that time, no relief can be given to the legatee: it is a mistake in the testator, but such as cannot be helped here. If a man, through a mistake, devises the inheritance of an estate which he really hath not, this Court cannot put the devisee in a better condition than the will has left him. Nor is this to be compared with the case in 2 *Leon.*, where it is held, that if one devises his land in such a place, and has no land, but only tithe in that place, the tithe shall pass; for, otherwise there would be nothing to satisfy the devise: but if one devises his lands, expressing them to be of the value of £600. and they prove to be worth but £500, this Court can make no addition; for, being a specific devise of the estate, the devisee must take it as he finds it.(1)

And so affirmed the decree.(2)

(1) This case seems to have been determined upon the testator's directing the £6000 *South Sea* annuities to be sold, and the produce thereof to be laid out in a purchase of lands, which strongly implied that the testator only intended to give the *South Sea* annuities which he was possessed of; and that he did not mean to have additional annuities purchased, in order to be sold out again presently afterwards.

(2) *Reg. Lib. A. 1735, fol. 112; et vide 3 P. Will. 387, S. C. Hinton v. Pinke, 1 P. Will. 540. Partridge v. Partridge, post, 226. Purse v. Snaplin, 1 Atk. 414, in which Lord Hardwicke expresses his approbation of this case. Avelyn v. Ward, 1 Ves. 424. Drinkwater v. Falconer, 2 Ves. 623. Sleach v. Torrington, 2 Ves. 560. Hambling v. Lister, Ambler Rep. 401. Ashburner v. Macguier, 2 Bro. Cha. Rep. 108, which recognises the material authorities upon this subject.*

Case 32.—CRAY *versus* ROOKE.

11 Decemb. [1735].

A bond given to a kept mistress for the maintenance of her and provision for a child she had by the deceased, shall not be set aside in favour of his legitimate children or heir, if not obtained by fraud ; but shall not be paid out of the personal estate until after simple contracts, but shall be paid out of the real estate, if there be one, in case the personal estate falls short.

Bill brought by the son and heir, and his two sisters, to have a distribution of their father *Jeremiah Cray's* estate, and to set aside a bond given by his said father to the defendant *Katherine Rooke*, in the penalty of £2000 to pay her (whom he had formerly kept as his mistress) the yearly sum of £80. The defendant insisted by her answer, that the bond was good ; that she being a woman of virtue, and intitled to some fortune, was prevailed upon, by larger promises, to live with the said *Jeremiah Cray* ; whereby she greatly disoblged all her friends ; and that she and *Jeremiah Cray* cohabited from *January 1728 to April 1731* ; when the said *Cray*, for making some provision for her child (then about two years [154] old) executed this bond, without any fraud or imposition, whereby he bound himself and his heirs in the penalty of £2000 for the payment of a yearly annuity of £80 *per ann.* for her maintenance, and that of her child ; the said *Jeremiah Cray* being then about marrying (which he afterwards did) the plaintiff's mother.

The master of the *Rolls* had decreed the annuity, secured by the bond, to be paid after all other creditors, whether by bond or simple contract, this being a voluntary bond ; and that in that course of payment, a fund should be set apart out of the personal estate ; but had given no direction whether the real estate should be chargeable with this annuity, in case of a defect of the personal assets.

Wherefore the defendant *Rooke* appealed, and it was insisted for her, First, that this bond was not to be considered as a mere voluntary bond : that the defendant *Rooke* appeared to be a virtuous young gentlewoman, before unhappily seduced by Mr. *Cray* ; that this was *premium pudoris, &c.*, and considerations may arise as well by suffering loss and damage at the instance of another, as by giving money, *&c.* And that in *Harris and Marchioness of Annandale* (*vide 2 P. Will.* 433, S. C.), decreed *June 25, 1727*, and affirmed in the *House of Lords* (3 *Bro. P. C.* 445 [2nd ed. 1 *Bro. P. C.* 250], S. C.), *March 19, 1728*, a like bond was to be paid in a course of administration, and not postponed, *&c.* And in *Ord and Blackett*, decreed by Lord *Macclesfield*, it appearing that Sir *William Blackett* had seduced the plaintiff, a young lady of £10,000 fortune, and settled upon her £300 *per ann.* annuity, by a deed, which was not an effectual conveyance, so that she could not recover in law. This Court interposed, and decreed against the heirs at law of Sir *William Blackett*. So in the case in the *Exchequer*, cited in *Harris and Lady Annandale*, in *Eq. Abr.* 87, where a man granted an annuity to a woman of £30 *per ann.* out of lands he had no title to : the Court decreed him to make a good grant, *&c.* And therefore the Court would not consider the grantees as meer volunteers.

[155] It was also insisted, that if the bond was to be considered as voluntary, and to be postponed to creditors by simple contract : yet as it affected the real estate, and no pretence to set it aside for fraud, the bill, so far as it sought on behalf of the plaintiff the heir at law, to set the bond aside, ought to have been dismissed, and the plaintiff left to her remedy at law against the real estate, or some provision made by the decree for the defendant *Rooke* to have satisfaction out of the real estate, *&c.*

Mr. *Attorney General* for the plaintiffs. This at best is to be considered as a voluntary bond. There is a difference where such bonds, *&c.*, are given before seducing, and where after, and this appears to be long after ; and it would be strange to put such bonds, *&c.*, upon a better foot than bonds and securities given after marriage, which are always deemed voluntary, *&c.*

As to the case of *Ord and Blackett*, and the other cases in the Court of *Exchequer*, they are founded upon this ; that though a bond of conveyance be at first voluntary, yet if the party who gives it does afterwards by fraud destroy or endeavour to defeat it, equity will relieve against the act of the party himself. And so was the case of *Pitt* and *Pitt* at the *Rolls* ; where it appearing that the late Governor *Pitt*, had granted the

younger son (the plaintiff) an annuity of £300 *per ann.* in order to qualify him for member of parliament, and afterwards got the deed and burnt it ; it was decreed against the eldest son, the heir at law, to make it good.

Lord Chancellor. No relief in equity can be had against this bond. Here is no pretence of fraud, and therefore no reason to relieve against it. It is indeed a voluntary bond, being given after actual cohabitation, and cannot be in a more favourable condition than a settlement made after marriage, which is looked upon as voluntary ; although the [156] obligation of nature is as strong upon a man to provide for his children after marriage, as before it.

If then it be once settled to be good, the next question is, In what degree it shall be paid ? And as to that, I think, that according to the Lord *Harcourt's* opinion, the resolution in *Jones and Powell's* case, *February* 23, 1712 (and *Abr. Eq. Ca.* 84), all creditors, whether by bond or simple contract, shall be preferred ; but that this bond shall be paid before legacies : for, the bond, although it be voluntary, transfers a right in the life-time of the obligor ; but legacies arise only from the will, which takes effect only from the testator's death ; and therefore ought to be postponed to a right created in the testator's life-time : the case of *Fairbeard and Powers*, (1) 2 *Vern.* 202, proves this expressly ; and that the Lord *Harcourt's* opinion in *Wood and Powell's* case, or in *Jones and Powell's* case, was grounded upon precedent authorities.

The next consideration is, how far it shall affect the real estate in case of a deficiency of the personal assets ? Now although it be a voluntary bond, and postponed in point of payment even to simple contract creditors ; yet it must not be in a worse condition than they are, its being voluntary giving the heir no right to set it aside : for, as the ancestor might have granted away the estate intirely from his heir, so, when he thinks proper to charge himself and his heirs, the heir shall be bound in respect of the assets descended upon him from his ancestor : and as the whole is now before me, I must give my opinion upon it ; since the leaving the defendant to sue the bond at law, where she can recover but the penalty, and where the parol must demur until the heir (who is now but three years old) comes to his full age, would be delaying her much too long ; and since even after advantage taken of the infancy at law, and the penalty recovered against the heir, he might resort again to this Court to have the whole thing reconsidered ; which is now as pro-[157]-per for the judgment of the Court as it would be then.

And so decreed, that if the personal estate fall short, upon payment of the arrears, and growing payments by the plaintiff, and upon his securing the annuity out of a sufficient part when he comes of age, the defendant *Rooke* be restrained from proceeding upon this bond at law. (2)

(1) In which case it was held, that a voluntary judgment given by a freeman of *London*, payable three months after his death, was to be postponed to debts by simple contract, and to the widow's customary part, but would bind the freeman's legatory part.

(2) *Vide Whaley v. Norton*, 1 *Vern.* 483. *Bainham v. Manning*, 2 *Vern.* 242. *Mathew v. Hanbury*, 2 *Vern.* 187. *Spicer v. Hayward*, *Prec. in Chanc.* 114. *Clarke v. Periam*, 2 *Atk.* 333. *Priesl v. Parrot*, 2 *Ves.* 161. *Walker v. Perkins*, 3 *Burr.* 1568 ; 1 *Black. Rep.* 517, S. C. *Lady Cox's* case, 2 *P. Will.* 340. *Hill v. Spencer*, *Amb. Rep.* 641.

Case 33.—IBBETSON *versus* BECKWITH. [1735.]

[See *Bowen v. Lewis*, 1884, 9 *App. Cas.* 896.]

A testator's setting out (1) in his will to give and dispose of his worldly estate is a strong proof that he intends to dispose of the inheritance of his lands, when there are sufficient words in the following parts of the will for that purpose ; the words *estate at* such a place, or *in* such a place, may carry a fee. The whole complexion of a will ought to be considered.

Thomas Beckwith made his will in the words following, *viz.* "As touching my worldly estate, wherewith it hath pleased God to bless me, I give, devise and dispose of the same, in the manner following ; *Imprimis*, I give my estate, which I lately purchased of *John Adamson*, to pay and discharge all my debts. *Item*, I give and bequeath unto my loving sister *Mary Beckwith*, all my estate at *Helmehouse* in *Hither Dale* Leasing at *Crew*, and all my estate at *Cubeck*, paying and discharging all legacies

"before charged by my father's will. *Item*, I give unto my loving mother *all my estate* at *Northwith Close, North Closes*, and my farm held at *Roomer*, with all my goods and chattels as they now stand, for her natural life, and to my nephew Thomas Dodson after her death, if he will but change his name to *Beckwith*; if he does not, I give him only £20, to be paid him for his life out of *Northwith Close, North Close*, and the farm held at *Roomer*; which I give her upon my nephew's refusing to change his name, to her and her heirs for ever."

Mr. *Solicitor General* and Mr. *Fazakerly* argued, that this was a fee simple in *Thomas Dodson*, the testator's intent being to dispose of his whole estate; and there such construction should prevail as should make the whole to pass. That as this was his intent, so had he used words sufficient to carry the [158] whole; three things only being necessary in wills to make the devise good, *viz.* The person described who is to take, the thing which is to be taken, and the interest which the party is to have in it; all which concur here: the words being sufficient to describe the person, the thing, and the interest which the party is to have in that thing. In wills the word *estate* (*Right v. Sidebotham, Dougl.* 764, *vid.* also the signification of the word *estate*, in *Co. Litt.* 345, *sec.* 649) carries the whole interest the party hath; as well held in *Wilson and Robinson's* case, 2 *Lev.* 91, where the opinion of the whole Court was, that the words *tenant-right estate* were sufficient to pass the fee; although, as that case is reported, 1 *Mod.* 100, it seems to be the opinion but of two judges. So in *Norton and Ladd's* case, 1 *Lutw.* 755, the words *whole remainder* were held to carry a fee, although one would think they would carry but an estate for life: but because the intent was manifest that a fee should pass by these words, it was held so accordingly. That the objection of a precedent estate being given (*viz.* to the mother) by the word *estate* was idle: for, that as it was restrained to be but for life; and had the word *inheritance* been used instead of the word *estate*, with such a *restriction*, it would have passed but an estate for life. That the other parts of the will made his intent to pass a fee simple quite plain: as the provision that he should take the testator's name, and the limitation over to another, and her heirs for ever, upon his refusal to take the name, is a plain proof that he intended him a fee simple, not to be divested out of him, but upon his refusing to take the testator's name. And might well be compared to *Beachcroft* and *Beachcroft's* case, (2) 2 *Vern.* 690, where the words *worldly estate* were held to pass a fee. *Barry* versus *Edgworth. Abr. Eq. Ca.* 178, and *Holden and Barker, June* 11, 1706. Devise of all his estate in *Mount Street*, adjudged to pass an estate in fee.

Mr. *Attorney General* and Mr. *Verney* insisted on the other side, that *Thomas Dodson* took but an estate for life; it being a known rule, that an heir was never to be disinherited but by express words, or by necessary implication: and there could be no [159] necessary implication where the words were capable of being taken in two senses; as they are in the present case, where it is natural to take the words in that sense, which is used by people in common parlance, rather than in the strict legal sense. This will was drawn by the testator himself, who appears not to have been very knowing in the legal signification of the words. Now the word *estate* does, in common speech, imply only the personal possession; as when it is said, that a man has an estate, by that is meant land, houses, &c.

The clause of his changing his name, is rather a proof that he intended him but an estate for life; for, it is usual in all such clauses to provide that not only the first taker, but likewise every heir shall take the testator's name; and that upon any of their defaults the estate shall go over: but here is no provision for the heir of *Thomas* taking the testator's name; which looks as if he intended *Thomas's* estate to determine with his life. A gift of one's inheritance for life will give to the devisee but an estate for life; because the word *inheritance* being restrained to the term of a life, can mean only a description, and not the continuance of the thing given; and where after such limitation the remainder is given over to another, the remainder-man takes a fee; because the word *inheritance*, where not restrained by others, can mean only a fee, which the word *estate* does not; and therefore very different from the present case. His intent appears farther from difference of his expression in this clause, and in that whereby, upon failure of taking his name, he limits it by express words, to her and her heirs: which diversity of expression proves a difference of intention in him. Indeed in some cases the devisee may have a fee simple, not from the words, but from the purposes for which he takes, which require a continuance of the estate; as in this very will, the clause whereby he devises several lands to his sister, paying his legacies, gives her a fee:

but in the devise to *Thomas* there is no particular purpose to make that construction requisite ; nor is there any other clause in all the will which has [160] a devise over but this one. *Wilson* versus *Robinson's* case, 2 *Lev.* 91, is scarcely intelligible as the case is there stated ; the misfortune of most of the modern books being, that they run to the argument and resolution before they have well stated the case, leaving us often to judge of the case by the arguments : besides the words *tenant right*, which were used in that case, are of a particular signification. *Burdet* versus *Burdet*, in 1732, is within the rule of passing a fee, because of the devise for payment of debts. In *Norton* and *Ladd's* case, 1 *Lutw.* 755, the words *whole remainder*, which were there used, ousted any notion of an estate for life only. And in *Beachcroft* and *Beachcroft's* case (2 *Vern.* 690), there being a precedent charge upon the inheritance for payment of his debts, the devise of the moiety of what was left must necessarily carry the inheritance. The distinction taken in *Barry* and *Edgworth's* case, *Abr. Eq. Ca.* 178, between a devise of all his estate *in* such a place, and *at* such a place, which latter (says the book) will carry but an estate for life, is an express authority for the defendant, that but an estate for life passes by this will ; the words here being the same as if he had put in the word *at*. (*Sed per Lord Chancellor*, I remember that case very well, and no such distinction was made in it as is pretended by the book.) Another strong authority for the defendant is *Wilkinson* and *Merryland's* case, *Cro. Car.* 447, 449, and 1 *Ro. Abr.* 834, held but an estate for life.

Lord Chancellor. The question turns intirely upon the construction of the words of the will, what interest was intended to *Thomas Dodson*, whether an estate for life, or in fee ? In order to come at the testator's intent, the whole complexion of the will has been very properly taken into consideration on both sides ; and it has been said, that the first words, *worldly estate*, were used only to shew, that what he was then doing was *animo testandi* ; but not intended by him to reach to the whole of his estate. As to that I am of opinion, that these words prove him to have had his whole estate in his view at that time. Indeed he might have made but a partial dis-[161]-position ; but if the will be general, and that taking his words in one sense will make the will to be a complete disposition of the whole, whereas the taking them in another will create a chasm ; they shall be taken in that sense which is most likely to be agreeable to his intent of disposing of his whole estate. If therefore *Thomas* takes an estate in fee, the will will be perfect, and take in the whole : whereas, if he takes but an estate for life, one moiety will, after his death, descend upon him as heir at law, and the other moiety to the other co-heirs. The clause whereby the estates are devised over to his mother and her heirs, in case *Thomas* should refuse to take his name, hath been argued as a proof of his intending him but an estate for life ; but that depends upon the construction of the word *estate*, which will be clear from the sense he hath taken it in through all the other parts of this will, whensoever he hath used it, he has meant thereby to pass the inheritance.

It hath been said indeed, that in those clauses the fee doth not pass from the force of the words, but from the nature of the purposes, *viz.* that of paying debts, &c., but still the words are an argument that he intended to pass the inheritance, though not the whole argument. It has been said likewise, that the word *paying* does not of itself import a fee ; but still, in what sense hath he used the words *my estate* ? to pass the inheritance. As for example ; the word is left out in the clause now in question ; which is a very material and a very operative word : but yet none will pretend that this clause should be expunged by reason of the omission of that single word. Then the next words are, *all my estate*. *Northwith Close*, *North Close*, &c., without either *in* or *and* ; which is likewise very imperfect : so that it must return to the words, *all my estate to my mother for life, and to my nephew Thomas Dodson after her death*. Now although the word *estate* may, in common speech, not mean an inheritance ; yet it is clear he has meant it so here : and then taking it in that proper legal sense it will be a complete dis-[162]-position of the whole : whereas, taking it to carry but an estate for life, there will be a chasm, an incomplete disposition ; since half must descend to this very *Thomas*, and the other half to the other co-heirs, as hath been before observed. In the Countess of *Bridgewater* and Duke of *Bolton's* case, 1 *Salk.* 236 ; *Abr. Eq. Ca.* 178, the devise of all his real estate *in* or *at* (I do not rightly remember which) *such a place*, was held to pass a fee. And I do not think there is any difference between the words *at* or *in* ; they, in my opinion, mean the same thing : the case of *Wilson* versus *Robinson*, 2 *Lev.* 91, and of *Burdet* versus *Burdet*, in 1732,

are very strong authorities for the plaintiff ; in the first of which the fee was held to pass by the words *tenant-right estate* ; and the latter was a devise of his particular estates at such and such a place ; which was held likewise to pass the inheritance. Nor did the provision in the end of that case, for payment of his debts, influence the construction ; but it was decreed upon the force of the first words. The same resolution was in that of *Barry and Edgeworth*, *Abr. Eq. Ca.* 178 (2 *P. Will.* 524, *S. C.*). All which are so many express authorities that the word *estate* carries a fee : nor hath any case been cited to warrant the altering the known legal signification of it. An objection indeed hath been made from the nature of the limitation ; and it hath been said, that although the word *estate* might in other cases carry a fee, yet it could not do so here, because applied, in the first instance, to an *estate* for life only ; and therefore was intended but as a description of the thing intended to pass : but that objection hath no weight in it ; for, although he gave it particularly to his mother in the first place, yet the devise to his nephew is in general words ; and I cannot see that the limitation for life, in the first instance, where the second limitation is general, can make any difference. Another objection has been made, that had he intended him an estate of inheritance, he would have given it him in the same words as he has limited it over upon his default of his taking his name : but this wording is so incorrect, that I think no great stress can be laid [163] upon it. What weighs with me, is the intent plainly appearing to pass the inheritance ; as is manifest from the other clauses of the will. Indeed as to the other lands, wherein the testator had not a fee, the words *my estate* pass only such an interest as the testator had ; if a fee, then a fee ; if but a chattel, then that only ; the operation of the words being according to the estate the testator hath in what he devises.

And so decreed (3) an estate in fee to *Thomas* the nephew.(4)

(1) *Sed vide* *Denn lessee of Gaskin v. Gaskin*, *Cowp.* 657, where, though the testator's intent appeared to be to give the whole interest in the estate devised by him, and had given a disinheriting legacy to his heir at law, the Court said they could not connect the *prefatory* with the *devising* clause. So *Right v. Sidebotham*, *Dougl.* 759, where no stress is laid upon the introductory clause of the will.

(2) *A.* begins his will with disposing of all his *worldly estate* ; and then wills that all his debts be first paid, and gives his wife a moiety of what is left after his debts paid : the question was, Whether a moiety of the real estate after debts paid, passed to the wife, or only half of the personal estate : *per cur.* *my worldly estate* comprises as well real, as personal : his worldly estate comprises all he has in the world. Without doubt those words subjected his real estate to the payment of his debts, and consequently a devise of a moiety of what is left, after debts paid, must comprise all that was liable to the debts : and therefore, decreed a moiety of the surplus of the real and personal estate to the wife.

(3) Note, the *Master of the Rolls* held that *Thomas* the nephew took only an estate for life ; but Lord *Talbot* varied the decree at the *Rolls*, and was of opinion *Thomas* had a fee. *Reg. Lib. A.* 1735, *fol.* 229.

(4) *Vide* *Bridgewater v. Duke of Bolton*, 1 *Salk.* 236. *Murry v. Wyse*, 2 *Vern.* 564 ; *Prec. in Chanc.* 264, *S. C.* *Chester v. Painter*, 2 *P. Will.* 336. *Barry v. Edgeworth*, 2 *P. Will.* 523. *Tanner v. Morse*, *post.* 284. *Goodwin v. Goodwin*, 1 *Ves.* 226. *Tufnell v. Page*, 2 *Atk.* 37. *Ridout v. Pain*, 3 *Atk.* 486. *Roe v. Blackett*, *Cowp.* 235. *Hogan v. Jackson*, *Cowp.* 299. *Loveacres v. Blight*, *Cowp.* 382. *Gaskin v. Gaskin*, *Cowp.* 687. *Frogmorton v. Wright*, 2 *Black. Rep.* 889. *Stiles v. Walford*, 2 *Black. Rep.* 938. *Goodright v. Allen*, 2 *Black. Rep.* 1041. *Right and Sidebotham*, *Dougl.* 789. *Maccree v. Tall*, *Ambl.* 181. *Holdfast v. Martin*, 1 *Term Rep.* 411. *Fletcher v. Smiton*, 2 *Term Rep.* 656.

[164] DE TERM. S. HILLARI, 9 GEO. II., IN CURIA CANCELLARIÆ.

Case 34.—Sir JOHN ROBINSON *versus* COMYNS.

7 Feb. [1736].

(1 Atk. 473, S. C.)

A. devises land to B. and his heirs, to the use of B. and his heirs, in trust to pay debts, and afterwards in trust for his grand-daughter C. (late wife of the plaintiff) and the heirs of her body, remainder to B. in fee, upon condition that he marry C., and gave him his personal estate in trust for C. until she attain full age; and made B. executor, and died. C. refused to marry B. and marries the plaintiff; and at full age she and her husband suffer a recovery of the premisses. The condition of the devise in fee to B. is dispensed with by the lady's refusal; but then that remainder is well barred by the recovery, without a fine, though the bargain and sale, whereby the tenant to the *præcipe* was made, were not inrolled till after the recovery was completed.

Robert Sheffield being seised of a real estate, and possessed likewise of a considerable personal estate, by will devised all his lands unto the defendant and his heirs, to the use of the defendant and his heirs, in trust for payment of his debts, and afterwards in trust for his grand-daughter *Mary* (the plaintiff's late wife) and the heirs of her body, remainder to the defendant *Comyns* and his right heirs, upon condition that he should marry the testator's grand-daughter; and gave him likewise his personal estate in trust for *Mary* until she should attain her age of twenty-one, and made the defendant his executor, and died soon after. The defendant brought a bill for perpetuating of testimony of the witnesses to the will; and in his bill, reciting the clause in *Robert Sheffield's* will, declared [165] himself ready and willing to marry the young lady; but she, by her answer, set forth her absolute aversion to the match, and utterly refused to have him; and soon after marrying the plaintiff, she and her husband (after she had attained her age of twenty-one) made a bargain and sale to J. S. in order to the suffering a common recovery; wherein her husband and she were vouched, and the uses thereof were to the issue of the marriage, remainder to her own right heirs; the lady died, leaving issue by the plaintiff two children; who set forth their right under the deed and marriage settlement, and insisted upon the defendant's remainder being barred by recovery.

This bill was brought against the defendant to have a conveyance according to the uses declared in the recovery.

Lord Chancellor. The first question is, what sort of estate the remainder in *John Comyns* is? Whether it be a trust, or a legal estate? It is observable, that the whole estate is given to the defendant and his heirs, to the use of him and his heirs; which is a complete disposition of the whole legal estate; and being in case of a will, would be so of the equitable interest likewise, unless the testator's intent appears to the contrary, as in this case it manifestly does; for, it is given in trust for payment of his debts, &c., and so far is a limitation of an equitable estate, the remainder of which (had the testator gone no farther) would, after the purposes served, return to the heir at law; as was determined upon Serjeant *Maynard's* will. But then there comes a remainder to the defendant and his right heirs, &c. It is true that the word *remainder* (properly speaking) signifies only a continuance of the same kind of estate as is before limited, which here was only a trust estate: for, when the whole legal estate is disposed of, and part of the equitable interest likewise, there the remainder must be an equitable remainder. In this case indeed it is not an absolute one, but conditional; which, when the [166] condition is performed, will vest the estate in him; and if the condition be not performed, it will then descend to the heir: the testator therefore has considered it as an equitable interest. And yet it is likewise true, that this equitable interest, when vested in the same person with the legal one, must, as to some purposes, be considered as a legal interest.

The next question is, whether the condition annexed to the defendant's remainder be a condition precedent or subsequent? And as to this, I am inclined to think it is a condition subsequent. There are no technical words to distinguish conditions precedent and subsequent; but the same words may indifferently make either according

to the intent of the person who creates it. In this case the precedent limitation was an estate tail in possession ; and therefore why shall we not say, that as to this remainder likewise, it was the testator's intent to have it vest immediately in the defendant ? The limitation is immediate, although the condition upon which it depends is subsequent. Whether the defendant hath broke the condition or not hath not been proved ; but from his answer, and some other things that have appeared in the cause, I am inclined to think it now dispensed with ; partly by the Lady *Robinson's* death, and partly by her declaration in her answer to the former bill, that she would not marry him ; and therefore the defendant's interest is now become absolute.

Another question has been made, whether the interest of the Lady *Robinson* and her husband was barrable by a recovery ? and if it was, whether it was well barred by this recovery without a fine ? It has been said, that a legal and an equitable interest cannot be incorporated together ; but that objection cannot affect this case : for, though the legal and equitable estates cannot be incorporated, yet the testator hath not limited an equitable estate, and then the legal estate, but hath at first given the whole fee. It happens indeed that the last part of [167] the equitable interest may be considered as merged by coming to one and the same person, who had the whole legal estate in him ; but it would be hard, that by coming to the defendant, although not absolutely (for the heir might, upon the condition broken, have taken the equitable interest out of him)—it would be hard, I say, that this should prevent their incorporation : I therefore think it an equitable estate in the defendant, as well as that which was in the Lady *Robinson*, and consequently that she and her husband had a power to bar it. Whether it hath been done in this case is next to be considered.(1)

It hath been said, that a feme tenant in tail and her husband (2) cannot make a tenant to the *præcipe* without a fine : but whatever may be the case where a husband is merely seised in right of his wife is not necessary for me to determine ; because in this case Sir *John Robinson* did, by his intermarriage, become intitled to an estate by curtesy ; and therefore he alone, without his wife's joining, might have made a good tenant to the *præcipe*. It has been also objected, that the bargain and sale, whereby the tenant to the *præcipe* was made, was not inrolled until the recovery completed : as to that, if the Lord *Hobart's* opinion, as cited some *Goldbolt's* reports, had been law, from judicial authority would certainly have followed it. If there be no inrolment, then the bargain and sale are void ; but if there be an inrolment within six months, then it is good by relation.(3)

And so decreed for the plaintiffs.(4)

See as to this point of relation *Hynde's case*, 4 Co. 70 b.

(1) *Vide North v. Champernon*, 2 Cha. Cas. 63, 78 ; 1 Vern. 13, S. C. *Beverley v. Beverley*, 2 Vern. 131. *Boteler v. Allington*, 1 Bro. Cha. Rep. 73. *Salvin v. Thornton*, Amb. Rep. 549. *Cruise upon Fines and Recoveries*, 241.

(2) Whatever doubts may have been formerly entertained whether a husband seised *jure uxoris* could make a tenant to the *præcipe* of his wife's land, for the purpose of suffering a common recovery, without the wife's joining him in a fine, it now seems to be a settled point that he can. Mr. *Cruise*, in his *Essay upon Fines and Recoveries*, p. 52, suggests that this doubt probably arose from an inaccurate statement in the report of Lord *Talbot's* argument upon that occasion, and states, from the authority of the late Mr. *Booth*, Lord *Talbot's* words to have been these : " If I should lay it down as a rule, that where the wife is entitled to an estate tail in possession, her husband and she could not make a tenant to the *præcipe*, for docking of the intail without a fine, because the law is supposed to appoint no other method, by which a woman under coverture can convey her freehold but by fine, I should shake many of the common recoveries of the kingdom ; for whatever may have been the practice of some over-cautious conveyancers, yet I believe it hath often been held, that the husband alone may by deed only, and without any fine levied by the wife, convey a sufficient freehold to the grantee to make him tenant to the *præcipe*." Mr. *Butler*, in a note on the first Institute, observes that Mr. *Booth's* statement of Lord *Talbot's* argument is confirmed by a manuscript report of the case of *Robinson v. Comyns* in his possession. *Vid. also Rolle's Abr. title Recovery*, (a) pl. 4. *Pig. Treatise of Com. Rec.* 72, whereby it is laid down that a husband, seised jointly with his wife, whether by moieties or entireties, or seised only in right of his wife, may create an estate of freehold during the coverture, and thereby make a good tenant to the *præcipe*.

(3) For although the freehold does pass not from the bargainor until inrolment, yet as soon as that is done, the freehold is considered as having passed from the bargainor at the time when the bargain and sale was executed by relation. *Cruise upon Com. Rec.* 88.

(4) The principal question in this case seems to have been, whether the remainder to the defendant *Comyns* was to be construed as the remainder of a *legal* or of a *trust* estate : for if it was a remainder of the *legal* estate, the recovery suffered by the *cestui que trust* could not operate so as to bar the *legal* remainder ; recoveries of that kind only operating on the *trust* estate whereof they are suffered, and the equitable remainders expectant thereon, but do not affect the *legal* estate. The Court considered the *legal* estate and use as having been wholly disposed of by the first part of the devise, and that no remainder could be in the defendant of that estate, which was clearly vested in him : but that as part of the *equitable* interest was likewise given to him, the remainder in question could be no other than an equitable remainder, which, if not disposed in the manner it was, would necessarily have resulted to the testator's heir at law. The intent of the testator, *viz.* " that the remainder should be considered as an equitable " one," appeared manifest to the court, for he gave it on a condition, which would be entirely defeated, if the remainder of the *legal* estate was held to vest by force of the first devise.

[168] Case 35.—ADAMS *versus* COLE.

8 March [1736].

The husband upon marriage (in consideration of his wife's fortune, computed at £500), agrees to yearly payments to her separate use, that she may dispose of £100 by will in his life-time ; that if she survive, he is to leave her £200, apparel, plate, &c. Part of her fortune was a bond of £200. The husband dies, having made his will, and the plaintiff residuary legatee, but had not recovered the £200 due on the bond ; then the wife dies : this bond shall go to the representative of the husband, he being a purchaser of it by the settlement on her.

John Lockyer upon his marriage with *Elizabeth Hody*, gave a bond to two trustees, reciting, that whereas by the said marriage he the said *Lockyer* should be greatly preferred in riches and substance to the value of about £500, and had agreed to pay her the yearly sum of £10 to her sole and separate use, as well during the coverture as being sole, without any controul from her intended husband ; and likewise that if she should die in his life time, that it should be lawful for her to dispose, by will, of the sum of £100, and all her wearing apparel, watch, rings, and jewels ; and that in case she survived him, then he was to leave her the sum of £200 and all her wearing apparel, plate, jewels, household goods, furniture, linen and woollen of all sorts, which she shall at her marriage be possessed of, to be at her sole disposal : and for the better securing the premisses, the said *John Lockyer* was upon request to settle lands of the yearly value of £12. Now the condition of this obligation is, that if the said *John Lockyer* should pay the said sum, and should (in case of his surviving her) permit her to make such will ; and if she survived him, would leave her the sum of £200 and all her wearing apparel, &c., that she should be possessed of at the time of her marriage, that then this obligation to be void.

Part of the said *Elizabeth's* fortune consisted in a bond debt of £200 given to her while sole ; then the marriage takes effect ; and *John Lockyer* the husband makes his will, and the plaintiff residuary legatee thereof, and dies, without ever recovering this bond debt of £200, then his wife dies.

[169] And the question was, whether this bond debt (being a chose in action, and never reduced into possession by him) should go to his representative, or to the representative of the wife, who survived her husband.

Mr. *Solicitor General* and Mr. *Clive* argued for the plaintiff, that although the husband hath by law no right to a chose in action belonging to the wife, unless reduced into possession by him during the coverture, according to 1 *Inst.* 351 *b.* yet that would not affect the present case, the husband here being a purchaser for a valuable consideration of all his wife's fortune, whether in action or possession, by force of the condition of his bond ; and cited the case of *Meredith versus Wynne*, (1) *Abr. Eq. Ca.* 70, *pl.* 15, although, as the Court observed, that case is quite different from this ; for, there the

husband survived the wife. And *Packer and Wyndham's case*, (2) *Precedents in Chanc.* 412.

Mr. *Fazakerley* insisted on the other hand for the defendant, that the husband could not be considered as a purchaser, the article reciting that he should be greatly advanced to the value of £500, and that if she survived he should leave her £200 besides her wearing apparel: and should the plaintiff's construction prevail, then she should not have even so much as was her own; and the husband would be a purchaser, not with his own, but with her money: so that here is no consideration moving from the husband to the wife. And where-ever the Court takes an advantage from the wife, which the law gives her, it must be upon some advantage redounding to her from her husband's estate, of which there was nothing here. Had there been any dowable estate, she must have been indowed notwithstanding this bond, and therefore no reason to bar her of this legal advantage; according to the resolution in *Lister and Lister's case*, (3) 2 *Vern.* 68.

[170] *Lord Chancellor*. Most of the cases where *choses in action* have been decreed to the husband's representative (he dying in the life-time of the wife) have gone upon the reason of equality, there being a settlement made by the husband on his wife, whereby he became a purchaser of her fortune; and therefore on the one hand, as she was to have the provision made by the settlement, so on the other he should have her whole portion. In this case indeed there is no settlement of any estate by the husband upon his wife, only a provision, that in case she should survive him, then he should leave her £200 and her wearing apparel, jewels, &c. So that it hath been truly said, that here is nothing moving from the husband; since the whole that she is to have will not amount to £500. But still is not this the agreement of the parties? Had he reduced it into possession during the coverture, it had been his absolutely: nay, he might have released it during the coverture. Indeed had there been no agreement, the law which gives her the chance of survivorship must have taken place: but she hath waived that chance by her express agreement of having so much at all events; and his departure from that absolute right which the law gave him over the whole, either by reducing into possession this debt or by releasing it, is of itself a sufficient consideration; the consequence of his not having this £200 would be, that he should be bound on the one side to leave her so much if she survived him, and she not bound at all. I think therefore that the husband's representative is intitled to this £200.

And so decreed for the plaintiff. (4)

(1) *Prec. in Chanc.* 312, S. C., where the wife's portion, charged by will on certain lands pursuant to a power in a settlement, was held to go to the administrator of the husband, and not to the administrator of the wife, they being both dead and the money not raised.

(2) In which case the wife's fortune, though the husband made no settlement upon her, was decreed to go to the creditors and representatives of the husband, and not to the representatives of the wife.

(3) Where the wife's fortune which consisted among other things of *choses in action*, and remained unaltered during her husband's life time, were held upon his death not to be liable to his debts, but the benefit thereof to survive to her, notwithstanding the husband had before his marriage settled a jointure upon the wife adequate to her portion.

(4) Upon the principle which governed the decision of this case, *viz.* "the express agreement of the parties," it seems to be generally admitted by a variety of determinations that a settlement made before marriage, if made in consideration of the wife's fortune, entitles the representative of the husband dying in his wife's life-time, to the whole of her *choses in action*; but if it is not made in consideration of her fortune, the surviving wife will be intitled to the *choses in action*, the property of which has not been reduced by the husband in his life-time; so if it is in consideration of a particular part of her fortune, such of the wife's *choses in action*, as are not comprized in that part, it has been said, survive to the wife, but that in all cases where a husband makes a settlement on his wife in consideration of her fortune, the wife's portion, though consisting of *choses in action*, and though there be no particular agreement for that purpose, shall be looked upon as intended for and purchased by him. *Blois and Martin v. Lady Hereford*, 2 *Vern.* 501. *Cleland v. Cleland*, *Prec. in Chanc.* 63.

Packer v. Windham, ib. 412; *Co. Litt.* 351, *Hargrave's ed. note* (1). And Lord *Hardwicke* is reported to say, that where the settlement made by the husband previous to the marriage, had not been *adequate* to the wife's portion, the Court has notwithstanding decreed the husband to be entitled to her portion, 2 *Atk.* 448, in the case of *Lannoy v. the Duke of Athol*, *vid. also Garforth v. Bradley*, 2 *Ves.* 677.

[171] Case 36.—FORT *versus* FORT and BLOMFIELD. [1736.]

A. devises the *residuum* of her personal estate, about £2000, to B. by her maiden name (not knowing her to be married), most of it being *South-Sea* Stock; her husband agrees to settle it in two trustees, in trust for husband and wife; and they transfer it to the trustees accordingly: there is a deed prepared, but not executed, as being objected to by the husband as not in pursuance of the agreement; and by letter he gives directions to prepare another: before that is done he dies; his wife administers; she shall have this *South-Sea* Stock, &c., in her own right, and not as administratrix to her husband.

Frances Witherley being possessed of *South-Sea* stock and other stock, to the value of £2000, by will dated the 14th of *December* 1732, devised some annuities, and subject to those annuities devised all the residue of her personal estate to *Bridget Fort* (the plaintiff) by the name of *Bridget Witherley* (her maiden name), and made her executrix of her will, and died: the plaintiff being sometime before the testatrix's death (but unknown to her) married to Mr. *Fort*, who thereupon agreed with the defendant *Blomfield* to settle this £2000, and put it into the hands of two trustees; one whereof to be nominated by him, and the other by his wife, in trust for husband and wife and the survivor: the husband and wife make a transfer of stock to the two defendants as trustees nominated by them both. *Blomfield*, the wife's trustee, draws a declaration of trust, and sends it into *Scotland* to *Fort* and his wife, to be executed by them; whereby this stock was to be settled upon the husband and wife for their lives, and for the life of the longest liver of them, then for the issue of the marriage; and if no issue, then for the wife, her executors and administrators: the husband refused to execute this declaration, apprehending that his wife would thereby be impowered to dispose of the stock during his life, in case they had no issue, and that she died before him; but by letter directed to the defendant *Blomfield*, he desired that the trust should be declared jointly for himself and his wife for their lives; and after their decease, then to their children, then to the survivor to take the whole: a declaration was accordingly drawn; but before it could be transmitted to the husband he died intestate without issue.

And now the question was, whether the defendants should be looked upon as trustees for the wife [172] as administratrix to the husband? (in which case the defendant *Fort* would be intitled to a moiety under the statute of distributions, he being father to her husband) or, whether they should be trustees for her in her own right?

Lord Chancellor. The testatrix has made the plaintiff executrix of her will, and residuary legatee thereof, by her maiden name, not knowing her to be married at that time; and it would be hard therefore to say this £2000 did vest absolutely in the husband, notwithstanding the case, 3 *Lev.* 403, that hath been cited; especially in the present case, where she is made executrix, and consequently chargeable with debts. But without entering minutely into the kind of right which the husband had to this stock, whatever it was, he had it singly through his wife, subject to the several agreements made for settling this stock: and it was very reasonable that it should be settled, the husband having made no settlement upon her. The first agreement between the husband and *Blomfield* was, that it should be settled so, as if they had no issue, the survivor of the husband and wife should take the whole, and that it should be put into the hands of two trustees, to be nominated by the husband and wife; who accordingly make a transfer of the stock to the two defendants as their trustees; then comes the declaration of trust drawn by *Blomfield*, and therein a new scheme of turning his money into land, which was never thought of before, and the proviso about the survivorship not at all observed; but instead thereof it is expressly said, that in case there be no issue of the marriage, it shall be to such uses as the wife shall direct: this declaration the husband positively refuses to execute, but by a letter to *Blomfield*, proposes

to have it settled according to the agreement, that is, that neither he nor his wife shall have power to dispose of it, but that it should go to the survivor; upon which another declaration of trust is drawn, but the husband is prevented by death from executing it, having before declared, that which of the two survived should have the whole: which shews [173] his intention of continuing in his former resolution: and nothing appears to shew any alteration of it. Taking it therefore in that light, I must consider the defendants as trustees, not only for the husband, but for him and his wife; otherwise, what necessity was there for their being nominated on both sides? it being antecedently agreed upon what terms this stock should be settled; the agreement was complete on both sides, and the subsequent transfer of the stock to the trustees must be taken in pursuance of that agreement: and not to convey away all the wife's right, which was settled by the precedent agreement to which this transfer relates, and is a completion of. I am therefore of opinion, that upon her surviving her husband, this stock is become her sole and absolute property.

And so decreed the defendants to be trustees for the wife in her own right. (See *Sir James Lowther v. Lord Charles Cavendish*, Amb. 356.)

Case 37.—HEARD *versus* STANFORD. [1736.]

[S. C. 3 P. Wms. 409; 2 Eq. Cas. Abr. 134, pl. 5. See *Bell v. Stocker*, 1882, 10 Q. B. D. 130; *Beck v. Pierce*, 1889, 23 Q. B. D. 320. See also Married Women's Property Act, 1882 (45 & 46 Vict. c. 75).]

The husband as such, is not chargeable in a court of equity any more than at law, with the debts of his wife after her decease; not even though he had a large fortune with her; as on the other hand he is, during the coverture, liable to all her debts, although he did not get a shilling with her.

The defendant's wife before marriage, gave a promissory note for £50 to the plaintiff, in consideration of five years service, at the rate of £10 *per ann.*, and afterwards married the defendant, who had a fortune with her to the amount of £700, part whereof consisted of things in action, some of which the defendant received as husband, and the rest he took as administrator to his late wife. The bill was for the payment of this note, upon suggestion of his having received a great fortune with her, and never having made any settlement upon her. The defendant insisted, that that part of his wife's fortune which was not reduced into possession by him during the coverture, and which he received after her death as administrator, was not near sufficient to pay her debts: and that he had already paid more than that part amounted to.

[174] The question was, whether the husband should be liable in equity to the payment of his deceased wife's debts; and the fortune he had received with her should be looked upon as equitable assets? it being clear, that at law he is chargeable only during the coverture, and no longer.

For the plaintiff was cited the case of *Freeman versus Goodham*, 1 *Chan. Ca.* 295, where, upon a bill brought against the husband for discovery of goods bought by the wife before marriage, which after her death came to his hands, the Lord *Nottingham* said, he would change the law in that point. And also that of *Powell versus Bell*, *Abr. Eq. Ca.* 60, pl. 7.

Lord Chancellor. The question is, whether the husband, as such, be chargeable for a debt of his wife's after her death in a court of equity? As on the one hand the husband is by law liable to all his wife's debts during the coverture, although he did not get one shilling portion with her, and that her debts should amount to £2000, or any other sum whatever; so on the other hand it is as certain, that if the debt be not recovered during the coverture, the husband is no longer chargeable as such, let the fortune he received with his wife be never so great. The case perhaps may be hard, but the law hath made it so, that it may be equal on both sides, as well where the husband is sued during the coverture, for a debt of his wife's, with whom he had no fortune, as where he by her death is discharged from all her debts, notwithstanding any fortune he may have received in marriage with her; so is the law, and the alteration of it is the proper work of the Legislature only. There are instances indeed in which a court of equity gives remedy where the law gives none; but where a particular remedy is given by law, and that remedy bounded and circumscribed by particular

rules, it would be very improper for this Court to take it up where the law leaves it, and extend it farther than the law allows. Besides, if relief was to be given [175] in this case, it would be very unreasonable not to extend it to the former case, where the hardship lies on the husband, which was never yet done. There is a case which may, and probably does happen very often, that comes very near to this. Suppose goods are sold for a certain price to a person, who just after the delivery, and before the price paid, becomes a bankrupt, and these very goods are vested in the assignees; the vendor can come in but as a creditor for his share; and can neither pretend to have the price agreed, nor pursue the goods in the hands of the assignees; and yet this is a hardship upon him, but not such as is relievable here. In the case of *Freeman* versus *Goodham*, the goods never came to the husband's hands until after the wife's death; which made it a very hard case upon the creditor, and probably occasioned the saying of my Lord *Nottingham*: but even there he only over-ruled a demurrer, put into a bill for a discovery of the goods; and it does not (1) appear what became afterwards of the cause. And in that of *Powell* versus *Bell* the wife was administratrix of her first husband, and it did not appear what she had in her own right, and what as administratrix of her husband; in which case the marriage is no gift in law of the goods which she hath in *auter droit*: and upon this reason only are founded all the cases where a surviving husband has been charged with his wife's debts after her death.

And so decreed an account of what the husband had received since his wife's death as her administrator; and that he should be liable for so much only: but as to any further demand against her dismissed the bill. (3 *P. Will.* 410, S. C. *The Earl of Thomond* v. *Earl of Suffolk*, 1 *P. Will.* 470, S. P.)

(1) In 3 *P. Will.* 411, note, the case of *Freeman* v. *Goodham*, and the proceedings therein are thus stated; "Upon searching the Register Book, it appears that in the case of *Freeman* v. *Goodland & c.* (not *Goodham*) the defendant had married the testator's widow, who had bought goods of the testator's executrix; that after the widow's death, the executors bringing their bill (*inter al'*) to be satisfied of these goods, the defendant demurred; which demurrer was on the 18th December 1676, overruled by the Lord Chancellor; that afterwards on the hearing of the cause the 2d of December 1678, the defendant insisted that his wife had a property in these goods at the marriage, which were part of her portion; but nevertheless to avoid further trouble, and in case an assignment of some leasehold estates mentioned in the cause were made to him (though he was not liable by law so to do), yet, by his counsel he offered to pay for the goods," whereupon the decretal order runs thus: "That the defendant *Goodland* do pay to the said executors the sum of £350 reported due to them on account of the said goods, according to his offer aforesaid." So that there being a decree in consequence of the defendant's offer, here appears to be no express determination in the point; however it is very probable that the defendant perceiving which way the opinion of the Court inclined on arguing the demurrer, was induced to make the abovementioned offer. [See *Cas. T. Talb.* 295.]

[176] Case 38.—STREATFIELD versus STREATFIELD. [1736.]

[See 1 *Wh. & T. L. C.* (7th edn.) 416. *Cooper* v. *Cooper*, 1874, L. R. 7 H. L. 63; *In re Vardon's trusts*, 1884, 28 Ch. D. 129; *In re Lord Chesham*, 1886, 31 Ch. D. 473.]

The ancestor by articles previous to his marriage, agrees to settle certain lands to the use of himself and his intended wife, remainder to the issue of the marriage, in the usual manner. He makes a deed, not pursuant to the articles, and has a son and two daughters; and upon the marriage of his son settles other lands, in consideration of this last marriage, in the usual manner; and levies a fine of the former lands to the use of himself in fee; and then makes his will, and devises part of the former lands to his two daughters, and the rest of his real estate to trustees, to the use of his grandson for life, with usual remainders; and with direction, out of the profits, to educate the grandson; and to place out the rest of the profits, to be paid to the grandson at twenty-one years of age; and if he does not attain that age, to be paid to his said daughters, their executors, &c. The grandson is not to be bound by the deed, which did not

pursue the articles ; but then he shall make his election when he comes of age ; and if he choses to take lands, which ought to have been settled, the daughters (his aunts) shall be reprised out of the lands devised to him.

Thomas Streatfield, the plaintiff's grandfather, by articles previous to his marriage, May 31, 1677, agreed to settle lands in *Sevenoake* to the use of himself and *Martha* his intended wife, for their lives and the life of the survivor : and after the survivor's decease, to the use of the heirs of the body of him the said *Thomas* on his wife begotten, with other remainders over. The marriage soon after took effect, and by deed, dated April 5, 1698, reciting the foresaid articles, he settled his lands at *Sevenoake* to the use of himself and his wife for their lives, and the life of the longest liver of them (without impeachment of waste during the life of *Thomas*), and after their decease, to the use of the heirs of the body of the said *Thomas*, on the said *Martha* to be begotten, and for want of such issue, remainder to the right heirs of *Thomas*. They had issue *Thomas* (their only son) and two daughters, *Margaret* and *Martha*. In the year 1716, upon the marriage of *Thomas* the son, the father settled other lands (of which he was seised in fee) of the yearly value of £355 to the use of his son for life, remainder to the daughters of the marriage, remainder in fee to the son, with a power to raise £2000 for younger children. And the son's death, *Thomas* the father, in the year 1723, levied a fine of the lands comprised in the deed of 1698, to the use of himself in fee, and in the year 1725, made his will, and thereby devised part of those lands to his two daughters *Margaret* and *Martha* ; "And also all other his manors, messuages, lands, tenements, and hereditaments whatsoever, either in possession, reversion, or re-[177]mainder not therein before given or disposed of, situate in the counties of *Kent*, *Surrey*, or elsewhere, to trustees, in trust for the plaintiff *Thomas* his grandson for life, remainder to his first and other sons in tail male, remainder to his daughters in tail, remainder to *Margaret* and *Martha*, with several remainders over" : [then comes this clause] "And my will and meaning farther is, and I do hereby authorise and appoint the trustees, and the survivor of them, to receive the rents and profits of the said estates to them devised, and out of the same to allow and expend, for the education of my grandson *Thomas*, so much as they shall think fit during his minority ; and that the trustees shall place out at interest such monies arising out of the rents and profits of the said estates ; which said monies, with interest arising therefrom, my will is, be paid to my grandson *Thomas* at his age of twenty-one years, if he so long live ; or, in case he dies before that age, then that the same shall be paid to my two daughters *Margaret* and *Martha*, their executors, &c." The testator died in the year 1730.

The question was, whether the settlement in 1698, was a proper execution of the articles of 1677 ? and if not, whether the general devise to the plaintiff should be taken as a satisfaction for what he was intitled to under the articles of 1677 ?

Mr. *Solicitor General*, Mr. *Brown*, Mr. *Fazakerley* and Mr. *Noel* argued for the plaintiff, that although in a will or articles executed, *Thomas* the grandfather would have been tenant in tail, yet the articles of 1677, being but executory, this Court would interpose, by carrying them into execution in the strictest manner, and not leaving it in his power to destroy the uses as soon as raised. That according to that rule the deed of 1698 was certainly no execution of the articles in equity ; for, though it was in the very words, yet did it not at all answer [178] the intent of the articles, and came therefore within the rules of *Trevor* and *Trevor's* case, *Abr. Eq. Ca.* 387. (1 *P. Will.* 622, *S. C.*)

That the settlement in 1716, upon *Thomas* the son's marriage (although it was of lands of greater value than those contained in the articles) could never be thought a satisfaction for them, there being no reference at all in it to the articles, and it being made only in consideration of the son's marriage, and for settling a jointure upon his wife, and making a competent provision for the issue ; all which are new considerations no way relative to the articles : and where there is an express consideration mentioned in a deed, there can be no averment of another not contained therein.

That nothing could be taken for a satisfaction but what was in its nature agreeable to the thing which was to be done, was held in *Lechmere* and *Lady Lechmere's* case (*ante*, 80). But in this case *Thomas* the son was by the articles to have been tenant in tail ; but by the settlement 1716, he was to be but tenant for life, which was giving him a less estate for a greater, and consequently not to be deemed a satisfaction without a special acceptance of it as such, according to the rule in *Pinnel's* case, 5 *Co.* 117, where it is held that payment of a lesser sum can never be a satisfaction for a greater, unless upon

a special circumstance shewing the intent ; as payment at an earlier day, &c. That the will could no more be taken for a satisfaction than the settlement, and upon the same reasons ; for, by it the plaintiff is no more than tenant for life, and even that not absolutely, the profits being directed by the testator to be accumulated until the plaintiff attains his age of twenty-one, and then to be paid to him ; but if he dies before that age, they are given away to the testator's daughters ; and when he does arrive to that age, he is to be but barely tenant for life, and even not that without impeachment of waste ; besides, if the will be construed a satisfaction as against the [179] plaintiff, so it must likewise be as to all the others claiming under the articles ; whereas the plaintiff's sisters, who were intitled under the articles, can never take any thing under this will, but are wholly excluded.

The general devise of all his manors, lands, &c., *in possession, reversion, or remainder*, will not alter the case ; for, where the testator hath estate sufficient to satisfy such general words, he shall never be construed to have intended to pass that which he had no right to dispose of, and the giving of which would work a wrong. That he had no right to dispose of the lands contained in the articles is evident from what hath been already said : and had not this been upon his own marriage, but in any other settlement, he had been a trustee for his son, and then had made his will in the same words that he hath done here, surely that trust-estate would never have passed ; and there is no difference whether the trust be expressed, or whether it arises by implication of equity. It would be an absurdity to construe these words to pass away a third person's estate. A *grant of all one's goods* will not pass those which he hath in *auter droit* : so if he had had a mortgage in fee, such general words would not have passed it from the devisee of the personal estate, to the devisee of the land. In *Rose and Bartlett's case*,⁽¹⁾ *Cro. Car.* 292, a general devise of *all his lands and tenements*, having both freehold and leasehold, was held to pass the freehold lands only. And in *Harwood and Child's case*, heard by the present Lord Chancellor, March 18, 1734, a devise of all his lands for payment of debts, having both freehold and copyhold, but no surrender made of the copyhold to the use of his will, was held not to pass the copyhold. Nor can the cases of *Duffield versus Smith*, 2 *Vern.* 250 ; *Noys versus Mordaunt*, 581, be objected ; for, in the former the decree was reversed, upon account of the sister's being heir at law, and disinherited ; which is the present case : for, here they would take a beneficial interest from the plaintiff ; who was heir at law to his grandfather, and give him but a very small one in its room ; and in the latter case, the father [180] being tenant in tail of part, had power to bar it by fine ; in which respect he might well be looked upon as a proprietor of the whole : but if he be decreed to make his election, it must be done presently, for then it is that he is to take : whereas he cannot by law make his election, being but an infant ; and if so, the Court must compel him to that which the law disables him from doing.

Mr. Attorney General, Mr. Strange, and Mr. Peer Williams argued for the defendant, that this Court will not, in all cases whatever, decree a specific performance ; but would, in some particular cases, leave the party to his remedy at law upon the covenant ; that these articles were made so long ago as in 1677, and Thomas the son, who was the person intitled to have them carried into execution, lived until 1722. Forty-five years after, without ever desiring to have them executed ; and that the intent of those articles did not seem to go any farther than the settling the jointure on the wife, and the making Thomas the grandfather tenant in tail, the words being *to provide for the wife*, but no mention made of the issue ; but whoever comes into equity must do equity ; and therefore if the plaintiff would take advantage of those articles, he must make a compensation for it out of the will, which gives him an estate upon a plain supposal that he shall take nothing by the articles ; but shall never be at liberty to take a great benefit under the will, and waive that part which makes against him, to the prejudice of a third person : the whole will must be acquiesced under, or no part of it at all, according to the resolution in *Noy's* and *Mordaunt's case* ; which went upon the reason of an intire compliance with the testator's intent in taking intirely under the will, and not upon the supposed reason of his being proprietor, by having it in his power to levy a fine. The like resolution was in the case of *Hearne versus Hearne*,⁽²⁾ 2 *Vern.* 555, in that of *Cowper versus Cotton*, February 16, 1731, at the *Rolls* ; where a freeman of London devised his estate to trustees for the raising £6000 for his four daughters, and made [181] a disposition of the surplus, and held that they should stand either by the will or by the custom, and if by the former, that they should not defeat the devise over. That in cases where general words in a will had been restrained from passing all which the testator had, it

hath been upon the testator's intention manifestly appearing in the will itself, not to pass so much as the generality of his words would comprehend ; but in the present case, his intent plainly appears to pass all : nor will that intent be satisfied by saying, that he had a reversion of the lands comprised in the articles ; since he would have been tenant in tail under the articles, and only for life under the will.

Lord Chancellor. It cannot be doubted, but that upon application to this Court for the carrying into execution the articles of 1677, the Court would have decreed it to be done in the strictest manner, and would never leave it in the husband's power to defeat and annul every thing he had been doing : and the nature of the provision is strong enough for this purpose, without any express words ; and I must therefore consider what was the operation of the deed of 1698, which is declared to be in performance of the true intent and meaning of the articles. If it be so, all is well ; but if it be not, it only shews that the parties intended it so, but were mistaken. So was the case of *West v. Erissey* [1 Bro. P. C. 225, 2d ed.], where the articles were by the *House of Lords* decreed to be made good ; and the same must be done in this case, if nothing intervenes to prevent it. The settlement in 1716, whereby the grandfather settled other lands upon his son's marriage, has been called a satisfaction for those articles ; but to me it appears neither an actual satisfaction, nor to have been intended as such. The grandfather had done that in 1698, which he apprehended to be a satisfaction for the articles ; but this deed proceeds upon considerations quite different from those of the articles, the persons claiming under this being purchasers for a consideration intirely new, the limitations being entirely different ; and therefore it would be absurd to call this a satisfaction for another thing it hath nothing [182] to do with, and to which it is no way relative. The next thing to be considered is, the fine levied of the lands in question in the year 1723, by the grandfather : the intent whereof was, to have the absolute ownership of those lands in him : and one reason why no application hath been made till now, to have those articles carried into execution, might be, that during the grandfather's life no body was intitled to any thing in possession under them. Then comes the will in 1725, whereby he gives part of those lands settled in 1698, to his daughter ; thereby shewing his apprehension to be, that by a fine he had given himself a power of disposing of them : and it would be a very strained construction to say that he intended this, not as a present devise to his daughters, but to take effect out of the reversion of the lands comprised in the articles. The next thing is the devise to the trustees for his grandson the plaintiff, upon his attaining the age of twenty-one ; and the question here is, whether the general words shall ever pass lands not capable of the limitation in the will ? And to that have been cited *Rose and Bartlett's case*, *Cro. Car.* 292, and other cases ; but they cannot influence the present case : for, the testator had legally a power to dispose of those lands ; and though they might be affected with a trust in equity, yet that cannot be supposed to lie in his conuzance, he having done an act to enable himself to dispose of these lands. And it differs from the case that was put of an express trust, and the trustee devises *all his lands* ; for, there the trustee cannot be ignorant that the lands which he holds in trust are not his own. But what makes his intent clear is, that he hath devised part of these lands to his daughters, and he must have looked upon himself as master of the one part as well as the other ; I therefore think his intent was clear to pass these lands by the will ; and if so, we must now consider what will be the effect of this will. If the plaintiff has a lien upon the lands of the articles, then he may stand to them if he pleases ; but when a man takes upon him to devise what he had no power over, upon a supposition that his will will be [183] acquiesced under, this Court compels the devisee, if he will take advantage of the will, to take intirely, but not partially under it ; as was done in *Noy's and Mordaunt's case* : (3) there being a tacit condition annexed to all devises of this nature, that the devisee do not disturb the disposition which the devisor hath made. So are the several cases that have been decreed upon the custom of *London*. The only difficulty in the present case is, that what is given to the plaintiff is precarious, nothing being given to him if he dies before twenty-one, and if after, then but an estate for life ; and that he appears before the Court in the favourable light of being heir at law : but this will not alter the case. The estates which the testator has given him were undoubtedly in his power ; he hath given them to trustees until his grandson attain twenty-one, and has disposed of them in such a manner as that there can never be any undisposed residue to go to the plaintiff as heir at law ; and surely it is as much in the power of the Court to make this bequest, thus limited, to be a satisfaction, if the party

will stand to the will, as in the other cases. Indeed if he takes by the will, there is nothing to make satisfaction to his sisters for their general chance under the articles ; but that is because nothing is left them by the will ; and they cannot be said to be quite destitute of provision, since it is just and reasonable that they should be maintained by their mother, who is intitled to a large and ample provision by her marriage settlement : nor can what is devised to the plaintiff be looked upon as intended by the testator to go towards the maintenance of younger children ; for, if the plaintiff dies before twenty-one, then all the profits already received are to go to his aunts ; and so by that construction I must take the maintenance out of their estate, and oblige them to contribute to the maintenance of distant relations, *viz.* nieces, at the same time that the mother (who hath an ample provision) would be left at large, and under no tie of maintaining her own children.

And so decreed the plaintiff to have six months after he comes of age to make his election, whether [184] he will stand to the will or the articles ? And if he makes his election to stand to the latter, then so much of the other lands devised to him as will amount to the value of the lands comprised in the articles, and which were devised to *Margaret and Martha*, to be conveyed to them in fee.(4)

(1) The authority of which case has been referred to, and acknowledged in *Day v. Trigg*, 1 P. Will. 286. *Davis v. Gibbs*, 3 P. Will. 26 ; by Lord *Hardwicke* in *Chapman v. Hart*, 1 Ves. 271. *Knotsford v. Gardiner*, 2 Atk. 450. Also in *Pistol v. Richardson*, in B. R. Hill. Term, 1784 (reported by Mr. *Cox* in his note (1) upon *Addis v. Clement*, 2 P. Will. 459). *Sed vide Turner v. Husler*, 1 Bro. Cha. Rep. 79, in which case Lord Chief Baron *Eyre* (in the absence of the Lord Chancellor) though reported to say, he did not mean to deny the authority of *Rose v. Bartlett*, determined, that by a devise of lands, tenements, and *tythes* (the testator having *tythes* in fee, and likewise *tythes* by *leases perpetually renewable*), the leasehold as well as the freehold *tythes* passed.

(2) Where A. by marriage articles agrees to leave his wife £800 and her jewels, &c., but it is declared that notwithstanding the articles she should not be debarred of any thing he should give her by will. A. by will makes a disposition of his whole estate, and gives his wife £1000, decreed, the wife must either waive the articles, or the will, and not claim the benefit of both.

(3) 2 Vern. 581, S. C., where A. having two daughters B. and C. devises fee simple lands to B. and lands which were settled upon him in tail, to C. Held, if B. will claim a share of the intailed lands under the settlement, she must quit the fee simple lands, for the testator having disposed of his whole estate amongst his children, what he gave them was upon an implied condition they should release to each other.

(4) In this, and many other cases of the same nature, the Court of Chancery has proceeded upon a principle of regard to the end and consideration of the settlement, and the intent of the trusts, as the same were in the original contemplation of the parties : and accordingly in the decreeing the execution of marriage articles or trusts in strict settlement (where the articles by legal construction give an estate of inheritance to husband and wife) the Court has been necessarily obliged to have recourse to a construction beyond the legal operation of the words, in which the articles or trusts are expressed. *Jones v. Laughton*, 1 Eq. Cas. Abr. 392, pl. 2. *Trevor v. Trevor*, 1 P. Will. 622. *Cusack v. Cusack*, 1 Bro. Parl. Cas. 470 [2d ed. 5 Bro. P. C. 116]. *Nandick v. Wilkes*, 1 Eq. Cas. Abr. 393, c. 5. *Honor v. Honor*, 1 P. Will. 123. *Roberts v. Kingsley*, 1 Ves. 238. *Legg v. Goldwire*, ante, 20. *Burton v. Hastings*, Gilb. Eq. Rep. 113. *West v. Erissey*, 2 P. Will. 350 [2d ed. 1 Bro. P. C. 225]. *Hart v. Meddlehurst*, 3 Atk. 371. *Powell v. Price*, 2 P. Will. 535.

Case 39.—WARRINGTON versus NORTON. [1736.]

A commission of bankruptcy issues against H. at eleven o'clock in the morning ; at three in the afternoon the commissioners declare him a bankrupt, and execute an assignment at six, and then have notice that he died at one o'clock that day ; this a *dealing* within the act of parliament, and the proceedings shall stand.

A commission of bankruptcy was taken out against one *Hughes*, and upon the 9th of February 1730, at eleven o'clock in the morning the commissioners met, and proceeded to declare him a bankrupt, and the declaration was signed by them between three

and four o'clock in the afternoon, and the assignment of the bankrupt's goods executed at six ; at which instant the commissioners had notice that the bankrupt died that day at one in the afternoon ; which was the first notice they had of his death. The bankrupt having before his death devised all his real and personal estate for the payment of his debts, the plaintiff, who was a creditor, brought his bill against the defendant as assignee under the commission, for an account of such goods of the bankrupt as had come to his hands ; to which the defendant pleaded the commission and the proceedings under it. The question was, whether this was such a *dealing* under the commission as was within 1 J. 1, cap. 15, sect. 17, the words whereof are ; "*That where after any commission of bankruptcy is dealt in by the commissioners, the offender happen to die before distribution, that nevertheless they may in that case proceed in the execution of the commission in such sort as they might have done if the offender was living.*"

Mr. Attorney General, Mr. Fazakerley, and Mr. Forrester argued for the defendant, that the meeting in order to declare him a bankrupt, was a sufficient *dealing* within the statute ; and that the assignment hath a relation to the bankruptcy : that when the commissioners assign, it is from the act of parliament, and not from themselves ; for, they have no [185] interest vested in them ; but it is the operation of the act which gives them right in the thing, but none at all in the person of the bankrupt ; so that his death cannot be material : and the law giving no right over the person, but only a power of calling him a bankrupt, it must be in pursuance of the commission, and therefore that examination was a dealing within the statute ; that by law there can be no spitting a day ; as a lease made to commence from *henceforth*, takes in the day of the date, although executed at the very last moment : and in *Shelley's case*, 1 Co. 93, the recovery was held good, although the party died the same day, because it was a legal proceeding. That the laws against bankrupts were not at all to be considered as penal, but as remedial laws, and as such were entitled to the most favourable construction, according to the rule laid down in *Heyden's case*, 3 Co. 7. And therefore if any construction could be made more beneficial for the creditors than another, that one was to be admitted as founded upon natural justice, and upon that best of rules, *jus suum cuique tribuere* ; that in these cases the law itself hath provided how it shall be construed ; for, by 21 J. 1, cap. 19, sect. 1, it is enacted, that all the statutes which were theretofore made against bankrupts, and for the relief of creditors, shall be in all things beneficially construed for the relief of the creditors of the bankrupts ; so that the law itself directs a beneficial construction to be made for the creditors ; and when a law does by express provision enact how construction shall be made, the clause so directive of construction is of the same force and authority as any other part of that law.

Mr. Solicitor General and Mr. Broune argued on the other hand, that these laws were rather penal than remedial, the party being therein called an offender, &c., which he does not appear to be until he is declared a bankrupt, and that declaration is the *dealing* meant by the statute ; for, till then, there can be no proceeding upon the commission properly so called. *Shelley's case* is quite different ; for, recoveries being common assurances, the law favours them, and does not enter into any inquiries about [186] the particular minute of the day the party died upon. Had this law not been made, the commissioners could not have proceeded after the bankrupt's death ; and the words of the statute seem to mean that he should be declared a bankrupt first.

Lord Chancellor. The plaintiff, if contented to come in under the commission, will be intitled to the benefit of it : but his intent seems to be, to set aside all the words of this *Statute* of 1 J. 1 ; it looks as if some doubt had been conceived, whether the party's death determined the commission ? The former statutes being, that they should seize his body, which they could not do when the party was dead ; but it was always clear, that no commission could be taken out against a man after his death : then (whatever might occasion the doubt) comes this statute, which says, that when the commission had been *dealt in*, &c. ; what is a *dealing* in it is the question ?

Indeed I know no particular act, as distinct from another, which can be called a *dealing*. It has been said, that the declaring him a bankrupt was the act meant ; but that declaration of the commissioners being only discretionary and for caution, and not at all binding to any body, it is not probable that the act should intend that only to be a *dealing*, which it hath not any where given the commissioners power to do ; whatever is done in pursuance of the commission is a *dealing* in it if never so minute ; and the rather, for that these being remedial laws, are to be beneficially construed in favour of the creditors. I cannot therefore put a narrow constrained

construction upon the words *dealt in*, in order to overthrow this commission, and all the just right of the creditors claiming under it.

The plea was allowed. (*Reg. Lib. A. 1735, fol. 188.*)

[187] Case 40.—LOWTHER versus CARLETON.

7 April [1736].

(2 *Eq. Cas. Abr.* 685, S. C. 2 *Atk.* 242, S. C.)

A man by marriage articles agrees to settle a church lease upon himself and wife, and the issue of the marriage; he afterwards sells it to a stranger, who had no notice of the marriage articles; the executors of this vendee fell to *B.* who had full notice of the marriage articles, and took a collateral security of the executors for the better assuring his title. *B.*'s purchase shall stand good against the plaintiff, who claims under the articles.

A Church lease of twenty-one years, obtained by the plaintiff's grandmother, was, upon the marriage of his father and mother, surrendered to the dean and chapter of *Carlisle*, and a new one for the same term granted to the plaintiff's father and mother, which by articles was agreed to be settled on them for their lives and the life of the survivor, and then upon the issue of the marriage; the father and mother afterwards surrendered this new lease, and a new one was granted to a stranger, to whom the father had mortgaged the second; the last lease was afterwards purchased by the late Marquis of *Wharton*, who did not appear to have any notice of the marriage articles. The defendant purchased the Marquis of *Wharton*'s title of his executors; who upon the purchase gave him a collateral security for the better assuring his title: but previous to this purchase the defendant had notice of the marriage articles, which were shown to him by his own father; and now the plaintiff brought his bill to be let into possession of this leasehold estate, and praying that the defendant might be considered as a trustee for him.

The defendant pleaded his purchase, and confessed the notice; but principally insisted upon the Marquis of *Wharton*'s purchase without notice, whose title was now in him.

Lord Chancellor. Had this bill been brought against Lord *Wharton* himself, and he had pleaded that he was a purchaser without notice of the articles, the plea would have been good; he having the law on his side, and having both law and equity, the Court would not take it from him: and as the Court would not have given any relief against him, so neither would it against his executor; for, if the [188] plaintiff's title had not been good against the Lord *Wharton* himself, it would not be so against his executors; and therefore his death is not material. Had the defendant paid nothing at all for his purchase, yet the plaintiff could not prevail against him; because, though he were but a voluntier, yet he claims under a purchaser without notice, who hath barred the plaintiff's right, and all the purchaser's right is now devolved upon him.

Indeed it hath been objected, that the defendant is a purchaser without notice under the Lord *Wharton*: but because he is so, shall he be in worse condition than a voluntier or executors claiming under Lord *Wharton* would have been? A voluntier claiming under a purchaser for a good and valuable consideration without notice, would have a clear and absolute right; and shall not the defendant have it also, because he is a purchaser with notice of the plaintiff's title? As the Lord *Wharton* had a right of enjoying it, so he had of aliening it: and when he had so done, his alienee hath the same right that he himself had. Nor can the defendant's taking a collateral security, make his case the worse; for, though he might be relieved against the Lord *Wharton*'s executors upon that security; yet what relief can they have where the testator was a fair and honest purchaser.

The executors, upon some doubts arising in the purchaser as to the title, gave him a collateral security; but why should they be liable to make satisfaction out of this security, when if they had kept the term in their own hands, it would never have been taken from them by the plaintiff? The security being given only to satisfy the purchasers' doubts, shall never return to their disadvantage. If the Lord *Wharton* can be affected with notice, then all will be overturned: but if he cannot, the defendant's plea will be good. I remember a case where a purchaser, with notice, aliened to one

who had no notice ; and there, although the court would not affect the purchaser without notice, yet it being a fraud, the vendor (who was the purchaser with [189] notice) was decreed to make satisfaction to the plaintiff. (*Vide Harrison v. Forth, Prec. in Chan.* 51. *Brandlyn v. Ord*, 1 Atk. 571.)

And so allowed the plea.

Case 41.—ROLT *versus* ROLT.

10 April [1735].

A. settles his estate to his sister B. for life, remainder to her second and other sons in tail, &c., and gives her a power with the consent of C. her husband, and for C. surviving B., to charge it with a sum not exceeding £12,000 for their children ; and if they or the survivor of them do not appoint the provision, then £2000 each to be raised for younger sons, and £3000 each for daughters, at their ages of twenty-one, with interest at £5 *per cent.* for their maintenance to commence from the time of the appointment ; and if no appointment, then from the death of the survivor of B. and C. And if any of the younger children die before their shares become payable, the same to go to the survivors. A. dies, C. dies, leaving four younger sons and two daughters : one of which died an infant soon after her father ; then B. dies without making any appointment, the whole £14,000 shall be raised, and carry interest only from the death of B.

Mr. Baynton being seised in fee of a considerable estate, and having no children, by indenture January 19, 1715, covenanted to suffer a recovery of all his lands, to the use of himself for life, then to his wife for life, then to the issue of their bodies ; and for want of such issue, in trust for his sister Anne Rolt for her sole and separate use during life ; and after her death, if Edward Rolt her husband should survive her, to permit him to receive the clear yearly sum of £1000 during life, and afterwards to Edward Rolt (eldest son (in the Reg. Book he is stated to be the second son) of Edward and Anne) for life, with remainder to his first and other sons, with like remainder to Thomas, and all the other sons of Edward and Anne. Then comes this proviso : " Provided also that it shall and may be lawful to and for the said Anne Rolt, with the consent of the said Edward Rolt her husband, and for the said Edward Rolt her surviving, from time to time, by sale, mortgage or otherwise, charging the premises, to rise and secure such sums of money not exceeding in the whole the sum of £12,000 as the said Anne, notwithstanding her coverture, shall, with the consent in writing of her husband, think fit, and for the said Edward Rolt her surviving, as he shall think fit, for the maintenance and portion of any of the children of them the said Edward and Anne, born or to be born ; and if the said Edward and Anne his wife, or the survivor of them, shall not appoint in what proportion such their children shall be [190] provided for, then all the parties to these presents are agreed that £2000 a-piece shall be raised and payable to each such younger sons, and £3000 a-piece for the daughters of the said Edward and Anne ; and if there shall be but one daughter, then £6000 for such only daughter, at their ages of twenty-one years, with interest for the said several sums after the rate of £5 *per cent.* for their several respective maintenances until their respective portions shall become payable ; and such maintenance to begin from the time that shall be appointed by the said Edward and Anne his wife, or the survivor of them ; and in case no such appointment, then from the death of the survivor of them the said Edward and Anne his wife : then comes a provision, that if any of the younger children die before their respective shares become payable, then the share of such child so dying shall be equally divided amongst the surviving children."

Mr. Baynton died soon after without issue, and then, in the year 1722, Mr. Rolt died, leaving issue by his wife four younger sons and two daughters, Elizabeth and Anna Maria, which last died an infant soon after her father's death ; and in the year 1734 the mother died, having never charged the lands with the £1200 or any other sum for the younger children's provision, nor given any direction in what manner or proportion they should be provided for, some of the children having attained their age of twenty-one in her life-time.

The questions were, first, whether, there having been no appointment made by the father or mother, the sum of £12,000 only should be raised pursuant to the power

given to them ? or, whether the whole sum of £14,000 should be raised pursuant to the clause, which in default of appointment, gives £2000 to each younger son, and £3000 to each and every daughter, there being four younger sons and two daughters, one of whom died an infant in her mother's life-time ? The second question was, whether such of the children as attained their ages of twenty-one in their mother's life-time, should have [191] interest for their portions from that time, or only from the time of their mother's death ?

Lord Chancellor. The first question is, how much shall be raised for the younger children, whether the whole sum of £14,000 or only £12,000.

By the first clause it is clear, that no more than £12,000 was to be raised ; but the doubt arises upon the second clause, whereby particular sums are provided for each younger child in case no appointment be made by the father or mother, which hath not been done ; and by the number of younger children the particular sums provided by this clause amount to £14,000. This second clause indeed is not an independent clause, but subsidiary to the first : in case the first does not take effect, then this second is to prevail, whereby he hath made a certain direct charge of £3000 for each daughter, and £2000 for each younger son, without any provision (as there is in the first clause) that the whole shall not amount to more than £12,000.

In the first clause, where he delegates the power of charging, he thought it proper to confine that discretionary power given ; but where he was to charge the estate himself, as by this second clause he does, there was no reason for him to confine his own discretion : and if so, can a court of equity (where there are six younger children, and the estate well able to bear the charge) seek for a foreign intention to take away their bread ? The question, whether *Anna Maria*, who died in her mother's life-time, be such a daughter as can be said to have any interest in this sum of £3000 depends upon the construction of the deed, whether it was a certain charge before, or not until the mother's death ?

The power of appointment is not given to the husband and wife jointly, but to her to be exe-[192]cuted with her husband's consent : which shews that he intended that she might execute it during her coverture ; and in case the husband should survive her, then there is an express provision that he might execute it ; but in case she survived her husband, as she did, it is not so clear by this clause, whether by the first gift of the power to her, he intended to enable her to execute it during the coverture only, but under the control of her husband ? or, whether she might execute it after her husband's death ? This I say is not clear by this clause ; but the other clause of maintenance makes it so, and proves his intent to be, that it might be done either way : for, it says appointed by the survivor ; and therefore the taking it in the first sense would be taking away the effect of the words : whereas in all cases the construction must prevail which makes the whole consistent ; and where there are plain and ambiguous words, those that are ambiguous and doubtful must give way to such as are plain and obvious. By the first clause, such children only can be considered as entitled to any share under the power of appointment, as were living at the survivor's death ; but no appointment having been made, it stands upon the second clause, which is a direct charge upon the land of £2000 and £3000 for each daughter.

The next question is about the interest, from what time it shall be payable ? And I am of opinion, that although the payments were to be at twenty-one, yet no certain interest vested in any of the children until the survivor's death : and although some of them attained their ages of twenty-one in their mother's life-time ; yet all being contingent until the survivor's death, no interest can be due but from the time of the happening of the contingency.

And so decreed the whole £14,000 to be raised, and interest from the mother's death only. (*Reg. Lib. A. 1735, fol. 212.*)

[193] DE TERMINO PASCHÆ, 9 GEO. II., IN CURIA CANCELLARIÆ.

Case 42.—BRADLEY *versus* POWELL.

24 May 1736.

[See *Remnant v. Hood*, 1860, 2 De G. F. & J. 411.]

A. the father, and B. the eldest son resettle an estate, to the use A. for life as to part, then to trustees for two hundred years, to raise £1100 to be paid to the second son within six years after A.'s death, or as soon after as the same could be raised, and in the mean time interest from A.'s death, for and towards his maintenance, remainder to B. the eldest, &c. C. died indebted, and two years after him A. died; from whom a good estate came to B. The creditors cannot have this portion raised, the contingency upon which it was payable never happening.

John Powell being tenant for life, with remainder to *Henry* his eldest son in tail, they two agreed to resettle the estate, and a recovery was accordingly suffered to the use of *John* the father for life as to part, then to trustees for two hundred years, upon trust to raise £1100 to be paid to *Richard Powell* (the second son of *John Powell*) within six years after the death of *John*, or as soon after as the same could be raised, and in the mean time interest from the death of *John* the father, after the rate of £5 *per cent.* for and towards his maintenance until the portion be paid to him, remainder to *Henry* the eldest son for life, and to his first and other sons in tail, &c. *Richard* the second son died considerably indebted leaving no assets, after having attained the age of forty-five years; and two years after *John* the father died, by whose death an [194] estate of £700 *per ann.* came to *Henry* and from him to his son the now defendant.

The bill was brought by the creditors of *Richard* against the defendant and the trustees, to have the £1100 raised and applied towards the payment of his debts: the defendant *Powell* insisted, that *Richard* dying in his father's life-time, the portion could not be raised, not being transmissible to his representative, but shall merge in the land for the benefit of the defendant, who was heir at law.

Lord Chancellor. It has been doubted whether this settlement was to be considered as voluntary? But I think it was made upon a good and valuable consideration, and that the parties are purchasers under the recovery suffered by the father and son, and therefore *Richard* is to be considered as a purchaser for the £1100 in question. But the main point is, whether this £1100 is to be looked upon as a portion? And I think it must be considered in that light, it moving from the father, and being intended by him as a provision for his child. The rule of portions sinking in the land where the party dies before the term out of which they are to arise, comes into possession, hath not always held without exception; as appears from *Butler and Duncumb's case* (*ante*, 122-3 (cited), and 1 *P. Will.* 448, S. C.), 2 *Vern.* 760, where the words were *from and after the commencement of the term*, and therefore the portion not payable during the life of the father and mother, the term not being yet commenced; but yet the Court enabled the husband and wife to raise money upon the interest by way of mortgage; which was, to consider it in some sort as already vested. So in that of *Broome versus Berkley* (*ante*, 123 (cited)), *Abr. Eq. Ca.* 340, notwithstanding the portions were decreed not to be raised immediately; yet they were considered as transmissible interests. The same in *King and Wither's case* (*ante*, 117, 122) in the *House of Peers*. In all these cases the limitation was, that the portions should be paid them at such a time, as upon marriage, or at such an age; and the intent of the parties was plain, that upon either of these contingencies hap-[195]-pening the child should be intitled to the portion, although it was contingent; since a contingent interest is transmissible, and a future provision may well be looked upon as a consideration for marriage. In the present case, the term and the trust are not to arise until the father's death; but no particular time is limited for the payment of the £1100, but barely within six years after his father's death, and not made payable to him, his executors and administrators, &c., but barely to him, with a provision, *that from the father's death £5 per cent. shall be raised for and towards his maintenance*; which looks as if the intent was to postpone the vesting until the death of the father; since the £5 *per cent. for and towards his maintenance* can never be raised by them to that purpose, when he died in his father's life-time.

This first act which the trustees are to do, *viz.* That of providing for his maintenance, necessarily supposes him living at his father's death; and where the interest is contingent, as it is in the present case, it is most conformable to reason to consider the principal as contingent likewise.

But if the construction should be otherwise, the term, by the express words of the trust, can never cease; it being to endure *for and towards his maintenance until the portion be paid unto him*; which it can never be, since he died in his father's life-time.

I therefore think the whole was contingent, principal as well as interest; and that it differs from the case of *Broome versus Berkley*, and of *King versus Withers* (*ante*, 117), for that in those cases marriage ensued, which was one of the times appointed for payment; but here the £1100 is limited to be paid to him within six years after his father's death, without any other limitation; and he dying in his father's life-time, the contingency hath never happened; and the portion must therefore sink for the benefit of the owner of the real estate.

And so dismissed the bill.(1)

(1) Lord *Talbot*, in his argument of this case, admits some exceptions to prevail against the general rule, *viz.* "that charges upon land, payable at a *future* day, shall not "be raised where the party dies before the time of payment": but he endeavours at a distinction between the present and the cases in which those exceptions are found to prevail; for in the latter he considered the intent of the parties to be manifest, *viz.* that the portion although contingent, shall be raised, whenever the contingency happened (as marriage, arising at such an age, &c.), which was to precede the raising of the portion, and was the cause of it. In the present case, he observed, the trust is not to arise until the father's death, and no particular time limited for payment of the £1100, but barely within six years after the death of the father, without any further limitation; and *Richard* dying in his father's life-time, consequently the contingency, which was to entitle him to the payment of the £1100, never happened, and therefore he thought the portion must sink for the benefit of the heir. Lord *Hardwicke*, however, in giving judgment upon the case of *Tunstall v. Brachen*, inserted in 1 *Bro. Cha. Rep.* 124, observes he had a great opinion of Lord *Talbot's* judgment, but yet, if he had then heard that case (*Bradley v. Powell*), he should not have been of that opinion, for he thought it a very hard case. *Vide King v. Withers, ante*, 117, and references.

[196] Case 43.—HUNTER *versus* MACCRAY.

27 May [1736].

Though *England* and *Scotland* be now one kingdom, yet the writ of *ne exeat regno* has not been altered since the union. It was originally a state writ. Q. Whether in the common form and security given thereupon, it can restrain the party from going into *Scotland*?

A motion was made before the Lord Chancellor, that a *ne exeat regno* might be so framed as to prevent the defendant from going into *Scotland*, upon affidavit made that he was soon going to reside there, and that he had confessed, that as trustee for the plaintiffs under their father's will he had received the sum of £10,000. The common order had been made at the *Rolls* for a *ne exeat* to issue (upon a petition there preferred) and marked for £10,000 bail; and this motion was now made upon an apprehension, that as the writ was only to restrain him from going out of the realm, it could not restrain him going into *Scotland*, which by the union is now the same Kingdom, and yet as effectually out of the reach of process of the court as any other foreign part which is of the king's allegiance.

His Lordship asked how they would have it altered? and what authority he had to alter an original writ? especially as this writ was not originally intended to aid the process of the court, but was a mandatory writ, to prevent the king's subjects from going (1) into foreign countries to practise treason with the king's enemies? and he seemed to think, that this case must have happened since the union; and yet he had never known, nor heard, that any attempt had been made to alter the writ: and he said, that perhaps there was no foundation for the doubt, whether the common writ

would not prevent the defendant from going into *Scotland* as well as any of the king's other dominions out of the reach of the process of the court.

Mr. *Hamilton* informed the court that something of this kind had been moved, in one *Mitchel's* case, in the Lord *Cowper's* time; who seemed to think that the writ extended to *Scotland*, notwithstanding [197] the union, and did nothing in it. The registers likewise said they never knew any other than the common order made. His Lordship considered whether he might not direct that the sheriff should take security, that the defendant should not go out of that part of *Great Britain* called *England*; but as such an order might be liable to objections as, whether the defendant might go into *Wales*? Whether it would be necessary to give the same direction in every other case as well as in the present? And whether it would not be countenancing an objection, which otherwise, perhaps, would not be of any force? He said, that it was dangerous to alter old established forms, (2) and therefore would make no order in it; but left the parties to proceed in the old beaten path. (*Reg. Lib.* 1735, fol. 407.)

(1) For the use to which this writ was originally applied, vide *Bacon's Tracts*, 295. *Ex parte Brunker*, 3 P. Will. 313.

(2) *Sed vide Done's* case, 1 P. Will. 263, where it was granted to prevent the party from going to *Scotland*, and also for a defendant against a co-defendant. Lord *Harcourt* considering the party by flying into *Scotland* to be out of the jurisdiction of the court, and consequently out of the reach of the process of it.

[198] DE TERM. S. TRINITATIS, 10 GEO. II., IN CURIA CANCELLARIÆ.

Case 44.—SCARTH *versus* COTTON.

5 July [1736].

An estate conveyed in trust to be sold to pay incumbrances, the residue in trust for the grantor and his heirs; upon a bill brought by another creditor against the trustees and heir, who was a minor, and the heir answering that the parol ought to demur during the minority, because (as to the residue) it was only assets; it was ordered accordingly, although the infant's counsel would have waived it as prejudicial to the infant.

A bill was brought by the plaintiff, as a bond-creditor, against the defendant as trustee of the estate of one *John White* (who had in his life-time conveyed it to the defendant, in trust to sell all or so much of the same as would be sufficient to pay his debts, and the incumbrances charged upon it, and then in trust for his own right heirs) in order to have the estate sold, the prior incumbrances paid off, and then to be paid his debt out of the residue. The daughter and heir, who was an infant, was also a defendant; and she, by her answer, insisted, that being an infant, the parol ought to demur; because that although it was a trust for paying off incumbrances which then affected the same, yet as to the residue, it was only assets.

The Lord Chancellor thought it was so, and that there was no difference between legal and equitable assets: and although in this case it would be to the [199] infant's prejudice to take advantage of the law, because the interest would out-run the rents and profits of the estate; yet, it being mentioned in the pleadings, he said he could not avoid ordering it, although the counsel would have waived the objection. And so an order was made to take an account of what was due to the plaintiff; but all proceedings to stay until the defendant came to age, and the plaintiff to pay all parties their costs, except the infant, and to have them again out of the estate. (*Vide Viner, Abr. tit. Infant*, letter (Q). *Creed v. Colville*, 1 Vern. 173. *Davison v. Goddard*, Gilb. 66. *Chaplin v. Chaplin*, 3 P. Will. 368. *Uvedale v. Uvedale*, 3 Atk. 117. See *Reg. Lib. A.* 1735, fol. 518.)

Case 45.—GALLEY *versus* BAKER.

3 July [1736].

A building lease is made of church-lands, by a deceit put upon this court by the lessor ; who takes a large fine from the lessee, though nothing of that was mentioned in the proposal laid before a master : the executor of the lessor was decreed to refund this money, to be laid out in a purchase for the benefit of the successors ; but the lease was allowed to stand good, because it did not appear that the tenant was privy to the imposition upon the court.

The Dutchess of *D*—— being seised in fee of a house and gardens in *St. Giles's* in the Fields called *Whitehouse*, upon the 7th of *April* 1662, made a lease of the premises to the then archbishop of *Canterbury* and other trustees, for the benefit of the rector of the parish and his successors, for the term of ninety-nine years ; and afterwards by her will, dated *November* 2, 1668, reciting the lease directed her heirs to convey, from time to time, as the rector of *St. Giles's* and his successors should direct, declaring her intent to be, that the said house should remain as a dwelling-house for the said rector and his successors for ever, as a free gift by her. There was at her death, a lease for lives subsisting, which determined in 1681, when the late archbishop *Sharp* was rector ; who finding that the house was so old and ruinous that it could not conveniently be made an habitation for the rector ; and thinking it would be more for the advantage of him and his successors to let out the ground on a building-lease, at a reserved rent, came to an agreement with one *Boswell* to let him a lease for forty-one years, at £11 *per ann.* to build houses on : and a bill being brought by *Boswell* to have this agreement carried into execution, it was decreed by the Earl of *Nottingham*, that a lease should be made, with covenants to build ; and a lease was accordingly made the 27th of *February* 1682, by Dr. [200] *Sharp*, and the heir of the duchess, and the surviving trustee of the term.

Boswell laid out a considerable sum, and built sixteen good houses ; and his lease expiring at *Michaelmas* 1720, when the late Bishop *Barker* was commendatory rector of *St. Giles's*, the Bishop, in the year 1724, brought this bill, setting forth all the former proceedings, and suggesting that the houses were so ruinous that it was necessary to rebuild them, which nobody would undertake unless a building lease could be obtained for a long term, and prayed it might be enquired under what rents and covenants it was proper to have such a lease granted ; the Court thereupon sent it to a master, who reported that the parties proposed to let a lease for sixty-one years, and to improve the rent from £16 to £20, and made it appear that the houses were ruinous, and that it would be for the benefit of the rector to have such a lease made with proper covenants : which the Court accordingly ordered, and a lease was made *June* 22, 1725, but in it there was no covenant to rebuild, only in case where any was necessary to be pulled down : and it appeared by the evidence that the bishop had taken £600 for a fine of the lessee : but nothing of it appeared upon the lease : in fact, the houses wanted a great deal of repair, but not to be rebuilt ; nor was any one of them rebuilt, but about £700 laid out in repairs, the rents being now £167 *per ann.*

This bill therefore was brought by the plaintiff the present rector and immediate successor to the bishop, against the bishop's executor and against the lessee, either to avoid the lease, as obtained by fraud upon the court, and on a contract injurious to the successor, or to have the £600 with interest from the bishop's death, for the benefit of the successor, the present rector.

Lord Chancellor. There was not the least suggestion to the Court that the bishop intended to [201] take a fine, or make any private advantage ; but only a desire of having it inquired how the end of the trust might be best answered.

In his proposal to the master he says, that notwithstanding the inconvenience he hath been at for want of a rectory house, yet, provided he may have leave to make a lease, he is willing to do it ; which is said to be a suggestion that he intended to take a fine. It might be a dark intention, and shews skill in imposing upon the Court, but cannot make the case the better. Affidavits were laid before the master, that the houses would fall of themselves if not speedily taken down, which was the inducement to the Court to make a final decree, and thereby give leave to lease ; and the present bill is not to set aside the former decree, nor can it be done by original bill, except in

case of apparent fraud ; nor is the decree wrong in itself ; but it hath not been rightly pursued, and a wrong use hath been made of it in the carrying it into execution.

According to the decree there should have been no fine, and there should have been proper covenants. If there had been no fine, the bishop would never have agreed to this lease at the rent of £20 *per ann.*, and if the facts had been known to the Court, it would never have ratified the lease : this therefore is what the present bill is brought to rectify. The questions are, first, as to the lessee who does not appear until 1725 (being no party to the former cause), when he was told that the bishop had power to make such a lease, he looked no farther back than the decree ; he saw the power that the bishop had, and it does not appear that he had a great bargain : so that it seems too hard to set aside his lease, and the rather because part is sold, and the repairs have been great. But secondly, as to the bishop, I have no doubt but the £600 ought to be considered as a part of the trust from which it flowed, and ought to be repaid with interest at £4 *per cent.* to the present rector, from the death of [202] the bishop.

And so decreed the £600 to be laid out in a purchase for the rector and his successors, and until such purchase made, to be laid out on security in trustees' names, and the bishop's executors to pay costs out of his assets ; but as against the lessee dismissed the bill without costs. (*Reg. Lib. A. 1735, fol. 342, by the name of Galley v. Sharplesse.*)

Case 46.—STAPLETON *versus* COLVILLE.

10 July [1736].

[See *Trott v. Buchanan*, 1885, 28 Ch. D. 451.]

A. devises his lands to B. his wife for life, chargeable with two annuities for life, and with a legacy of £1000, and gives B. power to raise by sale or mortgage of any part, such a sum as would be sufficient to pay his debts due at his decease ; and then reciting the great satisfaction he had of his estate's having continued long in his name and family, and his desire to perpetuate both, as far as might be, he devises all his real estate, after his wife's death to his nephew C. for life, remainder to the sons of C. successively in tail, &c., upon condition of their taking his name and arms ; and then gives all his personal estate to his wife, and makes her sole executrix ; she shall take the personal estate free from the debts of the testator ; it shall not be applied in exoneration of the real.

Mr. Colville, by will, devised his lands to his wife for life, chargeable with the payment of two annuities for the lives of the annuitants, and likewise with a legacy of £1000, and gave her a power to raise, by mortgage or sale of any part of the inheritance, such a sum as would be sufficient to discharge the debts he should owe at the time of his death ; and then reciting the great satisfaction he had of his estate's having continued so long in his name and family, and the great desire he had to perpetuate, as far as he could, his name and estate, he devises all his real estate (after his wife's death) to his nephew Robert Lupkin for life, remainder to his first and other sons in tail, &c., upon condition of their taking and using the name and arms of Colville for ever : and then, in the close of his will, he gives all his goods, chattels and personal estate to his wife, and makes her sole executrix.

The question was, whether the wife should take the personal estate exempt and discharged from the payment of debts ? or whether the personal estate should not according to the general rule be first ap-[203]-plied. It had been decreed at the *Rolls*, that the charge should be entirely upon the real estate, and the wife to have the personal estate to her own use.

Mr. Attorney General, Mr. Solicitor General, Mr. Verney and Mr. Hamilton argued, that by the known and general rule, the personal estate was the proper fund for payment of debts ; and that it hath been always held, that where there are no words in a will to exempt it, either particularly or by necessary implication, it shall be applied first ; and whenever it hath been held otherwise, that hath only been to satisfy the testator's intent, who being master of the whole may give and dispose of it in what manner he pleases ; as in the case of a devise to trustees to sell for payment of debts, &c. But where the debts are only charged upon the estate, the personal estate must be first applied, according to the distinction in *Wainwright and Bendlow's case*, 2 Vern. 718 (*Prec. in Chanc.* 451).

That in this case the clause whereby he hath disposed of his real estate, was to be considered but as auxiliary to that whereby he hath disposed of his personal estate ; and whether the devisee of his personal estate takes as executor, or in any other manner, both law and equity make him but as a trustee for the creditors, who have the best right to it : and although the testator makes both real and personal estate the fund for payment of his debts, yet there shall be no average ; but the real estate shall be chargeable only in case of deficiency of the personal. So where the personal estate is devised to one who is made executor, unless there be particular words to exempt the personal estate, it shall pass to the devisee but as executor, and consequently applicable in the first place ; according to *Cutler and Cozeter's case*, 2 Vern. 302, and *French and Chichester's case*, 2 Vern. 568, the last of which is a very great authority, being warranted by the opinion of the Lord Keeper *Wright* and the Lord *Cowper*, who both decreed the personal estate to be first applied, notwithstanding that the trust-estate was expressly [204] and directly charged with payment of debts. So in *Harewood and Child's case*, heard by the present Lord Chancellor, August 13, 1734, where the words were, " I devise all my manors to A. and B. and their heirs, in trust that they and their heirs, out of the rents and profits, or by lease, or mortgage, or sale thereof or any part thereof, shall raise so much money as I shall owe at my death ; and after payment of my debts, and reimbursing themselves, upon farther trust that they and their heirs shall stand seised of such part of the premises as shall remain unsold to and for such persons and uses as the manor of C. is already settled ; and if any money remains after payment of my debts, it shall be paid to my daughter, and such as are intitled to the said manor by the limitation aforesaid." He had already given the manor of C. to his daughter in tail, with remainder to his nephew ; and then he gave all his personal estate, of what nature or quality soever, to his daughter, whom he made executrix ; and it was held, that notwithstanding this express devise to the trustees, the personal estate should be first applied in discharge of the real. The like was decreed in *Bromhale and Wilbraham's case*, at the *Rolls* (the decree in which case was afterwards affirmed by Lord Chancellor *King*, *vid. post*, 274), about four or five years ago, where the testator devised in the following words, *viz.* " All my personal estate, of what nature, kind or quality soever, I give to my sister A. whom I make my executrix, and all my real estate, of what kind, nature or quality soever, I give unto my two sons B. and C. chargeable with my debts." It was held at the *Rolls*, and afterwards by Lord Chancellor *King*, that the personal estate should be first liable. And the same had been before decreed in the case of Lord *Gray* versus Lady *Gray*, 1 Chan. Ca. 297, and that of *Mead* versus *Hide*, 2 Vern. 120. In the present case there is no devise to trustees for payment of debts ; but a beneficial interest is given to the wife for life, with a power to raise, by sale or mortgage of the inheritance, such a sum as will be sufficient for the payment of his debts ; which was intended only to enable her to dispose of the inheritance in case of necessity, but not at all to take it [205] out of the common rule ; being no more in effect than charging the real estate ; which could be charged only by one of the two means chalked out by the testator. Indeed without this particular power, the wife being but tenant for life, could neither sell nor mortgage the inheritance ; but that can be no objection, since in case of a deficiency of the personal estate the inheritance would still be liable, although she had no power of charging it. Besides, the devise to his nephew after his wife's death, evinces the testator's intent to be, that the real estate should not be chargeable but upon deficiency of the personal, it being upon condition that his nephew shall take his arms ; which always implies the testator's intent to give the devisee as large, beneficial and great estate as possible to perpetuate his name and family ; and was one of the reasons for decreeing a fee simple to the devisee in *Ibbetson* and *Beckwith's case* (*ante*, 157).

Mr. *Browne*, Mr. *Fazakerley* and Mr. *Idele* insisted on the other hand, that upon the whole frame of this will the testator's intent clearly appeared to give his personal estate to his wife, exempt from the payment of his debts ; and that all the cases cited on the other side did but evince the general rule, without governing the present case, which was quite different from every one of them all. The directions given in respect of his debts, are contained in the clause whereby he disposes of his real estate, and with that clause he hath closed every thing in regard to his debts ; the devise of the personal estate standing sole and single, without any thing therein relating to the payment of his debts. And when an express devise is to be controlled by implication, it must be such an implication as is absolute and necessary ; whereas in this case the testator's intent plainly appears, to give his personal estate to his wife absolutely

without any charge; having used no words which, either by themselves, or by any implication, can denote an intent in him that the personal estate given should be charged with his debts; and since he hath not, neither this nor any other Court can narrow his ex-[206]-pressions so as to make the disposition different from what he intended it to be. Had he intended the charge to lie upon the personal estate, he needed only to have charged the real estate in aid of it; but would never have been so exact in describing the particular manner in which the real estate should be made chargeable with his debts, as he hath been in his creating this power; which if it is not considered as a beneficial power given to the wife in order to ease her own estate, can never have any effect: and it is not at all to be compared with an authority given to trustees to sell; there being a very great difference between such bare general powers to a third person to sell, or do some other act, and such a particular beneficial power as the present one; which, when given to a person to do a thing that is and will be advantageous to him, is to be considered in the same light as if the giver himself had done that thing; particularly in the case of a wife, as it is here. The devise of the personal estate is *all his goods, chattels, &c.*, by which words, unless a part can be taken for *all*, she must take the whole personal estate discharged from any outgoings; for, the word *all* implies it; since though as to the creditors the personal estate cannot be looked upon as *his* after his death, yet between legatees and devisees, it is as much his, and to be looked upon as such after his death as during his life. And in all the cases where the intent has clearly appeared to discharge the personal estate, it hath made no difference whether the devise was to charge the real estate only, or to sell it. According to *Bamfield* and *Wyndham's* case, *Precedents in Chan.* 101, where the devisee of the personal estate was almost in the same words as here, and which though decreed upon the reason, that if the personal estate should not be exempted, nothing would be left for the wife, yet seems likewise to have gone upon the words of the devise themselves. So in the case of the *Attorney General* and *Barkham*, decreed in this Court about two years since, where the testator devised in the following words, *viz.* "For the just and true performance of this my last will, [207] and for the payment of all my debts, I give and devise all my real estate; and as to the personal estate, which at the time of my death I shall be possessed of and intitled unto, I give the same unto my executor and executrix herein named, to defray my funeral charges and expences; and if my personal estate shall fall short to discharge the same, then the remainder to be paid to my executors out of the first rents and profits of my real estate, as they shall become due after my decease until payment be made of all my legacies, debts and funeral expences as aforesaid; and if there be any surplus of my personal estate, that then my executors pay the same to my dear and loving wife": and held in this case, that the personal estate should go to the wife discharged from the payment of debts. The cases of *Harewood* versus *Child* (*ante*, 204 (cited)), and of *Broomhall* versus *Wilbraham* (*ante*, 204 (cited)), are very different from the present case; for, in the first the daughter was to take the whole either way, whether as real or personal estate; and therefore the doubt there could only be with regard to the representatives. And in that of *Broomhall* versus *Wilbraham*, had the real estate which was devised to the sons been charged with the debts, the sons would have had nothing at all; and the testator's sisters, who were the devisees of the personal estate, would have run away with the whole; so that the question being between the testator's own children and his sisters, it was natural and just to construe the intent in favour of his children, and to lay the load on the personal estate. But what clearly evinces the testator's intent in the present case is, that the annuities, legacies and debts are all in one and the same clause; and the personal estate being as much the proper fund for the payment of legacies as debts, and the legacies being particularly charged upon the land, and coupled and joined with the power given for sale of part of the inheritance for payment of his debts, shews he intended no difference between them. The annuities likewise are given in the same clause; and it can never be pretended that the annuities were designed by him to [208] issue out of the personal estate. Then comes a separate distinct clause, whereby he disposes of all his goods, chattels, &c., without any reference to the former, or any thing that looks like an intent of burdening the personal estate with the debts: but those being particularly provided for by a former clause with the legacies and annuities, must be considered as designed by him to issue out of the same fund, and his intent as to all three to be one and the same.

Lord Chancellor. The single question for the judgment of the Court is, whether

the personal estate shall or shall not be liable to the payment of the testator's debts ? What the *quantum* of the debts, or the amount of the personal estate was at the testator's death, does not appear ; if it did, it would give a great light into this matter. Indeed it is not absolutely in the testator's power to take the personal estate from the creditors : but he may substitute another fund in the room of it ; and if so, this Court will take care that right be done to all parties, as well the devisees of the personal as of the real estate. The testator's intent must govern the construction of his will, and that intent must be collected from the will itself. In case where the real estate is charged with payment of debt, and an executor appointed, as in *Wainwright* and *Bendlow's* case (*ante*, 203 (cited)), there is no room to doubt of the testator's intent ; for, it is no more than charging his real estate for the better security of his creditors in case of a deficiency of the personal ; but can never be intended an exemption of the personal estate for the benefit of the executor. A difference hath been taken between the bare charging of the real estate, and a devise to sell : but I think, that in equity a charging of the real estate is almost equal to a devise to sell ; since the Court will, upon the necessity of a sale, order it so : and in *Wainwright* and *Bendlow's* case the testator's intent appeared to have the whole converted into money ; and therefore that case does not seem to me to weigh much either [209] way. It hath also been said, that where the executor is named in the same clause, the nature of the personal estate is not altered ; but it still remains liable to the debts ; and some cases have been so decreed : but although that reason may have some weight, yet do not I think it sufficient for the exoneration of the real estate : and unless I was acquainted with the particular circumstances of *French* and *Chichester's* case (*ante*, 203 (cited)), wherein the book seems deficient, I can never form any judgment from it ; since if the reason given in the book for it be the only one, I cannot say that it gives me intire satisfaction, nor can I lay any great stress upon it ; and the rather because there is a plain difference at law between the bare making an executor, and the making him likewise legatee of the personal estate, as it is in the present case ; for, in the first instance, if the executor dies intestate before probate, the representative of the testator is intitled to the administration ; whereas in the latter, there being an express gift to him, he takes as legatee, and consequently upon his death his representative would be intitled to it ; an interest being vested in him, in his own right, in the one case, but nothing at all in the other, until he hath converted it. In the case of *Harewood* versus *Child* (*ante*, 204 (cited)), the opinion of the Court was founded upon the completion of the will, which, being taken together, manifested the intent to be, that the daughter should take the personal estate liable to the payment of his debts, she herself being devisee of the whole ; and it would have been absurd to imagine the testator to have intended his personal estate to be exempt from the payment of his debts, when he had expressly provided that the surplus of the produce of what should be raised out of the real estate should go to the very same person, who was devisee in tail of the real estate. In that of *Broomhall* versus *Wilbraham* (*ante*, 204 (cited)), the real and personal estates were pretty much of the same value, and the debts must have exhausted the one or the other fund ; so that had the judgment of the Court been otherwise, the man's children would have been left without any provision. And in that of *Mead* versus *Hide* (*ante*, 204 (cited)), there [210] was an executor, but without any express gift made to him. But in *Bamfield* and *Wyndham's* case (*ante*, 206 (cited)), the determination was in favour of the wife, that she should take the personal estate exempt from the debts ; and there she was made executrix in the same clause : although indeed there be another reason given in the book, of the debts amounting to more than the personal estate. In that of the *Attorney General* versus *Barkham* (*ante*, 206 (cited)), the testator had laid the charge upon the real estate, and then taking up his personal estate, mentions particular things which he chargeth it with ; so that the surplus there meant, must be the surplus after the particular charge which he had there specified ; and therefore this case, being very particular, must stand upon its own bottom and reason, and cannot be compared to the present one. All those cases depended upon the intent plainly appearing, as this must do likewise. After the gift of the annuity and legacies wherewith he hath charged his real estate (wherein I do not think that the using the words *charging* or *chargeable*, will make any difference, since they are used indifferently) he gives his real estate to his wife for her life ; and although it does not necessarily follow that the coupling both together, shews he intended both to be payable out of one and the same fund, the personal estate being the proper fund for debts, though no provision had been made by the testator ; but the annuities having none but what is particularly provided for them, yet that must have some weight.

Then comes the power given to the wife, which seems to me very clearly to manifest the intent, that she should take what he hath given to her by his will to her own use. For, his intent being to carry down and perpetuate his estate in his name and family, can it be supposed, that having given his wife the whole power over his personal estate, by making her executrix, he would likewise give her a power of disposing of so much of the inheritance (and consequently of defeating the devise to his nephew, not of so much as the personal estate should [211] prove deficient, but of what should be necessary for the payment of his debts), unless he had intended her the personal estate absolutely to her own use, clear and discharged from the payment of his debts? His intent seems clear to give her this power of disposing of so much of the inheritance as would satisfy his debts, in order to secure her the full enjoyment of her estate for life, and of the personal estate, free from all charges whatsoever.

And so affirmed the decree in behalf of the wife.(1)

(1) *Reg. Lib. B.* 1735, fol. 417. In the decision of cases upon this subject, the Court seems to have adopted for the ground of its determination the distinguishing circumstances of each, without any direct reference to any general principle as applicable to them all, admitting however the general rule of the Court to be, *viz.* that the personal estate is the primary fund for the payment of debts, and will be so applied in the first instance, unless where the testator by express words, or by plain and manifest implication has exempted the personal, and directed the real estate to bear the burden of his debts: it therefore necessarily follows that in every case of the kind, the principal question must be, whether from the very words used by the testator, or by plain and necessary inference, the intention of the testator to exonerate the personal estate can be satisfactorily collected. *Wainwright v. Bendlowes*, 2 Vern. 718. *Bampfild v. Popham*, *Prec. in Chanc.* 101. *Adams v. Meyrick*, 1 Eq. Cas. Abr. 271. *Hall v. Brooker*, *Gilb. Eq. Rep.* 73. *Stapleton v. Colville*, *post*, 202. *Walker v. Jackson*, 2 Atk. 624. *Kynaston v. Kynaston*, 1 Bro. Cha. Rep. 457 (cited). *Anderton v. Cooke*, *ibid.* 556 (cited). *Holliday v. Bowman*, *ibid.* 145 (cited). *Webb v. Jones*, 2 Bro. Cha. Rep. 60, are cases where the intention of testator appeared sufficiently clear to the Court, to exempt the personal estate. But in *French v. Chichester*, 1 Bro. P. C. 192 [2nd ed. 3 Bro. P. C. 16]. *Fereyes v. Robertson*, *Bunb.* 302; *Ambl. Rep.* 33. *Earl of Inchiquin v. O'Brien*, 1 Wils. 82. *Bromhall v. Wilbraham*, *post*, 274. *Stephenson v. Heathcote*, 1 Bro. Cha. Rep. 458 (cited). *Samevell v. Wake*, 1 Bro. Cha. Rep. 144. *Duke of Ancaster v. Mayer*, 1 Bro. Cha. Rep. 454, the Court held the personal estate to be first liable. In the latter case, the material cases upon this subject are recognized, and the circumstances which governed the decision of each thoroughly considered.

[212] DE TERM. S. MICHAELIS 10 GEO. II. IN CURIA CANCELLARIÆ.

Case 47.—HERVEY *versus* ASTON. [1736.]

[S. C. 1 Atk. 361. See *In re Moore*, 1888, 39 Ch. D. 131.]

A. by settlement after marriage creates a term, in trust, by mortgage or sale, to raise £2000 for the portion of each of his daughters, provided they marry with their mother's consent, and directs a yearly payment out of the rents until they marry; and if any of them die before marriage with such consent, her portion to cease, and the premises to be exonerated thereof; and if it be raised, to be paid to such person to whom the premises should belong; and by will he creates another trust-term to raise by sale or mortgage £4500, whereof £2000 to be paid to each of his daughters in augmentation of their fortunes, subject to such condition as in the settlement; and by a codicil creates another term for the better raising their portions. A. dies: the daughters marry without consent; the portions shall be raised, but the husbands shall make competent settlements.

Sir Thomas Aston, by settlement after marriage, creates a trust-term of one thousand years, the trust whereof he declares to be by mortgage or sale of the premises to raise the sum of £2000 for the portion of each of his daughters, provided they married with

the consent of the defendant their mother ; then directs a yearly sum to be paid them out of the rents and profits until they marry ; and if any of his daughters should happen to die before marriage with such consent, that her portion should cease, and the premises be exonerated thereof ; and if such portion should be raised in whole or in part, that the same should be paid to such person to whom the premises should belong. By his will 1722, he creates another trust-term, to raise by sale or mortgage the sum of £4500, whereout £2000 [213] to be paid to each of his daughters in augmentation of their fortunes, but subject to such conditions as are declared in the settlement : and by a codicil, in pursuance of a power of revocation, he creates another trust-term for the better raising of his daughters portions. Sir *Thomas* died in 1724, leaving eight daughters, (1) one of whom Mr. *Hervey* married after the age of twenty-one, but without the consent of her mother ; and another married Mr. *Clutton* at her age of nineteen, and without consent likewise ; and they and their husbands brought their bill (in *Trinity* term 1734, *Reg. Lib.*) against their mother and brother to have their portions and additional fortunes, and to have the real estate applied towards payment of their respective portions ; alledging, that upon that respective marriages their portions became payable. Mr. *Clutton*, the husband of one of the daughters, died ; whereupon they brought a bill of revivor, and a decree was made by consent, with liberty to apply farther to the Court : and now Mr. *Hervey* and his wife, and Mrs. *Clutton*, preferred their petition for payment of their portions, Mr. *Hervey* offering therein to settle his wife's fortune, and they insisting, that the lands were sufficient to answer the daughter's additional portions.

The *Master of the Rolls* having taken time to consider of this case, now delivered his opinion. The question is, whether the plaintiffs be intitled to those original and additional portions, both the marriages being had without the consent of the Lady *Aston* the mother ? And first it is to be observed, that these portions are provisions for children. Secondly, that the loss of these provisions is a penalty. And, thirdly, that this court can impose terms upon the husbands as to the settling the fortunes. Nor are provisions for children merely voluntary ; since nature obliges parents to take care of their children. *F. N. B.* 284, of the new edition ; and that the Court did very early impose terms upon husbands applying for their wives' fortunes, appears [214] from the case of *Shipton*, in a book called *Reports of Cases in the time of Sir Heneage Finch* [Rep. temp. Finch], 145.(2)

Now, for the clearing up of this question it is to be considered, that by the canon law all conditions against the liberty of marriage are unlawful. *Swinbourne*, 150. And in the same chapter it is said, " that although the legacy be given over, yet it is " void, as being in restraint of marriage, and consequently against the good of the " commonwealth." Thus it stood by the ecclesiastical law. (*Vid.* the case of *Long v. Dennis*, 4 *Burr.* 2055.) And in *Moore*, 857, *Pigot's case*, (3) cited by *J. Winch*, comes up to the present case, it was a condition annexed to a legacy that the daughter should marry with the consent of the mother, she married without her mother's consent, and yet sentence was given, that she should have her legacy : which shews that the common law courts had adopted the notions of the ecclesiastical lawyers. This Court indeed hath not gone so far ; where-ever there is a devise over, that devise over having always been held to be good : but where there is no devise over, such conditions have been only considered as *in terrorem*, 1 *Mod.* 308 ; *Abr. Eq. Ca.* 110, and there is a reasonable foundation for construing such devises to be *in terrorem* only ; for, though a daughter marries without her father's consent, yet it is not to be supposed that this severity (was he living) would carry him so far as to leave her quite destitute. Besides, whatever is injurious to the commonwealth is unreasonable ; and therefore it was that restraints of marriages were discouraged by the *Roman* laws : for these reasons this Court hath construed such limitations to be only *in terrorem*, unless there be a devise over. Indeed it hath been insisted, that in the present case there was a devise over ; for that, by that clause of the will whereby the testator provides the additional sum of £2000 to each of his daughters, he gives the residue (over and above the £2000 a-piece) to his wife : but the legacy is not by that given over, only the residue over and above the £2000. It hath been likewise insisted, that by [215] the clause in the settlement declaring, that if any should die before marriage with such consent, that her portion should cease, there was a sufficient disposition of it : but surely this is not a good disposition within the meaning of those cases that allow a limitation over to be good : for, this is not to take place upon marrying without consent, but upon

dying before marriage with such consent, and is no more than providing for daughters dying unmarried; he taking it all along that if they married they would do it with consent. Here does not appear to be any person in the testator's view to whom these fortunes should go over; as there does in all the cases where these limitations over are allowed: the intent being as clear in those cases to give it over upon breach of the condition, as that upon performance of it the first taker should retain it.

As to authorities I shall cite first those that relate to personal estates; the case of *Escot versus Escot*, February 6, 1663, and mentioned in 1 *Chan. Ca.* 144, was a devise to his nephews and nieces; to his nephews at twenty-one, to his nieces at twenty-one or marriage; but if they married without their mother's consent, then he devised it over; and the Court went so far in this case as to decree the legacy notwithstanding the devise over. The next is that of Sir *Henry Bellasys* versus Sir *William Ermine*, 1 *Chan. Ca.* 22, and agrees with the Register Book; the condition was, that she should marry with the consent of A. and if not, that she should have but £100 *per ann.* The Court held this proviso to be only *in terrorem*. So *Garrett and Pretty's* case, (4) 2 *Vern.* 293, where, for want of a devise over, the condition was held to be but *in terrorem*.

The true reason of this distinction is given in *Stratton and Grymes's* case, 2 *Vern.* 357, that a devisee over being named, he must be looked on as a person whom the testator considered and had in his thoughts as to what provision and benefit he was to have by the will. Indeed that of *Amos versus Horner*, *Abr. Eq. Ca.* 112, is contrary to the former de-[216]-terminations; but no resolution was there taken, (5) but it went off for want of parties, and never came on again. And in that of *Creagh versus Wilson*, 2 *Vern.* 572, the intent of the condition was to provide against his daughters marrying a papist; which, since the protestant religion hath been settled here, is a very good condition; and if the testator's intent be defeated in that respect, the legacy shall not be paid. Nor will these fortunes being chargeable upon land, vary the case; for, although they are to issue out of land, and are secured by deed, yet this being upon a direction of trust-money, though by deed, the Court will adjudge this limitation to be only *in terrorem*; the intent of the parties being as much to govern in construction of trusts, as in construction of wills: as is said by Lord *Somers* in *Sheldon and Dormer's* case, 2 *Vern.* 311. Nor is the case of *Fry versus Porter* (1 *Mod.* 300; 1 *Eq. Cas. Abr.* 112) applicable to the present case; that being a condition annexed to a legal estate, and this being an equitable interest only. In *Farmer and Compton's* case, 1 *Chan. Rep.* 121, although the marriage was against consent, yet the daughter was held to take, by the opinion of two judges to whom it was referred. And in that of *Fleming versus Waldgrave*, 1 *Chan. Ca.* 58, the benefit of the lease was decreed to the administrator notwithstanding the devise over. Indeed in that of *Aston versus Aston*, 2 *Vern.* 452, the Court would not relieve, because of the express words of the devise over. The Lord *Falkland's* case, 2 *Vern.* 333, is not at all applicable to this case; nor will it be an authority almost in any case, from the peculiarity of its circumstances. That of *King versus Withers*, reported in a book composed by the late Lord C. B. *Gilbert*, called *Reports in Equity*, 26 (and *Preced. in Chan.* 348), is an express authority for the plaintiffs, although I cannot agree with what is there said, that trust-money to arise out of land must have the same construction that the lands themselves would. So likewise is the determination in *Semphill versus Baily*, (6) *Preced. in Chan.* 562. By all these various judgments it appears, that such clauses in restraint of marriage are never taken favourably, [217] but generally restrained, as intended only *in terrorem*. In the present case it is a sum of money charged upon land; but there being no distinction between conditions annexed to money charged upon land and conditions annexed to portions arising out of the personal estate; and portions by will being due by ecclesiastical law notwithstanding such conditions as this annexed to them, portions by settlement (although under the like conditions) are likewise due by the law and rules of this Court; and therefore I think the plaintiffs well intitled to their several portions.

And so ordered, that Mr. *Hervey* should make his proposals before the master as to the settling his wife's fortune; and that Mrs. *Clutton's* fortune should be paid to her, her husband being dead. (7)

(1) The daughters in *Easter* term 1725, filed their bill against Lady *Aston* and the trustees, for the purpose of having the trusts of their father's will carried into execution, and their portions secured to them, *Reg. Lib.*

(2) *Vide* also as to this point *Milner v. Colmer*, 2 P. Will. 642. *Jacobson v. Williams*, 1 P. Will. 382. *Adams v. Pierce*, 3 P. Will. 11. *Brown v. Elton*, 3 P. Will. 202. *Bosville v. Brander*, 1 P. Will. 459. *Jewson v. Moulson*, 2 Atk. 418. *Ex parte Corsegame*, 1 Atk. 192. *Grey v. Kentish*, 1 Atk. 280. *Saddington v. Kinsman*, 1 Bro. Cha. Rep. 47. *Worrall v. Marlur*. *Bushnan v. Pell*, both reported and cited by Mr. Cox in notes, 1 P. Will. 460. *Dimmock v. Atkinson*, 3 Bro. Cha. Rep. 195.

(3) *Gresly v. Luther*, S. C. which case Mr. Justice Comyns is reported to say was determined in the ecclesiastical court, neither did it appear there was any devise over, 1 Atk. 376.

(4) In this case the daughter was held to be entitled to the portion though she married without consent, because it was not devised over, but only directed to *fall into the surplus*; but in the case of *Amos v. Horner*, the residuary bequest was held to be a sufficient devise over. So *Scott v. Tyler*, 2 Bro. Cha. Rep. 431.

(5) But Lord Chief Justice Willes in his argument in *Hervey v. Aston* is reported to say of this case, "that though indeed there is no decree to be found in the register, yet it appeared by the *Calendar* that a decree was made, but being against the plaintiff, he supposed it had never been drawn up."

(6) This case was heard in the Duchy Court, *coram Lechmere Chan.* assisted by Lord Chief Justice King, and Mr. Justice Dormer, and the reason the chancellor and the chief justice went upon was, that the condition appeared to be a loose, inconsiderate expression, and besides there was no devise over. But Mr. Justice Dormer dissented.

(7) *Reg. Lib. A. 1736, fol. 60.* The Master of the Rolls seems to have determined this case upon a principle, that a condition annexed to money or portions *charged upon lands*, were entitled to the same equitable construction to avoid a forfeiture, as conditions annexed to portions arising from personalty, and that, notwithstanding the condition was a precedent one. But afterwards in *Trinity* term 1738, this decree was reversed by Lord Hardwicke, Chanc. assisted by Lord Chief Justice Lee of the King's Bench, Lord Chief Justice Willes of the Common Pleas, and Mr. Justice Comyns of the same Court. They seem to have considered that portions or interests directed to be raised out of *lands* had nothing testamentary in them, and therefore were not to be governed by the rules of the civil or canon, but by those of the common law: that no rule was more fixed, than that portions charged upon lands did not vest until the time of payment arrived: that the present condition to marry *with consent* was a lawful one, and a condition *precedent*, and that being such, nothing vested in the plaintiffs until that condition was performed. *Vide Comyns's Rep.* 726, S. C.; 1 Atk. 361, S. C. where the reader will find the arguments of the judges, with the reasons which induced a reversal of the decree at the Rolls stated much at large. It seems therefore by this decision to be settled that conditions in restraint of marriage, so far as the same respect interests arising out of lands are to be governed by the rules of the common law, and therefore whether the condition be precedent or subsequent, or whether there be a devise over or not, the interest shall never vest until the condition be performed. *Vide Popham v. Bamfield*, 1 Vern. 300. *Bertie v. Lord Falkland*, 3 Chanc. Cas. 129, 2 Freem. 220, and 2 Vern. 333. *Fry v. Porter*, 1 Chanc. Cas. 138; 1 Mod. 340, S. C. *Pigot v. Morris*, *Sel. Cas. in Chanc.* 26. *Mansell v. Mansell*, cited and stated in 2 Bro. Cha. Rep. 473. *Ambrose v. Ashby*, 4 Burr. 1429. But with regard to personal legacies the rule seems to be that the condition in restraint of marriage whether precedent or subsequent shall be void, unless there be a devise over, in which case, the right of the devisee over shall prevail. *Bellasis v. Ermine*, 1 Chanc. Cas. 22. *Sempill v. Bayly*, *Prec. in Chanc.* 562. *Pulleing v. Reddy*, 1 Wils. 21. *Wheeler v. Bingham*, 3 Atk. 365. *Reynish v. Martin*, 3 Atk. 330. *Elton v. Elton*, 1 Wils. 159. *Chancy v. Graydon*, 2 Atk. 616. *Daley v. Desbouverie*, 2 Atk. 261. *Underwood v. Morris*, 2 Atk. 184. *Hemmings v. Munckley*, 1 Bro. Cha. Rep. 303. So a gift of the *general residue*, without any specific bequest over, has been held to be effectual to defeat a legacy where the same is annexed to a condition to marry *with consent*, and the legatee afterwards marries *without consent*. *Amos v. Horner*, 1 Eq. Cas. Abr. 112. *Scott v. Tyler*, 2 Bro. Cha. Rep. 431, which seems to have settled this point, the contrary having been held in some antecedent authorities. *Garret v. Pretty*, 2 Vern. 293; 2 Freem. 220, S. C. *Wheeler v. Bingham*, 3 Atk. 365. *Paget v. Haywood* (cited 1 Atk. 378). The case of *Scott v. Tyler* (the latest authority upon this subject) was very elaborately argued, and the principles which the earlier and later authorities went upon very thoroughly investigated. By this decision there-

fore it should seem that a restraint imposed by a parent upon a child from marrying *without consent*, or until a certain age, &c., is a reasonable, and therefore a lawful one : that there is no distinction in the case of a personal legacy, or a portion payable out of money between precedent and subsequent conditions, whether the legacy shall vest, where the condition has not been performed, and there is *no devise over* : that a bequest of the *residue* is as effectual to defeat a personal legacy or a portion payable out of money, when the condition which is to vest the legacy has not been performed as a *specific devise over*.

Case 48.—CATHERINE MORRICE, Widow and Executrix of HUMPHREY MORRICE, deceased, Plaintiff ; GOVERNOR AND COMPANY OF THE BANK OF ENGLAND, and other Creditors, Defendants. [1736.]

[See *Dollond v. Johnson*, 1854, 2 Sm. & G. 303.]

An executrix of A. who was greatly indebted to divers persons, in debts of different natures, is sued in this court by some of them ; appears and answers immediately, and confesses their bill, some of the plaintiffs here being her own daughters ; other creditors sue the executrix at law (where she cannot plead the decree), and obtain judgments. The decree here being for just debts, is not *per fraudem*, and the creditors, plaintiffs at law, shall be enjoined, and the executrix protected in her obedience to the decree ; the plaintiffs at law to come in afterwards in due course of administration, the whole being legal assets. The judgments of all courts at law, having proper jurisdiction, whether by grant or prescription, are equally binding. The decrees in this court are of equal force with judgments at law ; and the real priority in point of time (and not by relation to the first day of a term) must give the preference in point of payment.

The state of the case, as far as is material, was as follows :

Mr. *Brown* in the life-time of the testator, the husband of the plaintiff, *viz.* in October 1720, made his will, and thereby gave to Mr. *Morrice* £16,500 in trust for his daughters, [218] to be paid to them, and the survivors of them, at twenty-one or marriage, which should first happen, share and share alike, together with such interest as should be made of the same. He gave several other legacies to other persons ; and, subject to his debts and funeral expences, he gave all the residue of his real and personal estate to Mr. *Morrice*, his heirs, executors, &c., and made him sole executor. Mr. *Morrice* being a great trader contracted many debts, and died November 16, 1731, having made his will, and the plaintiff his executrix ; his affairs being much embarrassed, and he standing indebted to several persons by specialty and otherwise in large sums of money, and particularly to the Bank of England for £35,000 by simple contract, soon after his decease, and before any action commenced against the plaintiff by any of the creditors, the defendants *Anne*, *Judith*, and *Elizabeth*, the daughters of Mr. *Morrice*, with some other few creditors, December 15, 1731, exhibited their bill against the plaintiff as executrix of her said husband, setting forth the several sums that Mr. *Morrice* was indebted to them respectively, and with which he was intrusted for their benefit, which remained unpaid, together with a great arrear of interest, and thereby prayed a decree for the payment thereof ; Mrs. *Morrice*, the now plaintiff, immediately put in her answer, confessing the bill, and on the 25th of January 1731, the cause was heard upon bill and answer only ; and the now defendants, Mrs. *Morrice*'s daughters, obtained a decree, that the plaintiff should, out of the assets of her said husband, pay the said several sums of money so demanded in a course of administration. The plaintiff, in obedience to that decree, on the 4th of February following, paid out of her husband's assets to two of the daughters £10,111 in satisfaction of part of their demands under the decree. On the 16th of December 1731, some few other creditors, for smaller sums of money, filed their bills for the payment of several quantities of *South-Sea* stock and annuities, and *East-India* stock, that were transferred to Mr. *Morrice*, in trust for them, praying that the several [219] stocks, as remaining in Mrs. *Morrice*'s name, might be transferred to proper trustees ; and as to so much as Mr. *Morrice* had disposed of to his own proper use, the now plaintiff might be decreed out of her husband's assets to make good the same. Mrs. *Morrice* confessed this bill, and on the 2d of February 1731, a like decree with the former was made, that the plaintiff should pay what was certified by the master to

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be due (after an account was taken) out of the assets in a course of administration. All the defendants had notice of these decrees, from the plaintiff or her agent, so soon as they were made ; and also notice that the assets of the said Mr. *Morrice* come to the defendant's hands were not sufficient to discharge their respective debts upon specialties ; and that the sums of money decreed as aforesaid, except the said £10,111 before-mentioned : were yet unpaid, and the other parts of the decree wholly performed : while all this was doing several other creditors brought their actions for their respective debts, against the plaintiff as executrix of her husband, and particularly the Bank of *England*, for £28,990, to which the defendant pleaded a special *plene administravit*, and would have pleaded several other bonds had she then been informed of the same ; and also the two decrees had she been able by the rules of law so to have done, they being obtained before any plea pleaded. After this the now plaintiff filed her bill, setting forth all the above-mentioned particulars ; and that by the rules of law she could not plead the said decrees to their several actions, or retain assets in her hands sufficient to satisfy them, or any way protect herself from the executions on the several judgments obtained against her ; and therefore she prayed, that what should appear to be due to any one of the defendants might be respectively paid out of the assets of the deceased, so far as they would extend, in due course of administration, regard being had to the nature and superiority of their debts ; and that the plaintiff might be protected and indemnified in paying a due obedience to the decrees of this Court ; and that the defendants might be restrained from proceeding at law.

[220] The *Bank* and other judgment creditors insisted, that the decrees were fraudulent, and obtained by collusion between the now plaintiff and the other parties to those suits, to give an undue preference to the parties concerned therein : and they insisted farther, that as their debts were due upon judgments, they were to be paid before the decree creditors.

Sir *Joseph Jekyll*, *Master of the Rolls*, directed the decree creditors to be first paid, as being prior in time (so *Joseph v. Mott*, *Prec. in Chanc.* 79) ; and after they were satisfied, then the surplus of the assets, if any, should be applied to the payment of the several judgments according to their priority, and the other creditors to be paid in a course of administration.

Lord Chancellor. The rule of this court, with regard to equitable assets, is to put all the creditors on an equal footing ; so where the assets are partly legal (1) and partly equitable : and though equity cannot take away (2) the legal preference on legal assets ; yet if one creditor has been partly paid out of such legal assets, when satisfaction comes to be made out of equitable assets, the Court will postpone him till there is an equality in satisfaction to all the other creditors, out of the equitable assets, proportionable to so much as the legal creditor has been satisfied out of the legal assets. This is a matter that has been so often determined, that it will be unnecessary to cite authorities ; and it is founded on this, that by natural justice and conscience all debts are equal, and the debtor himself is equally bound to satisfy them all. Indeed this Court, in the distribution of legal assets, follows the rule of law, which allows of preference to creditors, who have made use of legal diligence in getting in their debts. This Court and the courts of law, in that particular instance, have a concurrent jurisdiction ; and bills are at this day brought against executors, not merely for a discovery of the assets, but also for such discovery, and a satisfaction of the debt ; though the more ancient way might be to bring a bill for a [221] discovery only ; and the reason of such bills is, that the creditor can have better aid in this court than he can at law ; for he may have the oath of the executor for the discovery of assets. But as this Court hath only a concurrent jurisdiction upon legal assets with courts at law, and as such preference is allowed by law, there would be great confusion in the administration of legal assets if this Court did not in general follow the same rule here : and therefore it is upon that reason that courts of equity have departed from that rule which they had set to themselves, and borrowed from principles of natural justice. In the present case the assets are all legal ; and the first question will be, whether any of those creditors, who stood on an equal footing at the death of Mr. *Morrice*, have gained a preference by what has happened since ? Secondly, what will be the consequence of that with regard to the executrix, and whether she will be intitled to any, and what relief in this court ? In this present case some are simple contract creditors, others are creditors by judgment, others by decree ; and the general question at the bar has been, whether decree creditors are equal to judgment creditors or not ? In the considering of this point some gentle-

men have gone into the antiquity of the jurisdiction of the several courts of equity and law : but questions of that kind, unless they necessarily tend to give a determination to the matter in dispute, are greatly to be avoided. And that the present case does not depend on the antiquity of this court, or the extent of its jurisdiction, or whether it is a superior or an inferior jurisdiction, appears ; for that judgments at law against the testator in courts commencing by grants, are equal to judgments in courts by prescription ; and that the judgments of courts of general jurisdiction, as in *Westminster Hall*, and of courts of record of the narrowest jurisdiction, are all equal : which is a demonstration, that in consideration of law, it is not the antiquity of the court, nor the extent of its jurisdiction, or its being a superior or inferior court, that makes any difference with regard to the rank or order in which judgment creditors are to stand ; and consequently it is [222] plainly immaterial to enter into those matters : but the law seems to be founded in this, that the judgments of all courts, upon matters or persons within their jurisdictions, are conclusive so long as they are in force ; and the parties are bound to yield obedience to them ; and that obligation to perform them follows the assets in the hands of the executor or administrator. And if these matters are applied to courts of equity, I see no reason why a decree of equity ought not to be equal to a judgment at law : for, as judgments at law may be executed by a *capias ad satisfaciendum* to take the person, so similar to that are attachments for not performing decrees (*Finch*, 253 ; *Gilb. Chanc.* 82, 83) ; and although before the *statute* of Queen Anne an action of escape would not lie against the gaoler for letting the prisoners under such attachments escape ; yet no argument can be drawn from thence to shew the imbecillity of decrees ; for, though the act of parliament gives a new remedy, yet it affirms the jurisdiction of the court with regard to the power of taking up persons for not performing decrees. Judgments at law may be executed upon the goods by *fiery facias* ; decrees in this court, by sequestration. In this respect the process of this court is more effectual than by *fiery facias* at law ; for, there may be a sequestration against the goods, although the party is in custody upon the attachment : whereas at law, if a *capias ad satisfaciendum* is executed, there can no *fiery facias* issue. (*Vide Martin v. Theridge*, 3 P. Will. 248. Also *Hyde v. Petit*, 1 Chanc. Cas. 91, of the rise and progress of sequestration.) Indeed judgments at law bind lands, so that the party by *elegit* may have execution of a moiety by virtue of the statute, which ordinary decrees do not : yet there have been cases where even decrees have been held to bind lands, and where decrees are to hold and enjoy over. And such was the case of Lord Carteret and Paschal, 7 Geo. 2 [1733-34], before Lord King, Lord Chancellor, where the interest under such decree was taken to be similar to an estate by *elegit*, which shews this Court has considered decrees and judgments, and their several executions, as similar to each other. And as a *scire facias* may be brought at law to revive a judgment, so it may to revive a decree of this Court ; and in that respect they agree, and in this also, that the original de-[223]-mand is gone both by a decree and a judgment, for *transit in rem judicatam* ; and therefore I can see no reason why they should not stand on the same footing. Yet I am at the same time well apprised that the uniform judgments of courts of law have been otherwise : for, it is clear that a decree of this court, if an action is brought against an executor on a bond, is not pleadable, nor can be given in evidence against it. Why, I do not say, but that it hath obtained is certain : and the consequence is, that really the decrees of this Court are considered as nothing but the opinion of this Court, which, with regard to its own decrees, hath been different from that of courts of law, 2 Vern. 88, *Searles and Lane*, 3 Lev. 355. And if in consideration of this court decrees are equal to judgments, a way is pointed out in 1 Vern. 143, for the party to defend himself against actions at law. If this Court hath any jurisdiction, decrees here must have the same lien upon assets as a judgment at law. And the case of *Joseph and Mott, Preced. in Chanc.* 79, is in point, that a decree prior in time must be preferred to a subsequent judgment ; and if it was otherwise, the consequence would be, that this Court must give up its jurisdiction. *Darston* and the Earl of *Orford*, *Addis and Winter*, *Jones and Bradshaw*, 4 May 1661, (3) where an executor had paid assets in pursuance of a decree of this Court ; and on *plene administravit* at law he was not permitted to give such payment in evidence ; but this court decreed it should be allowed him ; which shews it hath always supported its jurisdiction, though its decrees would not be allowed at law. Upon this part of the case then, I think that decrees and judgments stand upon an equal footing, and that such as is first obtained against an executor ought to be first paid out of the assets.

The next thing that arises for the consideration of the court is, as to the priority of the decree creditors and the judgment creditors : and as to this matter, there is no doubt but the decree is prior in point of time ; yet if the judgments are allowed to have relation to the first day of that term in which they were entered, then they will be [224] before the decrees : but this Court must certainly attend to the truth of the fact. And though the general rule of the law is, that judgments relate to the first day of the term, yet that is not quite so absolute and conclusive to courts of law themselves but it may be examined into, 1 *Sid.* 432. *Co. Lit.* 150. (*Vide Prec. in Chanc.* 478, 9, *anon.*; *Robinson v. Tonge*, 3 *P. Will.* 398.) Then why may not a court of equity have the same privilege of examining into the exact time when a judgment was entered upon, or given, in order to prevent its jurisdiction from being defeated ? and if it should be otherwise, the consequence would be that a decree, which was good when it was pronounced, would, by matter *ex post facto*, be overturned ; and those assets would be taken away which were once bound by it. Another considerable objection has been taken relating to the nature of this demand ; which is, that the decrees have been obtained *per fraudem*, according to the legal language ; and as such matter might have been replied in case the decree should have been pleaded at law, therefore the other creditors ought in justice to be let into the same examination here : and it is certain, if they are fraudulent, nobody ought to have the benefit of them. As to what is said, that these decrees are *res inter alios acta*, and so ought not to hurt the other creditors, that has no weight with me ; for, the same may be said of all judgments at law. And though these decrees were obtained in a manner by confession, for I take them to be so, as Mrs. *Morrice* put in her answer in a short time, and thereby confessed the demand of the plaintiffs, and also as she appeared *gratis* at the hearing of the cause, thereby forwarding the plaintiffs more than they could otherwise be by the rules of the court ; yet courts of law hold it to be no objection if a judgment is pleaded that was obtained by confession, though there is favour shewn by the executor ; nor upon a replication of *per fraudem* is it any evidence of fraud if there was a real and just debt. As to bills of conformity, indeed the case of *Buckle and Atleo*, 2 *Vern.* 37, is a case where they have been allowed ; but they have since been discountenanced ; and the reason is, because this court is satisfied that they have no right [225] to take away the preference that one creditor gains over another by his legal diligence. Besides, that such bills may be made use of by executors to keep people out of their money longer than they would otherwise be : but in this case the executrix cannot be said to give preference, but wants to have it determined who hath gained a preference according to the rules of law and equity. Mrs. *Morrice* comes here for protection ; and if this court doth not protect her, she will be liable to a double satisfaction ; first, to pay the assets to the decree creditors, and afterwards to the judgment creditors ; and it is certainly proper for the executrix to come for protection to this Court, when she finds herself troubled for yielding obedience to the decrees of it. But then it is said on the other hand, that she has brought herself into this distress, and therefore ought not to be relieved : yet, with regard to the law, it must be owned that what she hath done is strictly right : for, an executor may confess a judgment to one creditor, and plead it in bar to the demand of others. (*Vide Waring v. Dawson*, 1 *P. Will.* 296.) And the original foundation of such liberty being given to an executor, might be to prevent the trouble of two demands when he had assets only to satisfy one : and then by parity of reason, an executor may suffer decrees to be against him as it were by confession : and as the Court hath never controlled an executor in such liberty, or in retaining, if he insists on it ; so what Mrs. *Morrice* has done is neither contrary to the rules of law or equity. And though it would have been much clearer had these decrees been obtained in a more adversary manner, yet as they are for just debts they must be paid according to their priority. It has been said at the bar, that the judgment creditors have both law and equity, and the decree creditors equity only ; and therefore that the Court ought not to take away the benefit of the law from the judgment creditors : but that has always been where equities were of the same nature ; for, where one equity has been of a superior nature, that superior equity has been preferred : as in the case of *Taylor and Wheeler*, *Salk.* 449, where the question [226] was, whether an assignee of a commission of bankruptcy, or a mortgagee under a defective conveyance, should be preferred ? And it was held that the mortgage should, his equity being specially a lien upon the lands. So in the present case, at the time of Mr. *Morrice's* death, the equity of all the creditors was equal ; but when the decrees were obtained, they bound the assets

in the hands of Mrs. *Morrice*, and being prior to the judgments, ought to be first satisfied. As the proceedings at law now stand, there being judgment *de bonis propriis* against the executrix, unless this Court injoins their proceedings, they will be paid out of her pocket; therefore they must be enjoined, as by the *Master of the Rolls* his decree: but as they are tied up at law, they must have a direction to the master to take an account of the effects which are first to be applied in discharge of the decree creditors, and the residue to the several judgment creditors according to their priority, and so on in a course of administration.

Upon the whole, the decree of the *Master of the Rolls* was confirmed,(4) with an alteration only, by deducting for the daughters' maintenance after their attaining the age of twenty-one years, and the additional direction on behalf of the judgment creditors.

(1) For the rule by which the court is governed in the marshalling of assets, *vide Masters v. Masters*, 1 P. Will. 422. *Clifton v. Burt*, *ibid.* 679. *Bligh v. Earl of Darnley*, 2 P. Will. 620. *Sagitary v. Hyde*, 1 Vern. 445. *Wilson v. Fielding*, 2 Vern. 763. *Lutkins v. Leigh*, *ante*, 54. *Haslewood v. Pope*, 3 P. Will. 323. *Galton v. Hancock*, 2 Atk. 435, 437. *Martin v. Martin*, 1 Ves. 212. *Arnold v. Chapman*, *ibid.* 111. *Lacam v. Martins*, 1 Ves. 312. *Lanoy v. Duke of Athol*, 2 Atk. 446.

(2) For the difference between legal and equitable assets, *vide Freemoult v. Dedie*, 1 P. Will. 429. *Deg v. Deg*, 2 P. Will. 415. *Cutterback v. Smith*, *Prec. in Chanc.* 127. *Bickham v. Freeman*, *ibid.* 137. *Allen v. Heber*, 2 Strange, 1270. *Plunket v. Penson*, 2 Atk. 290. *Prowse v. Abington*, 1 Atk. 482. *Hargrave v. Tindal*, 1 Bro. Cha. Rep. 136 (cited). *Silk v. Prince*, 1 Bro. Cha. Rep. 138 (cited). *Newton v. Bennett*, 1 Bro. Cha. Rep. 135. *Batson v. Lindegren*, 2 Bro. Cha. Rep. 94.

(3) In the case of *Darston v. the Earl of Orford*, A. and B. were both creditors by specialty of J. S. who died, and left an executor, against whom A. brought a bill in equity for a discovery of assets, and to be paid his debt; and pending such suit, the executor voluntarily, and without suit, paid B.'s debts: upon an account decreed on A.'s bill against the executor, the latter craved an allowance of this payment; and it was decreed by the Lord Keeper *Wright*, that the executor should not have an allowance thereof, seeing, that before payment made, a bill in equity was brought by A. of which the executor had notice; and a bill in equity is equivalent to an action at law, pending which action an executor cannot make a voluntary payment of any debt. From this decree an appeal was afterwards brought in the House of Lords, where the decree was reversed; and the reasons on which the Lords principally grounded their decree of reversal was, for that as the debts were of equal degree, and since a decree of the Court of Chancery cannot be pleaded at law to an action brought against an executor upon another of equal nature, therefore such executor might justify the payment of another debt of equal nature, even pending a bill in equity. *Prec. in Chanc.* 18. 3 P. Will. 400, *note*.

(4) This decree was afterwards, on the 28th of April 1737, upon an appeal to the House of Lords, affirmed [2nd ed. 2 Bro. P. C. 465], 4 Bro. Cha. Rep. 287. Lord *Hardwicke* afterwards, in *Smith v. Styles*, 2 Atk. 385, recognizes and admits this case to have fully established the doctrine, *viz.* that a decree of the Court of Chancery is equal to a judgment at law, and consequently that which is first obtained will be first paid. In what other cases decrees of this Court bind, and gain a preference, *vide Martin v. Martin*, 1 Ves. 214. *Douglas v. Clay*, 1 Bro. Cha. Rep. 183 (cited). *Brooke v. Adams*, 1 Bro. Cha. Rep. 183.

Case 49.—PARTRIDGE *versus* PARTRIDGE. [1736.]

A. devises £1000 capital *South-Sea* stock to B., at the time of making his will he had £1800 such stock, and after, by sale, reduced it to £200, which he after increased to £1600, and died. Between the making his will and his death, the act took place, which changed three fourths of the capital *South-Sea* stock into annuities: the legacy is not taken away or impaired by the sale, nor by the act of parliament.

The testator by his will devised £1000 capital *South-Sea* stock to his wife for life, for her sole use and benefit, with power to dispose of the same to such of her children as she should think fit. At the time of making his will he was possessed of £1800 *South-Sea* stock: he afterwards reduced such stock to £200, but after that purchased as much as

made up the £200 to be £1600, and afterwards died in July 1733. In June next before his death [227] the acts took place for changing three fourths of the capital *South-Sea* stock into annuities. The questions made upon this case were, first, whether the testator selling £1000, part of his £1800 *South-Sea* stock, after the making his will, should not be considered as an ademption of the legacy? If not, secondly, if the act for turning *South-Sea* stock into annuities should not be so considered? In the argument of this case, the case of *Ashton and Ashton* (1) was cited, where the testator devised £6000 *South-Sea* stock to J. C. and at the time of his death and will was possessed of only £5500 *South-Sea* stock; upon which a bill was brought against the executor to have it made up £6000. But the *Master of the Rolls*, and after him the *Lord Chancellor*, on appeal, were of opinion, the deficiency should not be supplied, upon this principle, that as general (2) legatees have no lien on what is given to specific legatees, so a specific legatee shall have no lien on the general fund of the testator; but if any loss happens to what is specifically given to him, he must bear the burden thereof himself.

Lord Chancellor. All cases of ademption of legacies arise from a supposed alteration of the intention of the testator (so, *Hambling v. Lister*, *Ambl. Rep.* 402); and if the selling out the stock is an evidence to presume an alteration of such intention, surely his buying in again is as strong an evidence of his intention that the legatee should have it again. It was not the particular stock he was possessed of that he gave; but the devise was only describing the nature of the thing he gave, of which he had sufficient to answer such legacy at the time of his death. If the testator after such legacy sells out part, and dies, such sale would afterwards be looked upon as an ademption *pro tanto*. If he devises so much particular stock, and at the time of such devise has not any such stock, it is a direction to the executor to procure so much for the legatee. It would be very hard in the case at bar, to consider the selling as an ademption, because he might sell out for some particular purpose, and as soon as that purpose was answered he might buy in again. As [228] to the second point, after such devise the legislature thought proper to make a law to change three fourths of the stock into annuities, and the fourth to remain as it stood before; so that the testator, when he died, was possessed of £1200 annuities, and £400 stock: and it would be extremely hard to say, that this alteration of the stock by parliament should work an ademption (so, *Bronsdon v. Winter*, *Ambl. Rep.* 57, S. P.), when it cannot be presumed the testator's intent was particularly asked, or that he concurred or agreed to such law in any other manner than what every other person is supposed to do. (*Reg. Lib. B.* 1736. fol. 81.)

If an obligee was to devise a legacy of £1000 secured by bond from A. B. and he should afterwards compel A. B. by due course of law to pay it him, this would be an ademption of the legacy; but it, was never thought, if A. B. should pay in the money voluntarily, (3) it would be an ademption, because the obligee is bound to receive it.

(1) *Ante*, 152; 3 *P. Will.* 384, S. C. The testator there intended to give only what he was possessed of, and it was of great weight in that resolution, that a trust was declared to sell and dispose of the stock, for it could not be supposed that the testator intended his executor should buy stock, and immediately sell the same again, and buy land with the money.

(2) For the distinction between a *specific* and *general* legacy, vide *Hinton v. Pinke*, 1 *P. Will.* 540, and the cases collected by Mr. Cox in note (1). *Purse v. Snaplin*, 1 *Atk.* 414. *Attorney General v. Parkyn*, *Ambl. Rep.* 566. *Ashburner v. Macquire*, 2 *Bro. Cha. Rep.* 109.

(3) The distinction between a voluntary and compulsory payment has in some cases been allowed: as in *Crockat v. Crockat*, 2 *P. Will.* 165. *Rider v. Wager*, *ibid.* 339. *Orme v. Smith*, 1 *Eq. Cas. Abr.* 302, pl. 2, in the above case of *Partridge v. Partridge*, and before Lord Hardwicke in *Lawson v. Stitch*, 1 *Atk.* 508. But in the Earl of *Thomond v. the Earl of Suffolk*, 1 *P. Will.* 467. *Ford v. Fleming*, 2 *P. Will.* 469. *Ashton v. Ashton*, 3 *P. Will.* 386, the distinction is not approved of. So in *Drinkwater v. Falconer*, 2 *Ves.* 624. *Hambling v. Lister*, *Ambl. Rep.* 401, a compulsory payment was considered not to be *in itself* sufficient evidence of an intention in the testator to adeem. Lord Camden again in the *Attorney General v. Parkyn*, *Ambl. Rep.* 566, held the distinction not to exist, and his opinion was afterwards adopted by Lord Thurlow in *Ashburner v. Macquire*, 2 *Bro. Rep.* 109.

Case 50.—STEPHENS *versus* STEPHENS.13 Decemb^r [1736].

An executory devise of an estate of inheritance to a person unborn when he shall attain the age of twenty-one years, is good : and there is no danger of a perpetuity.

There were five causes which were heard together by the late Lord Chancellor King ; and upon the hearing he directed a case to be stated and referred to the Judges of the King's Bench for their opinion ; and it now came back for the judgment of the Court, upon the Judges' certificate ; upon reading of which, the present Lord Chancellor was pleased to decree according to it, and expressed his satisfaction with it, as agreeing perfectly with his own sentiments ; and said, he hoped it would be for the future a leading case in the determinations of all questions of this kind. (*Reg. Lib. B. 1736, fol. 120.*) The case stated, and the opinion of the Judges, were as follow :

Sir William Stephens being seised of the several messuages, lands, and tenements herein after-mentioned, made his will the 15th day of February 1712, whereby (*inter alia*) he made the several devises in the words following : " *Item*, I give, devise, and bequeath unto my grandson [229] William Stephens after the decease of my said wife dame Susanna Stephens, all those my messuages, lands, tenements, and hereditaments, situate, lying, and being in Deptford in the county of Kent, and by deed settled by my said wife on me, my heirs and assigns, to hold the same to my said grandson William Stephens, his heirs and assigns for ever. *Item*, I give, devise, and bequeath to my said grandson William Stephens all my freehold estates, messuages, lands, tenements, hereditaments, and premises in the parish of St. Mary Magdalen, Bermondsea, in the county of Surry, situate and being in Rotherhith Wall, East Lane, St. Mary Magdalen, Court-yard, and elsewhere in the said parish of St. Mary Magdalen, Bermondsea ; and also all those my freehold messuages, lands, tenements, hereditaments, and premises in the parish of St. Olave in Southwark, and elsewhere in the county of Surry ; and also all my freehold messuages, lands, tenements, and hereditaments in the county of Essex, to hold my said freehold messuages, lands, tenements, hereditaments, and premises to my said grandson William Stephens, his heirs and assigns for ever : but in case my said grandson William Stephens shall happen to die and depart this life before he attains his age of twenty-one years, then I give and bequeath to my grandson Thomas Stephens all and every my messuages, lands, and hereditaments before mentioned, as well those in the parishes of St. Mary Magdalen, Bermondsea, and St. Olave in Southwark, as those in the counties of Essex and Kent, to hold the same to my said grandson Thomas Stephens, his heirs and assigns for ever : but in case my said grandson Thomas Stephens shall happen to die and depart this life before he attains his age of twenty-one years, then I give and bequeath all my said freehold messuages, tenements, hereditaments, and premises whatsoever before mentioned to such other son of the body of my daughter Mary Stephens, by my son-in-law Thomas Stephens, as shall happen to attain his age of twenty-one years, his heirs and assigns for ever ; the elder of such sons [230] to take place before the younger, one after another in order and course as they and every of them shall be in seniority of age and priority of birth, and of the several and respective heirs male of the several and respective body and bodies of all and every such son and sons, and the heirs male of his and their body and bodies issuing ; and for default of such issue, then I give and bequeath my aforesaid freehold estates, messuages, lands, tenements, and hereditaments to all and every the daughter and daughters of my said son Thomas Stephens, on the body of my said daughter to be begotten, and to the heirs of the body and bodies of all and every the said daughter and daughters, as tenant in common, and not as jointenants ; and for want of such issue, then I give, devise, and bequeath my aforesaid freehold estates, messuages, lands, tenements, and hereditaments to my brother Sir Richard Stephens, to hold the said freehold messuages, lands, tenements, and hereditaments to the said Sir Richard Stephens, his heirs and assigns for ever. *Item*, all the rest and residue of my estate, real and personal, goods, chattels, rings, jewels, plate, money and monies-worth whatsoever and wheresoever not hereby before bequeathed, I give and bequeath the same to my said son Thomas Stephens, his heirs, executors, administrators, and assigns for ever." And the said testator, by his said will made his said son-in-law Thomas Stephens sole executor thereof. And

afterwards (to wit) on or about the 15th day of *March* following died, leaving Dame *Mary*, the wife of *Thomas Stephens*, his daughter and heir, and leaving two grandsons, *William* and *Thomas*, living at the time of his death, and no grand-daughter. On the 18th of *May*, 1713, *Susan*, the daughter of *Thomas Stephens* and *Mary* his wife, was born, and is still living; the said *Thomas Stephens* the grandson died without issue and under the age of twenty-one years, the 24th day of *October* 1714; and the said *William Stephens*, the other grandson, died the 14th day of *September* 1718, without issue, and under the age of twenty-one years: *Mary Stephens*, an-[231]-other daughter of the said *Thomas Stephens* and *Mary* his wife, was born the 14th of *March* 1719, and died without issue and under age the 26th of *October* 1722; *Sarah Stephens*, another daughter of the said *Thomas Stephens* and *Mary* his wife, was born the 13th of *November* 1721, and is yet living; *Mary Stephens*, another daughter of the said *Thomas Stephens* and *Mary* his wife, was born the 15th of *February* 1722, and died without issue and under age the 26th of *April* 1723; *Thomas Stephens*, one of the parties in this suit, son of the said Sir *Thomas Stephens* and *Mary* his wife, was born the 12th day of *January* 1727, and is still living; Sir *Richard Stephens*, the said testator's brother, mentioned in his will, is still living; the said *Thomas Stephens* claims title to the premises as residuary devisee of the said testator; and the said Dame *Mary* his wife lays claim thereto as heir at law to the said *William Stephens*, the testator; and the said other parties likewise claim title thereto under the said testator's will; *Susan Stephens*, the plaintiff in the original cause, since the hearing the said causes (to wit) the 14th of *April* 1734, died without issue and under age: and on the 6th of *August* following an order was obtained upon the petition of all the surviving parties, that the case should be made agreeable to the fact, as it now stands since her death, and that the judges of the Court of *King's Bench* be then desired to give their opinion on this question, what estate, right, or interest, either in the present or in contingency any of the said parties have in or to the lands in question, or any part thereof?

The judges of the *King's Bench* certified their opinion as follows: we have heard counsel for all the parties, and maturely considered the case upon which the question is raised and referred to us; and the principal point appears to be, whether the devise made by the will in these words, *viz.* "And in case my said grandson *Thomas Stephens* shall die before he attains his age of twenty-one years, then I give all my said freehold estates, &c., to such other sons of the body of my said daughter *Mary Stephens*, by my son-in-law *Thomas Stephens*, as [232] shall happen to attain his age of twenty-one years, his heirs and assigns for ever," be good by way of executory devise? As to which we do not find any case wherein an executory devise of a freehold hath been held good, which hath suspended the vesting of the estate until a son unborn should attain his age of twenty-one years, except the case of *Taylor* and *Bydall*, adjudged upon a special verdict in the Court of *Common Pleas*, *Hill. 29 & 30 Car. 2.* and reported in 2 *Mod.* 289. The resolution appeared in every view of it to be so considerable in the present case, that we caused the record to be searched, and find it to agree in the material parts thereof with the printed report: and therefore, however unwilling we may be to extend executory devises beyond the rules generally laid down by our predecessors; yet upon the authority of that judgment, and its conformity to several late determinations in cases of terms for years, and considering that the power of alienation will not be restrained longer than the law would restrain it, *viz.* during the infancy of the first taker, which cannot reasonably be said to extend to a perpetuity; and that this construction will make the testator's whole disposition take effect, which otherwise would be defeated; we are of opinion, that the devise before mentioned may be good by way of executory devise.

The consequence whereof is, that all the subsequent limitations will be good; the estate will vest in *Thomas*, the son now living, when he shall attain the age of twenty-one years in tail male, according to the clause directing the order of succession between the sons to be born; if *Thomas* the son, now living, should happen to die before his age of twenty-one years, and the testator's daughter Dame *Mary Stephens* should have any other son by Sir *Thomas Stephens*, then the estate will go over to him when he shall attain his age of twenty-one years, in like manner as it would have vested in *Thomas*; if *Thomas* the son should die before the age of twenty-one years, and Dame *Mary* should have no other son by Sir *Thomas Stephens* who should attain his age of twenty-one years, then his estate will go over to *Sarah* the daughter, and all other daughters

of the [233] said Dame *Mary* by Sir *Thomas*, as tenants in common in tail, with remainder over to *Richard Stephens* the testator's brother in fee : but in case *Thomas* the son should die before the age of twenty-one, and *Sarah* the daughter should then be dead without issue, and there should be no other son of Dame *Mary*, who should attain the age of twenty-one years, or any other daughter hereinafter born of their bodies, then the estate will go over to the said Sir *Richard Stephens*, by virtue of the last remainder to him in fee. As to the profits of the estate received since the death of *William* the grandson, or to be received until it shall vest in any one person by force of the said executory devise, or shall go over to the remainder man, we conceive that they belong to Sir *Thomas Stephens* by virtue of the residuary devise in the will, as an interest in the testator's real estate not before bequeathed or disposed of by his will. (*Vide Clare v. Clare*, ante 26, and references.)

Hardwicke, E. Probyn,
F. Page, W. Lee.

[234] DE TERM. S. HILLARI 10 GEO. II. IN CURIA CANCELLARIÆ.

Case 51.—SAVAGE *versus* TAYLOR. [1736.]

There may be a degree of unfairness in obtaining articles for the purchase of an estate, for which this Court will not set them aside ; but will refuse its aid to carry them into execution. And if the party who obtained such articles hath been in possession, and made lasting improvements, he shall be allowed for them on consenting to deliver up the articles and account for the profits ; otherwise, if he goes to law, and fails there.

William Taylor made his will, bearing date May 25, 1727, and thereby devised to trustees and their heirs all his messuages, lands, &c., in *Cherrington*, in com. *Gloucester*, to the use of *Mary* his wife for life, remainder to trustees for five hundred years, to raise £400 for her as she should appoint, or in default thereof to her executors, remainder to the use of the testator's nephew *John Taylor* in tail remainder to *William Taylor*, son of the testator's brother *Humphrey* in fee, and makes *Mary* his wife sole executrix and residuary legatee ; and by a codicil October 27, gives two cottages to two servants in fee. and 20s. *per ann.* to the poor of *Cherrington*. Before the making this will the testator had a fit of the palsey, which impaired his health, but did not affect his understanding : in August 1728 he had a second fit of the palsey, which deprived him of his speech, and greatly, impaired his understanding. January 31, 1728, after a treaty between one *Savage* and the testator, which was [235] chiefly managed by the testator's wife and one *Nathaniel Thomas* her relation, articles were entered into by the testator and his wife of the one part, and *Savage* of the other part, for sale of the testator's estate in *Cherrington* to *Savage* in fee, for £2080 and a guinea. In July 1729, the testator died ; and about November 1732, *Mary* the testator's widow died, having made her will, and the plaintiff *Savage* sole executor and residuary legatee. *John* the nephew, the first devisee of the testator, died soon after the testator's wife, leaving one son named *John Taylor*. The plaintiff *Savage* brought his bill in the life-time of *Mary*, but not long before her death, against her, and against *John Taylor* the testator's eldest brother and heir at law ; against *John* the nephew, and *William* the nephew an infant, the two devisees in the will ; and also against the trustees, and the devisees in the codicil ; for a specific performance of the articles, and to have conveyances accordingly. *John Taylor* the heir at law died in 1735, having put in his answer, and leaving *John* his grandson and heir at law. A second bill was brought by *William Taylor* the infant devisee, intituled in fee under the will, to establish the will, and to be relieved against the articles.(1) And a third bill was brought by *John Taylor* an infant, grandson and heir at law of *John*, against *Savage*, to discover a settlement made 1683. and to have the same delivered up to him, under which he claimed a moiety of the estate comprised in the articles of purchase ; and against *William Taylor* the infant, disputing the will, claiming the other moiety as heir at law. *John Taylor*, great grandfather of the infant *John*, had issue four sons, *John*,

William, Thomas, and Humphry. John the grandfather had issue John, who married and died in the life-time of his father, leaving John the great grandson, the plaintiff in the third bill. May 17, 1688, John Taylor the great grandfather, and John his son, in consideration of a marriage to be had between John the son and Hannah Whiting, conveyed the estate in question to trustees, to the use of John the son for ninety-nine years, if he should so long live, remainder to trustees to preserve con-[236]-tingent remainders during his life, remainder to Hannah his wife for her jointure, remainder to the heirs of his body in special tail, remainder to the heirs of his body in tail general, remainder to the right heirs of John the great grandfather. March 29, 1694, John the grandfather and Hannah his wife, in consideration of £1000 paid by John the great grandfather and the testator William, covenant to levy a fine *sur consuance de droit come ceo, &c.*, to them with warranty. Easter Term 6 & 7 of Will. and Mary, a fine was levied between John Taylor, sen., and William the testator, complainants, and John Taylor and Hannah his wife, deforceants. Easter Term, 9 Geo. 1, William Taylor, the testator, levied a fine, but no deed leading the uses thereof appeared.

Lord Chancellor stated the three bills, and the design of them, and added to this effect: the first question is with regard to the articles under which the plaintiff claims, whether he is intitled to have the benefit of them? which depends on two considerations; 1, whether the articles are such as a court of equity will set aside? and if the court will not, whether the plaintiff shall have its assistance by decreeing a specific performance of them? It is certain this court, in cases of articles, has a discretionary power to carry them into execution or not; and if it appears they are unfairly obtained, though not to such a degree as to set them aside, yet this Court will not order a performance, but will leave the plaintiff to his remedy at law. And upon the whole matter, I am clearly of opinion this Court ought not in this case to aid the plaintiff: but if upon the prospect of having the articles performed the plaintiff has improved the estate, it is reasonable he should have an allowance for lasting improvements; provided he is content to deliver up the articles, and to account for the profits; otherwise, if he goes on at law, he must not expect it.

[237] The next question is, as to the title upon the settlement in 1683, whereby the remainder under which John claims is barred in point of law by the first fine; the uses of which are declared by the deed of March 29, 1694. And in that fine there was a warranty, which was contended to be collateral, and to bar the right of John by descending upon him. And undoubtedly the warranty is collateral to the title of John, who claims by purchase, and not from the person who made the warranty; and as this was before the *Stat. 4 & 5 Q. Anne, cap. 16* (how hard and unreasonable soever it may be), there is no room for a court of equity, which cannot alter the law, to interpose. (By which stat. all collateral warranties by any ancestor who has no estate of inheritance in possession are rendered void against his heir.) But to this two answers have been given, either of which seems sufficient; (1st.) that this warranty descended on an infant, and therefore is no bar to him: (2d) that supposing it to work a wrong, and to displace and divest the estates, then it is a warranty commencing by disseisin, and so commencing by a tortious act, the law did not allow such effect as if it was not attended with that circumstance; for, collateral warranties are grounded on this presumption, that no one would bind the estate of his heir without leaving him a satisfaction, but when he who makes the warranty does a tortious act, it seems that presumption ceases. Then the next question to be considered is, whether the fine and non-claim, by the *Stat. 4 H. 7, cap. 34*, has barred this contingent remainder? If it is considered as a fine levied by tenant for ninety-nine years, determinable on his death, it is not a bar; but an averment may be taken, that *partes finis nil habuerunt*; and it is a forfeiture of his estate, if the parties over will take advantage of it; otherwise it is a nullity, and will not take away the entry of the trustees when their right takes place. It is said this case differs from the common case of a fine levied by tenant for years; for, here the wife joined in the fine, who had an estate for life; and if that had been a freehold, properly so called, then it might have a greater effect than a fine levied by tenant for years: but in this [238] case that freehold lies behind the limitation to trustees to preserve contingent remainders; and then it is hard to say the fine shall operate as to displace the precedent estate for life limited to the trustees. But supposing this fine did displace the estates, and should be considered in the same way as a fine levied by tenant for life in possession; the consequence would be, that the trustees might enter immediately or within five years after the determination of the estate for life.

But then it is said, that though a right of entry in the trustees is sufficient to preserve contingent remainders, yet the right of entry which the trustees had, is quite gone in this case by the death of *John*, who was tenant for ninety-nine years if he should live so long ; because his estate, and the estate of the trustees determined *eodem instante* : but that is not so certain ; for, the estate of the trustees might subsist after the estate of *John* determined, if he out-lived the ninety-nine years ; which the law supposes may happen ; for then the trustees might enter, because their estate is for his life : so they had a possibility to enter after the estate of *John* was determined, and during his life. And though that did not take place, yet their right was not clearly gone and extinguished ; and therefore it may be considered, whether that possibility of entry within five years after the determination of ninety-nine years is not sufficient to support the contingent remainder ? I should think courts of law should go a great way to support such remainders, which could not be destroyed without this practice, I had almost said iniquity ; but this is properly a legal question, and not determinable here. And the same things may be said with regard to the other fine levied afterwards ; and farther also, that it is not certain that it includes these lands now in question. Thus far is clear, that the plaintiff in the third bill has a right to have the deed of 1683, and *valeat quantum valere potest* : there is another point very considerable in this case, upon a supposition that the contingent remainder is barred in point of law. If there is tenant for life, remainder over to some other person, so as to be in contingency, if [239] the tenant for life makes a feoffment, or levies a fine without trustees to preserve the contingent remainders, in point of law they are barred : but it is a most barbarous thing to rob persons unborn of their inheritance, and to give it to one who has no colour of title ; yet hard and unjust as it is, I do not remember this Court has ever interfered so far as to direct a conveyance to him in remainder (so *Pye v. George*, 1 P. Will. 129). In the case of *Mansell and Mansell* there were trustees to preserve contingent remainders, who were drawn in to destroy them ; and this Court considered the matter as a breach of trust, and followed the lands in the hands of a purchaser with notice. This is a kind of middle case ; for, here is no actual breach of trust by any act done ; but if the contingent remainder is barred, it is by their neglect to perform the trust, and that in the single instance for which they were appointed trustees ; that is, to bring actions, and make entries : and it may deserve consideration how far one who has notice shall avail himself by this neglect of the trustees ; but I will not enter into a case of this consequence unnecessarily, but will reserve a liberty of considering it when it comes back to the Court for farther directions after the trial.

It was decreed, that upon *Savage's* submitting to give up the articles to be cancelled, his bill, so far as it prayed a performance of them, should be dismissed ; and that he should account for the rents and profits of the estate by him received, and should be allowed for his lasting improvements. That an ejectment should be brought to try the right of the whole estate, both of that in settlement and that out of settlement, and no term to be set up ; and in this ejectment *John* to be lessor of the plaintiff, and *William* defendant : that the deed of 1683, should be delivered up to *John*, and *William* to have a copy of it at his own charge ; and that the other deeds and writings shall be brought before the master ; and that *William* should admit himself in possession, and that after trial the parties should resort back for farther direction.

(1) It being charged in his bill, that the defendant *Savage* was a purchaser of the estates comprised in the articles, with notice of the settlement in 1683, *Savage* admitted by his answer (though before or at the time of the execution of the articles he had not actual notice of the settlement) that he had heard it talked, that part of *William Taylor's* estate had been settled on the plaintiff's grandfather's marriage ; but that it was also reported, that the said settled estate was fairly sold to the said *William Taylor* for a valuable consideration ; and further admitted, that after the execution of the said articles several deeds relating to the said estates were delivered to him, among which were indentures of lease and release, dated the 16th and 17th days of May 1683, purporting to be a settlement made upon the marriage of *John Taylor* the younger (the plaintiff's grandfather), and made between *John Taylor* the elder, and *John Taylor* the younger his son and heir, of the first part ; *Hannah Whiting*, of the second part ; and *John Whiting* and *Thomas Taylor*, of the third part ; in consideration of a marriage agreed to be had between the said *John Taylor* the younger, and *Hannah Whiting*, and of £500 portion paid to the said *John Taylor* the younger, the said *John Taylor*

the elder and *John Taylor* the younger, did grant, &c., all their estate in *Cherrington* to the said *John Whiting* and *Thomas Taylor*, their heirs and assigns, to the use of the said *John Taylor* the younger for 99 years, without impeachment of waste, remainder to *John Whiting* and *Thomas Taylor*, and their heirs, for the life of the said *John Taylor* the younger, to support contingent remainders, remainder to *Hannah Whiting* for life for her jointure, remainder to the heirs of the said *John Taylor* the younger, with divers remainders over, remainder to the right heirs of the said *John Taylor* for ever. That by lease and release, bearing date respectively, the 27th and 28th days of *March* 1692, and made between the said *John Taylor* and his wife (the plaintiff's grandfather and grandmother) of the one part, and *William Taylor* of the other part, the said *John Taylor* and his wife, in consideration of £1000 did grant, release, and confirm all or most of the premises comprised in the said settlement, to the use of the said *William Taylor*, his heirs and assigns for ever, in which was a covenant for quiet enjoyment and further assurance : and by indenture, bearing date the 29th of *March* 1694, and made between the said *John Taylor* the younger and his wife, of the one part, and the said *John Taylor* the elder and the said *William Taylor*, another of the sons of the said *John Taylor* the elder, of the other part, in consideration of £1000 paid by the said *John Taylor* the elder and *William Taylor* to the said *John Taylor* the younger, the said *John Taylor* the younger, and his wife covenanted to levy a fine before the then next *Easter Term*, which was levied accordingly of the said lands comprised in the said settlement, the use whereof was declared to be to the use of the said *John Taylor* the elder and *William Taylor*, their heirs and assigns for ever ; and the said defendant submitted whether the said plaintiff's right and title to the said premises was not barred by the said fine. *Reg. Lib. B. 1736, fol. 209.*

[240] DE TERM. S. MICHAELIS 8 GEO. II. IN CURIA CANCELLARIE.

Case 52.—BROWN versus SELWIN, & contra. 1734.

[Distinguished, *In re Applebee*, [1891] 3 Ch. 422.]

A. devises the residue of his real and personal estate, not before devised, to his two executors, &c., as tenants in common, &c. One of them is indebted by bond to the testator. This bond-debt is not released, but shall be divided between them ; and no parol evidence shall be admitted, that the testator intended to release it to the obligor, and had given instructions for that purpose to an attorney who drew his will, &c.

John Brown, on the 23d of *June* 1732, made his will, and thereby bequeathed to the plaintiff a legacy of £500 and all his plate ; to the defendant he gave all his leasehold messuages ; and after several other legacies and bequests, as well as devising some freehold and copyhold lands, he devised as follows : “and as for the rest, residue and “remainder of my estate, whether real or personal, whereof I am seised or possessed, “or which I am any ways intitled to, which I have not herein and hereby devised, “given, &c. I give and bequeath the same, and every part thereof, and all my right, “title and interest therein and thereto, unto such my executor or executors herein “after named, as shall duly take on him or them the execution of this my will, according “to the true intent and meaning thereof, his or their heirs, executors, administrators “and assigns, as tenants in common, and not as jointenants ;” and afterwards appointed the plaintiff and defendant his executors, and [241] soon after died ; and the plaintiff and defendant proved the will. The defendant was at the time of the testator's death indebted to the testator in £3000 principal money, besides interest, and for securing thereof had given a bond to the testator, dated the 20th of *June* 1732, in £6000 penalty : the bill was brought that the defendant might account with the plaintiff for the testator's residuary estate, and pay him a moiety of the said £3000 and interest ; and the cross bill was to have the bond delivered to be cancelled. (*Reg. Lib. A. 1733, fol. 220.*)

It appeared by the answer of the defendant in the original cause, and by the proofs in both causes, that the testator designed to give this money to the defendant ; and gave

one *Viner*, the attorney concerned in drawing the will, instructions in writing accordingly; but *Viner* refused to make mention of it in the will, insisting that the bond would be extinguished and released of course by Mr. *Selwin*'s being appointed executor; but the testator appearing dissatisfied with *Viner*'s opinion, a case was stated for counsel's opinion, who confirmed what *Viner* said: in confidence of which the testator signed and published his will, with full persuasion that the bond would be extinguished; and this appeared clearly to be the intention of the testator.

Lord Chancellor. The question is, whether £3000 which was due to the testator from Mr. *Selwin*, shall pass to Mr. *Selwin* by his being made executor? or, whether it passed by the devise of the residue to the two executors? The written instructions for drawing the will directs the £3000 all to Mr. *Selwin*. The attorney who was to draw the will says it was the testator's intention it should go so: but that he, apprehending that making the obligor executor was an extinguishment of the debt, hindered it from being particularly mentioned. It was never doubted but a debt due from an executor to a testator shall be assets in the executor's hands to pay debts; (1) for, [242] if the testator had expressly given it away, even that could not have screened it from debts: so the testator may give a legacy out of a debt due to him, as in the case in *Yelv.* 160, *Flud v. Rumsey*, which authority is right; the implied gift, by making the debtor executor, may be controlled by an express gift, or by a devise of all his debts.

It hath been questioned whether such a debt be assets to pay legacies in general (*vide Phillips v. Phillips*, 1 *Chanc. Cas.* 192, also 3 *Chan. Cas.* 89); but that not being the present case, it is not necessary to be determined: I am at present inclined to think it may; but shall not bind myself by giving my opinion till the case happens. If this be considered upon the will, without the parol evidence, it will appear clearly from the general words of devising the residue, (*i.e.*) *all his real and personal estate which he had not thereby before given to the residuary legatees*; that this debt, which at that time was part of the personal estate, falls within the description: the testator was intitled to this debt when he made his will, and at the time of his death: he had not before disposed of it, nor had he appointed Mr. *Selwin* executor. A devise of the residue after payment of debts and legacies plainly comprehends this debt; and the only doubt is with regard to Mr. *Viner*'s evidence, who wrote the will. I privately think that it was intended the £3000 should go to Mr. *Selwin*. Privately I think so; but I am not at liberty, by private opinion, to make a construction against the plain words of a will. None of the cases where parol evidence has been admitted have gone so far as the present case; the farthest they go is to rebut an equity (2) or resulting trust; the parol evidence in those cases tended to support the intention of the testator consistent with the written will, and did not contradict the express words of the will, as in the present case. It is better to suffer a particular mischief than a general inconvenience, and so reversed the decree, and ordered Mr. *Selwin* to account with the plaintiff *Brown* for the said £3000 but no costs.

This was upon an appeal from the *Rolls*.

[243] This cause, the 26th of *March* 1735, came before the *House of Lords* upon an appeal, and the *Lord Chancellor*'s decree was affirmed: and the lords would not allow the parol evidence to be read, nor even the respondent's answer as to these matters. (4 *Bro. P. C.* 180 [2nd ed. 3 *Bro. P. C.* 607].)

(1) *Plowd.* 184. *Wankford v. Wankford*, 1 *Salk.* 299, 303; 1 *Roll. Abr.* 921. 2 *Black. Com.* 511, 512. *Carey v. Goodinge*, 3 *Bro. Cha. Rep.* 119, in which the appointment of a debtor, executor, to whom a legacy was at the same time given, was determined to be no release of the debt, and the executor held to be a trustee as to the residue for the next of kin.

(2) As in *Doxey v. Dozey*, 2 *Vern.* 677. *Littlebury v. Backley*, *ibid.* (cited). *Batchelor v. Searle*, 2 *Vern.* 730. *Petit v. Smith*, 1 *P. Will.* 9. *Lady Granville v. Dutches* of *Beaufort*, 1 *P. Will.* 550. *Heron v. Newton*, 9 *Mod.* 11. *Gale v. Croft*, 8 *Vin. Abr.* 195, pl. 25. *Rachfield v. Careless*, 2 *P. Will.* 158. *Lady Osborne v. Villiers*, 2 *Eq. Cas. Abr.* 410. *Mallabar v. Mallabar*, ante 80. *Brasbridge v. Woodroffe*, 2 *Atk.* 68. *Ulrich v. Litchfield*, 2 *Atk.* 373. *Blinkhorne v. Feast*, 2 *Ves.* 28. *Lake v. Lake*, 1 *Wils.* 313. *Ambl. Rep.* 126, S. C. *Lowfield v. Stoneham*, *Str.* 1261. *Earl of Inchiquin v. O'Brien*, 4 *Burn's Eccl. Law*, 122. *Kelly v. Pawlet*, 1 *Bro. Cha. Rep.* 476 (cited). But notwithstanding, in some cases extremely dark and doubtful, such

evidence has been received to assist the judgment of the Court, as in *Fane v. Fane*, 1 Vern. 30. *Hodgeson v. Hodgeson*, 2 Vern. 593. *Oldham v. Lichford*, *ibid.* 506. *Cuthbert v. Peacock*, *ibid.* 594. *Pendleton v. Grant*, *ibid.* 517. *Strode v. Russell*, *ibid.* 621. *Harris v. Bishop of Lincoln*, 2 P. Will. 136. *Rosewell v. Bennet*, 3 Atk. 77. *Goodinge v. Goodinge*, 1 Ves. 231. *Hampshire v. Peirce*, 2 Ves. 216. *Fonnereau v. Poyntz*, 1 Bro. Cha. Rep. 475. So Lord Hardwicke in 2 Atk. 375, is reported to say "He was of opinion that in the case of *Brown* and *Selwyn* the parol evidence ought to have been received, and that Lord Talbot rejected it with no small degree of reluctance, though the House of Lords affirmed his decree, deeming the admission "of the evidence to be of the most mischievous consequence." But Lord Hardwicke afterwards in *Ulrich v. Litchfield*, 2 Atk. 372, laid down the rule of courts both of law and equity in the admission of parol evidence, in the case of wills to be only, 1st. to ascertain the person, where there are two of the same name, or where there has been a mistake in the christian or surname, and this upon absolute necessity, to prevent the will from being rendered void, as in *Cheyney's* case, 5 Co. 68. 2dly, To rebut a presumption raised in favour of the next of kin against the legal title of the executor to the residue of his testator's effects: though for this latter purpose *his Lordship* afterwards in *Blinkhorne v. Feast*, 2 Ves. 28, expresses some doubt of the propriety of admitting such evidence. However the above case of *Brown* and *Selwyn* seems to have fully established the rule, that no parol evidence, to supply, or contradict the words of a will, or to explain the intention of the testator, is admissible, where the words used are unambiguous and intelligible. So *Stratton v. Payne*, 3 Bro. P. C. 257. *Errington v. Broughton*, 7 Bro. P. C. [461]. *Chamberlayne v. Chamberlayne*, 2 Freem. 52. *Cole v. Robinson*, 1 Salk. 244. *Maybank v. Brooks*, 1 Bro. Cha. Rep. 85. But if it is doubtful out of what fund a legacy given by a testator is to arise, or where there is an ambiguity with respect to the subject to which the words of the will (though clear in themselves) are to be applied, it should seem parol evidence is admissible to explain and remove the doubt. *Fonnereau v. Poyntz*, 1 Bro. Cha. Rep. 474. [See Cas. T. Talb. 296.]

Case 53.—DE GOLS *versus* WARD. [1734.]

Whether an act of bankruptcy may be purged by length of time? and, whether creditors after an act of bankruptcy shall come in under the commission, or only have their remedy against the person of the bankrupt? on whose petition a commission shall issue?

The defendant *Ward* became indebted to the plaintiff in 1730, and afterwards committed an act of bankruptcy; upon which the plaintiff, being the petitioning creditor, took out a commission of bankruptcy against the defendant; and in order to over-reach and make void as many of his conveyances and settlements, &c., as possible, the creditors on a bill filed endeavoured to prove him a bankrupt as far backward as they could; and did actually prove, to the satisfaction of the Court, that he committed an act of bankruptcy in the year 1726. Then it became a question whether the commission of bankruptcy, and all that was done under it, was not wrong, in regard that the debt of the petitioning creditor, on which it was grounded, was contracted subsequent in time to the first act of bankruptcy? After this matter had been argued and time taken to consider of it,

Lord Chancellor declared, it was clear that no body but a creditor could take out a commission of bankruptcy against another; for, that the acts of parliament were all made for the relief of creditors; and likewise that such commission must issue on the petition of some creditor who could be relieved under it. Now if the debt is subsequent to the act of bankruptcy, the creditor cannot come in under the commission against the effects of the bankrupt, though the person of the bankrupt himself will be liable. The general rule is not to determine the time of the bankruptcy, but only that the person was a bankrupt antecedent to the commission; for, then all the creditors before that time will have a [244] right to come in: but when that matter is minutely entered into, it must be distinguished which creditors are precedent, and which are subsequent to the act of bankruptcy. If the defendant became a bankrupt

in 1726, then the petitioning creditor is out of the case ; but if not till 1730, when the plaintiff's debt was subsisting, then all is right. What puzzles the case is, that the assignees have been over diligent, and in order to rescind as many of the defendant's acts as they could, have endeavoured to prove him a bankrupt as far backwards as possible ; by which they have cut up their own foundation by proving an act of bankruptcy in 1726. Then the difficulty is, whether the act of bankruptcy in 1726, cannot be considered as purged, (1) being near ten years since, and no commission taken out upon it ? I am most inclined to direct an action of *trover*, in which the jury will consider whether the defendant was a bankrupt in 1726, or not ; and if they pay no regard to it, I am sure I will not.

Then Mr. *Fazakerley* objected, that the Court would never direct a trial at law, unless it appeared doubtful whether he was a bankrupt in 1726, which he said, was not the present case. And, he said, it was never determined that an act of bankruptcy could be waived or purged.

The *Lord Chancellor* dismissed the plaintiff's bill without prejudice.

Note : this decree was reversed in the *House of Lords*, by the opinion of all the judges, (2) *February 17, 1737*.

(1) It should seem that an act of bankruptcy, if once *plainly* committed, can never be purged. *Worsley v. Demattos*, 1 *Burr.* 484. But if the act was doubtful, then circumstances may explain the intent of the first act, and shew it not to have been done with a view to defraud creditors. *Ex parte Hall*, 1 *Atk.* 201, *et vide Cooke's Bank. Laws*, 129.

(2) Lord Chief Justice *Lee*, who delivered the opinions of the judges, saying, that as the commission issued when the *old statutes* relating to bankrupts were in force, they had considered it upon the foot of *those old statutes*, and that they were all of opinion that the petitioning creditor *being a creditor at the time the commission issued*, the commission therefore was good and valid in law, 4 *Bro. P. C.* 327 [2nd ed. 1 *Bro. P. C.* 536], *S. C.* *Sed vide e contra Cooke's Bank. Laws*, 24, 25, and the cases there cited.

[245] Case 54.—JANE SABBARTON an infant, by THOMAS PARR Esq. her next friend *versus* BENJAMIN SABBARTON, DULCIBELLA SABBARTON Widow, ROBERT KIDWELL, WILLIAM SABBARTON an infant, by the said ROBERT KIDWELL his Guardian, JOEL POCOCK, GILES POCOCK, SARAH POCOCK, and THOMAS DIGGLES and SARAH his Wife. (*Ante*, 55, *S. C.*) [1734.]

J. S. by will, reciting that a marriage is proposed between his niece *A.* and his cousin *B.* devises to trustees divers freehold houses, &c., and the rents due, or to become due, and money in the orphan's fund, and the produce of the same, and *Bank* stock, and money due thereon, in trust to pay the rents and profits to *A.* if living at his decease, during life, or to such person as she by writing should appoint, with or without the consent of any husband ; but if she should marry *B.* then, after the decease of *A.* in trust for *B.* during life, and after his decease in trust for the first and other sons successively of *A.* and *B.* and their heirs male ; and for want of such issue in trust for the daughters of *A.* and *B.* equally to be divided between them, and for want of issue of that marriage, in trust for the issue of the survivor of them ; and if neither of them leave issue, in trust for *C.* for life, with remainder for such child and children, as his brother *D.* should leave living at his decease, or that *D.*'s wife should be *ensient* of, that should attain the age of twenty-one, and to the heirs, executors, &c., of such child, &c., as they should respectively attain the age of twenty-one years ; and if none attain that age, to his own right heirs : but if *A.* should not marry *B.* then in trust after her decease for *C.* for life, remainder for the child and children of *D.* *ut supra*, and if none attain the age of twenty-one, to his own right heirs ; and devised the residue of his estate, real and personal to *A.* and *C.* equally to be divided between them, their heirs, executors, &c., and made others executors, and died. *A.* and *B.* intermarried ; *B.* died without issue ; *C.* married, and died without issue ; *A.* died without issue, having made her will, and appointed an executor ; *D.* died before *A.*, leaving issue two sons, *E.* and *F.* above twenty-one years of age ; *E.* died (before *A.*) intestate, leaving *G.* a daughter an infant, now living ; *F.* is also living ; the orphan's

fund and *Bank* stock were not transferred but remain as at the testator's death : the bequests of these (considered as a bequest of a term for years in lands) to the child and children of *D. ut supra*, is held to be good as this case has happened.

Joseph Sabbarton, late of *London*, merchant, made his will, dated *April 20, 1710*, and so much thereof as regards the present question is in the words following (that is to say) " And whereas a marriage is proposed to be had and solemnised by and between " the said *Catherine Corr* and *Benjamin Sabbarton*, jun. eldest son of my cousin *Benjamin Sabbarton*, sen. of the city of *Norwich*, weaver. Now I do hereby devise and bequeath " unto the said *Thomas Botterell* and *John Young*, and the survivor of them, and the " heirs, executors and administrators of such survivor, all that [246] my freehold house, " out-houses, barn, coal-house, stable, gardens and orchards at *Enfield* in the county " of *Middlesex*, which I lately purchased of *Patience Ashfield*; and also all and every " my freehold houses, messuages, lands, tenements and hereditaments situate in or near " *Queen-street* and *Bow-lane*, *London*, or either of them, or any court or courts adjacent " thereunto, which I lately purchased of *John Kalendar* and *Edward Kalendar*, or either " of them, together with such rents as shall be due and in arrear for the same premises at " the time of my decease, and after that shall become due; and also the sum of £287, 1s. 3d. " in the orphans fund of the chamber of *London*, and the interest, increase and produce " of the same fund that shall be due at the time of my decease, and after that becomes " due and payable; and also the sum of £350 capital stock in the corporation of the " *Bank of England*, and all monies due thereon at the time of my decease, or that shall " thereafter become due and payable for the same, to and for the several uses, trusts, " intents and purposes hereafter mentioned, limited and declared (that is to say) in " trust that they the said *Thomas Botterell* and *John Young*, and the survivor of them, " and the heirs, executors and administrators of such survivor shall pay, or cause to " be paid, all and singular the said rents, issues, profits and produce of all the said " messuages, lands, tenements and hereditaments at *Enfield*, and in or near *Queen-street* and *Bow-lane*, *London*, and orphans fund in the chamber of *London*, and *Bank* " stock, to the said *Catherine Corr*, if living at the time of my decease, and not otherwise, " quarterly, half-yearly or otherwise, as the same are and shall become due, paid and " payable, for and during the term of her natural life, or unto such person or persons " as she shall by any writing under her hand direct and appoint, with or without the " consent of any husband she may have; and whether the hereby proposed marriage, " or any other marriage of her to any other person, may or shall happen, or notwithstanding she shall never marry [247]: but in case she the said *Catherine Corr* do or " shall marry the said *Benjamin Sabbarton*, jun. then that they the said *Thomas Botterell* " and *John Young*, and the survivor of them, and the heirs, executors and administrators of such survivor, shall, from and after the decease of the said *Catherine Corr*, " stand seised, interested and possessed of the said premises, in trust for the said " *Benjamin Sabbarton*, jun. for and during the term of his natural life; and from and " after his decease, then in trust to and for the first son lawfully begotten of the said " *Catherine Corr* and the said *Benjamin Sabbarton*, jun. and the heirs male of such " first son, and so on successively to the second, third, fourth and fifth, and all and " every other son and sons of the said *Catherine Corr* and *Benjamin Sabbarton*, jun. " as they shall stand in seniority of age and priority of birth, and their heirs male respectively; and for want of such issue male, then in trust to and for the use and behoof " of the daughter and daughters lawfully begotten of the said *Catherine Corr* and " *Benjamin Sabbarton*, jun. equally to be divided between them share and share alike; " and for want and in default of any lawful issue of the hereby proposed marriage " between the said *Catherine Corr* and the said *Benjamin Sabbarton*, jun. then in trust " to and for all the issue male and female lawfully begotten of the body of the survivor " of them, equally to be divided between them share and share alike; and in case " neither of them shall leave any lawful issue,(1) then in trust to and for my said " sister *Sarah*, for and during the term of her natural life; and from and after her " decease, in trust to and for the only proper use and behoof of all such child and " children lawfully begotten, as my said brother *John* shall at the time of his death " leave living, or that his wife shall be then *ensient* or in child with, that shall live and " attain to the age of twenty-one years, and to the heirs, executors, administrators and " assigns of such child and children, equally to be divided between them share and share " alike, as they shall respectively attain the said age of twenty-one years; and in case

"no such child of my [248] said brother *John* shall live to attain the said age of twenty-one years, then I give, devise and bequeath the said house, out-houses, barn, stable, coal-house, gardens and orchard at *Enfield*, houses, lands, tenements and hereditaments in or near *Queen-street* and *Bow lane*, *London*, and orphans fund in the chamber of *London* and *Bank*, to my own right heirs for ever ; but in case the said *Catherine Corr* shall not marry the said *Benjamin Sabbarton*, jun. then in trust that they the said *Thomas Botterell* and *John Young*, and the survivor of them, and the heirs, executors and administrators of such survivor, shall, from and immediately after the decease of his said *Catherine Corr*, stand seised, interested and possessed of the said last-mentioned premises, in trust to and for my said sister *Sarah*, for and during the term of her natural life ; and from and after her decease, in trust to and for the only proper use and behoof of all such child and children lawfully begotten as my said brother *John* shall at the time of his death leave living, or that his wife shall be then *ensient* or in child with, that shall live and attain the age of twenty-one years, and to the heirs, executors, administrators and assigns of such child and children, equally to be divided between them, share and share alike, as they shall respectively attain the said age of twenty-one years ; and in case no such child of my said brother *John* shall live to attain the said age of twenty-one years, then I give, devise and bequeath the said last-mentioned premises to my own right heirs for ever." And as to the residue of the said testator's estate, he by his said will disposed thereof in the words following, *viz.* "All the rest, residue and remainder of my ready money, plate, rings, jewels, clocks, watches, notes, bills, bonds, mortgages, household goods, and all other my estate and estates, as well real as personal, wheresoever and whatsoever, either in possession, reversion or expectancy, after my debts and funeral charges shall be fully paid and satisfied, I give, devise and bequeath unto my said sister *Sarah* and the said *Catherine Corr*, equally to be divided be-[249]tween them, to hold unto them my said sister *Sarah* and the said *Catherine Corr*, their heirs, executors, administrators and assigns for ever ; and I do hereby make, constitute and appoint my said sister *Sarah* and the said *Catherine Corr* my joint residuary legatees." (*Reg. Lib. B. 1734, fol. 45.*)

The said testator appointed *George Vergoe* and *Thomas Pilkington* executors of his said will, and died sometime in the month of *January* 1710, without revoking or altering the same ; and the said executors proved the said will, and the trust is now vested in the defendant *Diggles* and his wife. The marriage proposed between *Benjamin Sabbarton* the younger and *Catherine Corr* took effect after the death of the said testator ; and *Sarah*, the testator's sister, about the 28th of *March* 1713, intermarried with the defendant *Robert Kidwell*, and died without issue the 9th of *August* 1721, and he is her administrator. The said *Benjamin Sabbarton* the younger died the 2d of *December* 1718, without ever having had any issue, and the said *Catherine* his wife survived him, and died on the 7th of *September* 1733, without having ever had any issue, having made her will, and thereof appointed the said *Kidwell* executor in trust, who proved the same. *John Sabbarton* the said testator *Joseph Sabbarton's* brother, died about the 19th of *November* 1729, leaving issue two sons, namely *Joseph Sabbarton* and *Benjamin Sabbarton*, then both of the age of twenty-one years and upwards. *Joseph Sabbarton*, the eldest son of the said *John Sabbarton*, the said testator's said brother, died in *January* 1729, intestate, leaving issue only one child, *Jane* an infant, now living ; and the said *Benjamin*, the other son of the said *John Sabbarton*, is also living ; and neither the said sum of £287, 1s. 3d. in the orphans' fund, or the said £350 *Bank* stock have been ever transferred ; but the same remain in the same condition as they did at the time of the making of the said will by the said testator.

Upon the hearing of two causes before the late Lord Chancellor upon the said 15th of *November* [250] 1736, one between the said *Jane Sabbarton* the infant, by her next friend, plaintiff, and the said *Benjamin Sabbarton* (her uncle), *Robert Kidwell*, and *Thomas Diggles* and his wife, and others defendants ; and the other between the said *Robert Kidwell*, plaintiff, and the said *Thomas Diggles* and his wife, *Jane Sabbarton*, *Benjamin Sabbarton* and others, defendants ; it was ordered (amongst other things) that a case be made for the opinion of his Majesty's Court of *King's Bench*, on the following question :

If a term for years in lands had been bequeathed in the same manner as the trust of the orphans and *Bank* stock is limited by this will, whether the limitation to all such child and children lawfully begotten as the testator's brother *John* should at the time

of his death leave living, or that his wife should be then *ensient* or with child with, that should live to attain the age of twenty-one years, and to the heirs, executors, administrators and assigns of such child or children equally to be divided between them share and share alike, as they should respectively attain the age of twenty-one years, whether that would have been good in the case that hath happened ? (2)

On hearing counsel on both sides, and consideration of this case, we are of opinion, that if a term for years in lands had been bequeathed in the same manner as the orphans and *Bank* stock is limited by this will, the limitation to all such child and children lawfully begotten as the testator's brother *John* should at the time of his death leave living, or that his wife should be then *ensient* with that should live to attain the age of twenty-one years, and to the heirs, executors, administrators and assigns of such child or children, equally to be divided between them share and share alike, as they should respectively attain the age of twenty-one years, would have been good in the case that hath happened.

W. Lee, E. Probyn,
F. Page, W. Chapple.

(1) There seems to be no diversity betwixt a devise of a term to one for life, and if *he die without issue*, remainder over, and a devise thereof to one for life, with such remainder, if *he die leaving* no issue ; for both these devises seem equally relative to the failure of issue at any time after the testator's death. 1 *P. Will.* 665. *Sed vide e contra*, 1 *Bro. Cha. Rep.* 191.

(2) Whether the words "dying without issue" in the case of a limitation of chattels real or personal are to be construed to mean a general failure of issue, or such a failure as is to happen within the compass of a life, has been a question of much diversity of opinion in the books. *Donne v. Merrifield*, *ante*, 56 (cited). *Forth v. Chapman*, 1 *P. Will.* 663. *Nicholls v. Hooper*, *ibid.* 198. *Hughes v. Sayer*, *ibid.* 534. *Nicholls v. Skynner*, *Prec. in Chanc.* 528. *Kelly v. Fowler*, 6 *Bro. P. C.* 309 [2nd ed. 3 *Bro. P. C.* 299]. *Pinbury v. Elkin*, 1 *P. Will.* 563 ; *Prec. in Chanc.* 483, S. C. *Pleydell v. Pleydell*, 1 *P. Will.* 748. *Target v. Gaunt*, *ibid.* 432. *Maddox v. Staines*, 2 *P. Will.* 422. *Stanley v. Leigh*, 2 *P. Will.* 686. *Higgins v. Dowler*, 1 *P. Will.*, the above case of *Sabbarton v. Sabbarton*, *Atkinson v. Hutchinson*, 3 *P. Will.* 258. *Read v. Snell*, 2 *Atk.* 647. *Ezel v. Wallace*, 2 *Ves.* 318. *Sheffield v. Lord Orrery*, 2 *Atk.* 388. *Chamberlain v. Jacob*, *Amb.* *Rep.* 72. *Sheppard v. Lessingham*, *ibid.* 124. *Lamplsey v. Blower*, 3 *Atk.* 396. *Knight v. Ellis*, 2 *Bro. Cha. Rep.* 574, are cases in which the Court held that the words, "if the first devisee died *without issue*", must be intended to mean without issue *living at his death*. But according to the decision of several modern cases it should seem as if the Court had adopted a different rule of construction, *viz.* that the words "dying without issue", will *prima facie* be intended to mean an indefinite failure of issue, unless the contrary appears from other circumstances. *Richards v. Lady Abergavenny*, 2 *Vern.* 324. *Clare v. Clare*, *ante*, 21. *Green v. Rodd*, 2 *Atk.* 308 (cited). *Milward v. Milward*, *ibid.* (cited). *Beauclerk v. Dormer*, 2 *Atk.* 308. *Saltern v. Saltern*, *ibid.* 376. *Earl of Stafford v. Buckley*, 2 *Ves.* 181. *Butterfield v. Butterfield*, 1 *Ves.* 133, 154. *Attorney General v. Hird*, 1 *Bro. Cha. Rep.* 170. *Bigge v. Benseley*, 1 *Bro. Cha. Rep.* 187. *Earl of Chatham v. Tothill*, 6 *Bro. P. C.* 450 [2nd ed. 7 *Bro. P. C.* 453]. *Glover v. Strothoff*, 2 *Bro. Cha. Rep.* 33. *Fearne's Cont. Rem.* 368.

[251] Case 55.—THOMAS *versus* HOLE.

11 April 1728.

A devise to relations is to be confined to such as would take by the statute of distributions : but their shares may not be the same as under that statute.

One *Hole* by his will gave £500 to the *relations* of *Elizabeth Hole* to be divided equally between them. *Elizabeth Hole* had at the testator's death two brothers living, and several nephews and nieces by another brother. The cause came on to be heard before my lord *King*, and two questions were made ; in the first place, who should take by this description of the *relations* of *Elizabeth Hole* ? It was said, that in the case of *Brown and Brown* my Lord *Macclesfield* had determined that the word *relations* should be confined to such *relations* as were within the statute of distributions, because

of the uncertainty of (1) the word *relations*; and upon this authority my Lord King determined, that no *relation* should take by this description that could not take by the statute of distributions. The next question was, in what proportions such *relations* should take, whether as they would have taken by the statute, or in a different manner? And as to this he determined, that as the testator had directed the £500 to be divided equally among them, he could not direct an unequal distribution, and accordingly decreed them to take *per capita*.(2)

(1) So *Car v. Bedford*, 2 *Cha. Rep.* 146; 2 *Eq. Cas. Abr.* 365, S. C. *Roach v. Hammond*, *Prec. in Chanc.* 401. 1 *P. Will.* 327, *Anon.*

(2) The authority of this case has not only been recognized by, but seems to have governed the decision of many subsequent cases, in which, words of the same, or of a similar import have been used, as in *Edge v. Salisbury*, *Ambl. Rep.* 70. *Isaac v. Defriez*, *ibid.* 595. *Widmore v. Woodroffe*, *ibid.* 636. *Harding v. Glynn*, 1 *Atk.* 469. *Whithorne v. Harris*, 2 *Ves.* 527. *Green v. Howard*, 1 *Bro. Cha. Rep.* 31. *Hands v. Hands*, *Hil.* 1782, at the *Rolls*, 3 *Bro. Cha. Rep.* 69 (cited). *Phillips v. Garth*, 3 *Bro. Cha. Rep.* 64. *Rayner v. Mowbray*, 3 *Bro. Cha. Rep.* 234. *Vide also Beale v. Jones*, 2 *Vern.* 381. *Brunsdon v. Woodbridge*, *Ambl. Rep.* 507. *Bennet v. Honeywood*, *ibid.* 709, in which last case a bequest to the testator's brother amongst such of his (testator's) poor relations as he should think fit, was held not to be confined to the next of kin.

[252] DE TERM. S. TRINITATIS 6 GEO. II. IN CURIA CANCELLARIÆ.

Case 56.—MANSELL *versus* MANSELL. 1732.

(2 *P. Will.* 678, S. C.)

Trustees to preserve contingent remainders for children unborn, join to defeat them; this is a breach of trust relievable in equity; and where there is not a purchaser for a valuable consideration without notice, the estates shall be conveyed to the former uses.

This cause came on upon an appeal to my Lord Chancellor King from the decree of the *Master of the Rolls*.

Edward Vaughan seised in fee in 1683, devised lands to his sister *Dorothy*, afterwards the plaintiff's mother, for life, remainder to trustees to preserve contingent remainders, remainder to the use of her first and other sons in tail male, remainder to the use of his cousin *Edward Mansell* in fee, and charges the estate with a debt of £1200 and dies.

The plaintiff's mother intermarried with Sir *Edward Mansell*, and in 1685, they, with the remainder-man in fee, join in a feoffment, with a covenant to levy a fine to trustees to the use of the plaintiff's father in fee; and this is exprest to be to [253] the intent that the fee simple might be vested in him for the raising of money for the payment of the debts of *Edward Vaughan* the testator (whose inheritance it was) by demising, selling or mortgaging the estate or any part thereof, and for other good causes and considerations a fine is levied accordingly at the grand sessions in *Cardiganshire*, where the lands lay. About a year after, the trustees, to preserve contingent remainders, reciting the will, feoffment and fine, convey the whole estate by lease and release to the plaintiff's father in fee, *Dorothy* being then with child, and then the plaintiff is born. Afterwards the father by will makes the plaintiff tenant for life. &c., and dies.

The plaintiff brought his bill to have the benefit of Mr. *Vaughan's* will, and insisted on the breach of trust; and that the parties who claim under the fine and feoffment, being parties to the breach of trust ought not to take advantage of it.

The defendant in his answer insisted on the fine and feoffment.

The *Master of the Rolls* decreed for the plaintiff for so much as was not aliened *bona fide*.

It was argued for the plaintiff by Mr. *Attorney General*, that the estate ought to be preserved by the trustees according to the intent of the deed of trust; that their

joining with the tenant for life in the alienation was a high breach of trust ; and that had they aliened to one who had no notice of the trust the remedy should be against them ; but where with notice, the parties claiming under the trust should make good the estate ; and so held by the Lord *Harcourt* in *Pye* and *George's* case (1 *P. Will.* 128, S. C. ; also 1 *Bro. Parl. Ca.* 359 [2nd ed. 7 *Bro. P. C.* 221], where it is stated at large), in *Salk.* reports : which is stronger than our case ; for, those we claim against are all volunteers under Sir *Edward Mansell's* will. Mr. *Vaughan's* estate being subject to a charge of £1200, it cannot be supposed that Sir *Edward Mansell* and the trustees should bar the re-[254]-mainders to prevent them coming to the first and other sons of *Dorothy*, who was his wife ; but merely to discharge that debt, which a court of equity would, upon a bill brought, have decreed to be done by sale. Wherever a conveyance has been made for a particular purpose, and no particular limitation of the estate after that purpose performed, it has been always looked on as a resulting trust for the heir, or for such to whom the inheritance belongs ; there are many cases where it has been so held. 2 *Vern.* 52, *Baden* versus *Earl of Pembroke*.

It was also insisted, that old Sir *Edward Mansell* had in an answer (formerly put in to another suit in this Court) allowed that the plaintiff would be intitled in equity to an estate tail under Mr. *Vaughan's* will.

Mr. *Solicitor General*, Mr. *Verney*, and Mr. *Ryder*, after the proofs read, added, that their claiming only against devisees under Sir *Edward Mansell's* will, and not against any purchasers either with or without notice of the trust, obviated all objections that could be made on that head ; and that where a volunteer claims under a breach of trust, without any consideration paid, and with notice of the trust, it would be unconscionable he should take advantage of it ; but he shall hold the estate liable to the trust. *Pye* and *George's* case, though not a case directly adjudged, yet was a very strong declaration by the Court.

Trustees to preserve contingent remainders were found out to help the defect in the law of the first son's not being able to take advantage of the forfeiture of the tenant for life by making a feoffment, because not *in rerum natura* at the time of the forfeiture committed : and at law, before the statute of uses, if a feoffee to uses had enfeoffed another with notice of the uses, the second feoffee would have held the estate subject to and for the use of the *cestui que trust* ; and trustees are appointed to preserve and not to destroy contingent remainders. Then taking it on the other side, this does not seem [255] so much a breach of trust as a just and legal act, to take off that charge which lay on the estate, and to secure that very intail which they were trustees for, and would have been destroyed by a sale ; for, the acts done by the husband and wife are recited in the deed to be done only in order that the estate may be settled on the husband, to and for the raising such sums as the estate is chargeable with ; and it is the greatest equity they should be taken to this particular purpose only, it being a lawful one : for, where a deed may be taken in a double sense, the just and equitable one shall be preferred.

Neither is it to be supposed the wife would have joined in the disherison of her children, but only to make Sir *Edward Mansell*, her husband, a trustee for this special purpose of discharging the estate. In all cases of raising of terms for one purpose, after that purpose served, the term shall attend the inheritance, though no trust appointed after the serving of the purpose. *Lowther* versus *Lowther*, heard at the *Rolls* the last term. And so whether it is considered as a rightful act, or whether it is taken as a breach of trust, and so a wrongful one, the plaintiff ought to be relieved ; and so *quacunque via data*, the decree ought to be affirmed.

Mr. *Lutwyche*, Mr. *Willes* and Mr. *Mead* argued on the other side for the defendant, and said, that it was not pretended that the legal estate was well vested in Sir *Edward Mansell* by his father's will : but they object that there has been a contrivance to defeat the plaintiff not then born of that intail which he would otherwise have had. It was not the feoffment that destroyed the contingent remainder ; for, therein the trustees were not concerned, but it was the release : and it is observable that here is no purchaser, but only volunteers claiming under a settlement made by Mr. *Vaughan's* will ; and there are many instances where, in case of volunteers, contingent remainders have been destroyed, they being favoured neither in law or equity. *Pollexfen*, 250, [256] where tenant for life, with remainder to himself, destroys the contingent remainder, it has always been held good : and it is here admitted, that had there been a purchaser there would have been no relief, which appears by this very decree : for, it

gives no relief against such who have purchased part of this estate *bona fide*. As this case is circumstanced there can be no reason for a court of equity to interpose ; for, they seek relief as to one part of the father's will, which they do not like ; but would have the other part, which makes for them, to stand. 2 *Vern.* 582, *Noy versus Mordaunt*. Here is a very fair settlement made by the father, and it has gone farther towards serving Mr. *Vaughan's* intent, which was to have the estate remain in the family, than would have been otherwise if he had been tenant in tail : the defeating this will be disappointing the provision made by the father for his younger children, which, could the father have apprehended, he would have provided otherwise for his children. Their saying the conveyance to Sir *Edward Mansell* was only a trust for payment of debts (for, that it was not *Dorothy's* intent to disinherit the child she was then *ensient* of) is setting up an intent to defeat the express act of the parties, which was a conveyance for and in consideration of natural love only to Sir *Edward Mansell*, and to no other use or purpose whatsoever ; and the word *trust* not so much as mentioned in any part of the deed ; and there being in the end of the deed an express provision that all conveyances shall be to the use of Sir *Edward Mansell* in fee, and to no other use whatsoever. In the case of *Lowther versus Lowther* there was an express conveyance to strangers in trust ; none of which is in this case : but here the conveyance is to his own heirs, without mentioning a word of any trust. Neither will their other method of taking it as a breach of trust do much better ; since remedy has been often denied against the trustees for preserving contingent remainders in case of a tenant in tail. (1) *Pratt versus Spring*, 2 *Vern.* 303. *Bowater versus Ely*, 344. *Ely versus Osborne*, 754 (1 *P. Will.* 387). Neither do they pray their remedy against the trustees, but against the remainder-men under the will. [257] Tenant for life by fine bars the contingent remainders, there can be no remedy against him : and yet that is a stronger case than this ; since there he had a kind of trust reposed in him, but here he has none at all. Then were cited the cases of *Stapleton versus Sherrard*, 1 *Vern.* 212. *Sherbourne versus Clarke*, 273. *Smith versus Dean and Chapter of St. Paul's* and *Rogle*, 367, and in *Show. Parl. Cas.* 67, to prove that equity would not assist to defeat those advantages a man has at law, by taking fetters off another man's estate. Upon the whole, as no precedent had been shewn where in the like case any remedy had been given, and that the case of *Pye versus George* was but an extrajudicial opinion of the Court, and so imperfectly reported that no stress can be laid on it, they said it would be hard to begin in this case ; which must be by taking away a legal title, and defeating the provisions made for younger children, who are always favoured in equity. Besides, we should be left without any provision for the debts which had been paid by old Sir *Edward Mansell*, and to which this estate was liable : and therefore prayed the decree might be reversed.

No judgment was now given. But in *Michaelmas* vacation, 6 *G.* 2, the opinion of the Court was delivered at my *Lord Chancellor's* house.

Lord Chancellor *King* ; Lord Chief Justice *Raymond* ; Lord Chief Baron *Reynolds*, *Reynolds*, Chief Baron, after having stated the case,

There are two points ;

First, Those conveyances being made with an intent to raise money to pay the debts of *Edward Vaughan*, whether this provision ought to extend to that purpose only ? for, then there would be a resulting trust to the old uses under the will of *Edward Vaughan*.

[258] *Secondly*, Supposing the contingent estate destroyed, whether this is such a breach of trust as that the estates defeated thereby ought to be set up again in this Court against those who claim under a voluntary conveyance with notice ?

1st, In the first place it is evident that the trustees not having executed the deed of feoffment, but being made parties without their consent, their estate could not be affected or destroyed thereby ; and the same may be said of the fine ; and if nothing else had been done, the contingent remainder had been good ; but the deeds of lease and release executed by the trustees, were an absolute conveyance, and have no reference to what was done before, but were made on purpose to destroy their own estate, and consequently the contingent remainders. I admit all the cases of resulting trusts, 2 *Vern.* 645, *Harcourt and Weymouth*, *Loder and Loder*, and which are all founded upon this plain principle, that when an estate is conveyed for particular purposes, so soon as they are satisfied there is a resulting interest to him who ought to have the estate ; but there is no trust express in the deeds of lease and release ; nor can it be

pretended they ought to be coupled with the deed of feoffment before executed by different parties, and for different purposes ; the one being to pay debts, and the other to destroy contingent remainders.

2dly, Whether equity ought to interpose, so as to set up these estates against the trustees, and those claiming under them.

That this is a breach of trust is so plain, that I know not how, by any thing I have to say, to make it more so. Indeed had this conveyance been for a valuable consideration without notice, the purchaser could not have been affected ; but when any one claims by a voluntary conveyance with notice, he must take the conveyance clothed with all its trusts. *The dictum of a counsel at the [259] bar in the Duke of Norfolk's case* is of very little weight ; besides it does not appear there to be his own opinion. And *Salk.* 680, is to the contrary. The case of *Englefield and Englefield*, 1 Vern. 413, was solely decreed on the point of fraud ; for, there were no trustees to preserve contingent remainders. As to the case of *Else and Osborne*, 2 Vern. 754, that determination can be of no greater authority than the reason on which it is founded will warrant ; there the Lord Chancellor took it, that the son had an estate tail, and therefore the remainder ought to be considered no longer as contingent, and that then the trustees became trustees for the tenant in tail, to which estate the quality of barring remainders over is essential ; but this is not the present case : for, here the trust subsisted in its full force. *Winnington versus Foley* (1 P. Will. 536, S. C.), *Tipping versus Pigot*, reported in *Abr. Eq. Cases*, 385, in all these cases the remainder-man was *in esse* ; so that he had an estate tail vested, and then the trustees became trustees for tenant in tail, and consequently the estates over might be barred. It is said, that courts of equity (2) have obliged trustees to join ; but this has been just as the circumstances of the cases have appeared, 2 Vern. 303. And whatever they have done, or may do, yet they will never have it left to the discretion of a trustee to do it. It is objected that the plaintiff has a satisfaction by the will, and therefore he ought not to have the advantage of both. 2 Vern. 581. I answer, that what he has under the will is not a proper equivalent, since he is thereby only made tenant for life, without power to provide for younger children, or pay his debts ; besides, the estate is only limited to his first son in tail : and farther, there is no condition annexed to the devise, either exprest or implied ; but the present question is only concerning the *Vaughan's* estate, the *Mansell's* is sufficient to pay the farther debts and legacies. As to the inconveniences they are imaginary, and there is no comparison between them and those which would attend the other side of the question ; for, if this should stand, the trustees might, without rea-[260]-son, and without the direction of a court of equity, join to defeat most settlements : therefore the plaintiff ought to be relieved, but in what manner must be left to my Lord Chancellor.

Lord Chief Justice *Raymond* agreed with the Chief Baron in both points, and spoke to this effect : as to the contingent remainders, since they are destroyed, the plaintiff is intitled to relief, either against the trustees or the purchasers with notice. That such remainders may be destroyed is a positive law, and when done, there is no remedy at law ; and therefore persons were chosen in whom there was a confidence placed to preserve men's estates in their families. It has been said, that remedy may be had at law for a breach of trust : but I think it is the proper business of a court of equity to keep trustees within due bounds, and to give relief. If there is tenant for life, with contingent remainders, and he defeats them, he is not answerable for it, since no trust or confidence was reposed in him : and in such case *aequitas sequitur legem*. As to cases in point, though there are none, yet the reason of the thing will govern it. If an estate subject to a trust is purchased from the trustees for a valuable consideration, without notice, a court of equity cannot affect the purchaser, but they can the trustees ; but if such purchaser had notice, then the trust goes along with the estate, and the land still continues subject to it. It may be trustees have been excused where there have been favourable circumstances : but here is not the least reasonable matter to induce the trustees to join ; therefore what they have done is against natural equity and justice. In the case of *Else and Osborne*, 2 Vern. 754, the inheritance was vested ; and what was done might be proper for the circumstances of the family : but *non sequitur* a trustee may do it in what cases he shall think proper. Upon the whole he was clear that the plaintiff should be relieved.

[261] Lord Chancellor said he would confine himself to one point, whether in this case the breach of trust ought to be relieved against ? For, as to the resulting trust,

and the equivalent satisfaction, he thought there was not much in them, and would give no opinion about them. In point of law these remainders are absolutely destroyed. Though the trustees had defeated their estates, yet if the wife had kept hers, that would have preserved the contingent estates over. The question now is, whether equity will relieve? Here is no fraud but what appears on the deeds. It would be a very odd thing to say, it is not a breach of trust for those persons who are appointed to preserve estates, to defeat them contrary to the intent of him who reposes a confidence in them. Then if this is a breach of trust, equity may relieve; for, this is a matter within its original jurisdiction. He said, he never knew that law had any thing to do in the case; if then it be the business of equity to keep trustees within compass, and to see trusts executed, can equity sit still and see trustees break their trusts? At law, if there had been a trustee to an use, and he had conveyed without consideration and without notice of the use; or though it had been for a valuable consideration, yet if there had been notice, the use would have followed the land: and trusts are to be governed by the same rules that uses were before the statute of uses. If there had been a bare tenant for life, who is no trustee, equity would not have relieved; for, there can be no breach of trust where there is no trustee (*vide Fearne's Cont. Rem.* 487, 4 ed.); and such case is like a collateral warranty by tenant for life, against which equity would never relieve (*vide ante*, 237). Indeed courts of equity have gone great lengths to judge whether a man would have any child or not; but I shall be very cautious how I do it. A breach of trust will go so far as to affect the trustees, and all who purchase under them having notice. However, here is no occasion to go against the trustees, since the lands themselves may be had: and this being the case of a purchaser with notice (*Vide Garth v. Cotton*, 3 Atk. 751; 1 Ves. 542, S. C. *Durnford v. Lane*, 1 Bro. Cha. Rep. 109), my Lord Chancellor confirmed the decree made by the Master of the Rolls in favour of the plaintiff. *Reg. Lib. B.* 1732, fol. 76.

(1) As where upon a subsequent remainder to the *right heirs*, a *collateral relation* only has been affected by it, there having been no issue of the marriage, for next after the parties to the marriage, the Court considers the issue to be the only objects of the settlement and trusts, and pays less regard to the remainder over to the right heirs, as no immediate objects of consideration in the settlement: as also where the application to the Court for relief, has been made by one who has not at the time, nor possibly ever might be entitled to the remainder, under the words of the limitation. *Vide Sir Thomas Tippen's case*, 1 P. Will. 359 (cited). *Else v. Osborne*, *ibid.* 387; *Fearne's Cont. Rem.* 482, 4 ed. But where a trustee joins with the *cestui que trust* in tail, in any conveyance to bar the entail, it is no breach of trust, for it is no more than what he may be compelled to do. *Robinson v. Comyns. ante*, 166. *Adington v. Boteler*, 1 Bro. Cha. Rep. 72.

(2) But this (in the words of Mr. *Fearne*) has only happened under peculiar circumstances; either of pressure to discharge incumbrances *prior* to the settlement, or in favour of creditors where the settlement was *voluntary*; or for the advantage of the persons who were the first objects of the settlement; as to enable the first son, &c., to make a settlement upon an advantageous marriage. *Vide Fearne's Cont. Rem.* 4 ed. 483. *Platt v. Sprigg*, 2 Vern. 303. *Frewin v. Charleton*, 1 Eq. Abr. 386, pl. 4. *Bassat v. Clapham*, 1 P. Will. 358. *Winnington v. Foley*, 1 P. Will. 536. And however (continues the same learned author) the court may see proper to direct trustees to concur in destroying contingent remainders, under circumstances like those in the above noticed cases; it has repeatedly denied the same interposition, in cases where such ingredients were wanting, as in *Davies v. Weld*, 1 Vern. 181; 1 Eq. Cas. Abr. 386. *Townsend v. Lawton*, 2 P. Will. 379. *Symance v. Tattam*, 1 Atk. 613. *Woodhouse v. Hoskins*, 3 Atk. 22. *Barnard v. Large*, Cox's note, 2 P. Will. 684; 1 Bro. Cha. Rep. 534, S. C.; *Ambl. Rep.* 774, S. C.

DE TERMINO PASCHÆ 6 GEO. II. IN CURIA CANCELLARIÆ.

Case 57.—Lady LANESBOROUGH *versus* FOX.

25, 26 April 1733.

Cited *ante*, 25, 26.

A. having the reversion in fee of lands settled upon the marriage of B. his son, in the usual manner, devises all the lands in that settlement *on failure of issue of the body of B. and for want of heirs male of his own body to his daughter F. and the heirs of her body*. This will does not give an estate tail by implication to B. The devise to F. is executory ; and is void, as being on too remote a contingency.

Mark Anthony Morgan, Esq., lessee of George Fox, Esq. brought an ejectment in the Court of *Exchequer in Ireland* against the Lady Dowager Lanesborough, for several castles and lands in the county of Longford in Ireland : to which the Lady Lanesborough pleaded not guilty. The cause came to be tried by a special jury at the bar of the said Court, who found a special verdict in Michaelmas term, 1727, *viz.* That Sir George Lane, Knt. and Bart. afterwards Lord Viscount Lanesborough, was seised in fee of the said castles and lands, and being so seised did, in consideration of a marriage then to be had between his son James and Mary Compton, now the said Lady Lanesborough, and of £2000 marriage-portion, by indentures of lease and release, dated the 3d and 4th of May 1676, convey the said castles and lands to Thomas Earl of Ossory, Richard Earl of Arran, Henry Lord Bishop of London, and Sir Hugh Cholmondeley, Bart. and their heirs, upon the trusts and to the uses following, *viz.* That the said James Lane should have thereout, during the joint lives of him and Sir George Lane, one annuity of £300, and in case the said intended marriage should take effect, then after the death of the said James Lane, that the said Mary Compton should have and receive one annuity or yearly rent of £320 for her jointure ; and subject thereto to the use of the said Sir George Lane, for his life, without impeachment of waste, and then to the use of the said James Lane for ninety-nine years, to commence from the decease of his father Sir George Lane, if the said James Lane should so long live, without impeachment of waste ; and then to the use of the said [263] Earl of Ossory, Earl of Arran, Bishop of London, and Sir Hugh Cholmondeley, and their heirs, during the life of the said James Lane, upon trust to support the contingent remainders, and then to the first son of the body of the said James Lane on the body of the said Mary Compton to be begotten, and the heirs male of the body of such first son, with like remainders to all other the sons of the said marriage successively in tail male ; and for default of such issue, then to the use of the heirs male of the body of the said James Lane ; and then to the right heirs of the said Sir George Lane.

That the said marriage was had and solemnized, May 5, 1676, and the said £2000 paid to the said Sir George Lane.

That Sir George Lane, then Viscount Lanesborough, being seised in fee of the reversion of the said premises, did, the 10th day of July 1683, make his last will and testament in writing, and did thereby, among other things, devise in the words following : “ *Item*, I will and devise the manor and town of Lanesborough and all other the lands, tenements and hereditaments, mentioned or contained in the settlement made by me on the marriage of my said son James Lane with the daughter of Sir Charles Compton, second brother to the late Earl of Northampton, *on failure of issue of the body of the said James Lane, and for want of the heirs male of my body*, to my said daughter Frances Jane, and the heirs of her body lawfully to be begotten ; and for want of such issue, to my said daughters the Lady Beaufoy and Mary Bingham severally, and the heir of their bodies lawfully begotten or to be begotten, severally and respectively ; and for want of such issue, that all and every of the premises shall be and remain to his Grace James Duke of Ormond, and the heirs male of his body lawfully begotten or to be begotten.” And in a subsequent part of his said will, he did will and devise, that if his said son James Lane should die without issue male, his the said testator's wife surviving him, his said wife should hold and enjoy his house and park in Rathline, and all the houses, lands, te-[264]-nements and hereditaments in the county of Longford, wherein he had any estate of inheritance in possession,

reversion or remainder, for and during her natural life, and after her decease, to the several uses to which the same are limited as aforesaid ; and made his said wife executrix of his said last will and testament.

That the said *George* Lord Viscount *Lanesborough* died the 1st of *December* 1683, so as aforesaid seised of the same reversion of the manors, towns and lands in the declaration mentioned, and had issue at the time of his death the said *James*, his only son and heir, and two daughters, to wit, *Mary* and *Charlotte*, by his first wife, and the said *Frances* by his second wife, and no other issue male ; and that *Thomas* Earl of *Ossory* died the 2d of *June* 1681, and that *Frances* Viscountess *Lanesborough*, the widow of *George* Lord *Lanesborough*, died the 1st of *May* 1700, in the life-time of the said *James* Viscount *Lanesborough*.

That *James* then Viscount *Lanesborough*, *December* 1, 1683, after the death of his father, entred upon the premisses, and was thereof possessed, and the said surviving trustees became seised of the said manors, towns and lands in the declaration mentioned, by virtue of the said deeds of lease and release, bearing date respectively the 3d and 4th of *May* 1673, in such manner as the law allows.

That the said *James* Viscount *Lanesborough*, and the said Earl of *Arran*, Lord Bishop of *London*, and Sir *Hugh Cholmondeley*, the then surviving trustees, by indenture of lease and release, the 16th and 17th of *October* 1684, for the barring all estates tail, reversions and remainders, and to the end to settle and assure the same as therein after mentioned, did convey to *Edward Brabazon*, Esq., and *William Smyth*, Gent., and their heirs, amongst others, the manors, castles and lands in question, to the intent [265] and purpose, that one or more common recovery or recoveries might be thereof had and suffered ; which said recovery or recoveries should be and enure to the use of the said *James* Viscount *Lanesborough*, for his life, without impeachment of waste ; and after his decease, then to the use of the Lady *Mary* Viscountess *Lanesborough*, wife of the said *James* Viscount *Lanesborough*, for her life, as and for an increase or augmentation of her jointure, and in bar of her dower and thirds at common law ; and after her decease, then to the use of the said *James* Viscount *Lanesborough* and his heirs.

That the said recovery was accordingly suffered, *Hill*. 36 Car. 2, 1686, of the said manors, towns and lands in question, in which *Fergus Farrell*, Esq., and *Edward Nangle*, Gent., were demandants, and the said *Brabazon* and *Smyth* were tenants, who vouched the said *James* Viscount *Lanesborough*, who vouched the common vouchee.

That the said *James* Viscount *Lanesborough* being so possessed of the manors, towns and lands in question, *October* 15, 1722, did make his last will and testament, and did thereby devise to *George Hooper*, Lord Bishop of *Bath* and *Wells*, and *Hatton Compton*, Lieutenant General, and *Robert Dormer*, Esq., a judge of the *Common Pleas*, and *James Middleton*, Esq., and their heirs, all his manors, lands, tenements and hereditaments whatsoever in the kingdom of *Ireland*, in which he, or any person in trust for him, had any estate of inheritance or other interest, in possession, reversion, remainder or expectancy, in trust nevertheless, and to and for the several uses therein after expressed : that is to say, that from and after his decease, his said trustees should stand and be seised of all the said premisses in the said county of *Longford*, in trust for the heirs of his body : and for want of such issue he did will and devise that the said trustees should permit and suffer his sister *Charlotte* Lady *Beaufoy*, for and during her life, to have and receive for her own use and behoof, the rents, issues and profits of the farm and land of [266] *Coolcroy Barony* of *Rathline* in the said county of *Longford* ; and after her decease, his said trustees should permit and suffer his said wife to have and receive to her own use the rents, issues and profits of the said premisses last mentioned. And his will was, that his said trustees should suffer his said wife, from and immediately after her decease, to have and receive to her own use, all the rents, issues and profits of all the rest and residue of his said manors, lands and real estate in the kingdom of *Ireland*, for her life ; and after her decease, directed his trustees should convey the said premisses to the several uses in the said will mentioned, viz. To the use of *John Bell Lane*, the eldest and only grandson of his sister *Mary Bingham*, afterwards called *Mary Middleton*, deceased, for his life ; and after his decease, to the use of his first and other sons in tail male, with several remainders over : and he did appoint his said wife sole executrix of his said will.

That the said *James* Viscount *Lanesborough* August 30, 1724, died possessed of the said manors, towns and lands in question, and without issue.

That the said *Frances Lane*, daughter of the said *George Lord Viscount Lanesborough* and devisee in his said last will, married *Henry Fox*, and by him had issue *George Fox* the lessor of the plaintiff, her eldest son and heir; and the said *Henry* died the 13th day of *October* 1718, and the said *Frances* died the 12th day of *December* 1712, leaving the said *George* the lessor of the plaintiff, her eldest son and heir of her body, who, on the 1st of *September* 1724, entered upon the said premises, and was thereof seised as the law directs, and made the lease to the said *Mark Anthony Morgan*, as in the declaration above-mentioned, who entered upon the premises, and was possessed thereof until the said *Mary Viscountess Lanesborough* entered upon the premises and ejected him.

But whether upon the whole matter found by the said jury, the said Lady Viscountess *Lanesborough* be guilty of the said trespass or not, the jury are altogether ignorant: and if the Court judge her guilty, then they find her guilty, and assess damages and costs; but if the Court do not think her guilty, then they say she is not guilty.

The jury find the several settlements, recovery and wills herein before-mentioned in hæc verba:

Hill. 1730. The Court of *Exchequer* in *Ireland* gave judgment for Mr. *Morgan* the lessee of *George Fox*, Esq., and £68, 18s. for damages and costs.

The same term the said Lady Viscountess Dowager *Lanesborough* brought her writ of error in the *Exchequer* chamber in *Ireland*, returnable in *Easter* term, 1731. Upon which writ of error the said judgment was affirmed in *Easter* term, 1732. Upon which affirmance of the said judgment the said Lady Viscountess Dowager *Lanesborough* brought a writ of error before the *House of Lords* of *Great Britain*, which coming on to be heard on the 25th and 26th of *April* 1733, and Mr. *Talbot*, Solicitor General, and Mr. *Ryder*, having argued for the plaintiff in error; and Sir *Philip Yorke*, Attorney General, and Mr. *Lutwyche* for the defendant in error; the judges having been ordered to attend, were asked their opinion, whether Lord *James* took any other or greater estate by the will than by the settlement? and it being agreed they should deliver their opinions *seriatim*,

Mr. Justice *Reeve* delivered his opinion with his reasons; that the Lord *James* could not take an estate tail, no alteration being made by the will, and that no estate is raised to Lord *James* by implication. Then

Mr. Justice *Lee*, Sir *William Thompson*, Mr. Justice *Fortescue*, Mr. Baron *Comyns*, Mr. Justice *Probyn*, Mr. Justice *Page*, and the Lord Chief Baron, severally delivered their reasons, and all were of the same opinion.

[268] After which this question was put to the judges, *viz.* whether any or what estate *Frances* took by the will of Lord *George*? And thereupon Mr. Justice *Reeve* delivered his opinion, with his reasons for it, that *Frances* took no estate whatsoever; but that the devise to her was absolutely void in its creation, as being in too remote a contingency. Also all the other judges declared themselves of the same opinion, and severally delivered their reasons.

The judgment of the *Exchequer Chamber* in *Ireland* affirming the judgment of the Court of *Exchequer* there, was reversed.⁽¹⁾

(1) 4 *Bro. Cha. Rep.* 96, S. C. The principle which governed the opinion of the judges upon the questions put to them in this case seems to have been, that the limitation to the daughter *Frances Lane* was future, being to arise after the failure of issue of the body of *James Lane*, and of the heirs male of the body of the father, Sir *George Lane*: now, there was no subsisting estate extending to the issue of the body of *James Lane* (generally), the settlement being confined to his first and other sons, and their issue male; nor indeed was there any estate tail in Sir *George Lane* himself, to extend to the heirs male of his own body, and therefore the estate devised by Sir *George Lane*, could not be considered as the devise of a reversion depending or expectant on such preceding estates. And though as Sir *George Lane* had but one son, and there was a limitation by the settlement to the first and other sons of such son in tail male, the devise for want of heirs male of his (Sir *George's*) own body, might have been construed as a devise of the reversion expectant on the failure of sons of his said son, and the heirs male of their bodies; yet as there was no pre-existing estate extending to issue female of the body of *James Lane*, it was impossible to consider the devise on failure of issue (generally) of the body of *James* as the devise of a reversion expectant

on failure of such issue, there being no preceding estate extending to that period, consequently, unless such a preceding estate was raised by implication (which was not admitted by the judges), the devise to the daughter *Frances Jane* was not the devise of a reversion, but was an executory limitation unsupported by any preceding estate; and being not to take effect till after a *general failure* of issue, was therefore too remote. The decision in *Lady Lanesborough v. Fox*, was afterwards very amply discussed in the case of *Morgan v. Jones*, *B. R. Hill*. 1773, and by the whole Court allowed to be law. *Vide Fearne's Conting. Rem.* 3 ed. 329; 7 *Bro. Parl. Cas.* 130 [2nd ed. 3 *Bro. P. C.* 323], *S. C.* where the above case of *Morgan v. Jones* is fully stated. *Moore v. Lord Parker*, *Lord Raym.* 37; 4 *Mod.* 316, *S. G.* *Badger v. Lloyd*, 1 *Salk.* 232; 1 *Lord Raym.* 523. *Goodman v. Goodright*, 2 *Burr.* 873.

DE TERM. S. MICHAELIS 4 GEO. II. IN CURIA CANCELLARIÆ.

Case 58.—ROGERS *versus* ROGERS.

(3 *P. Will.* 193, *S. C.*)

A. among other legacies, gives a legacy of £5 to B. his brother and heir, and then makes his beloved wife C. his sole heiress and executrix of all his lands, tenements, goods and chattles, the same to sell and dispose of as she should think proper, to pay his debts and legacies. This is a gift to her of the surplus in fee; and there is no resulting trust for the heir.

William Rogers made his will, and gave a legacy of £5 to *H. Rogers* his brother, and heir at law, amongst several other legacies; and then he constituted his beloved wife *Mary Rogers* his whole and sole heiress and executrix of all his lands, tenements, goods and chattles whatsoever, real and personal, the same to sell or dispose as she should think proper, to pay his debts and legacies of that his last will and testament. (*Reg. Lib. B.* 1732, fol. 330.)

The question was, whether there be a resulting trust, &c., for the plaintiff the heir at law?

It was said for the plaintiff, that in cases parallel to this, the determinations had been that there should be a resulting trust. The rule at law in devises of legal estates is, that the heir at law shall not [269] be disinherited without express words; and equity has followed the same rule with respect to trusts; in the present case it is not said what is to be done with the estate after the particular purposes are satisfied. 2 *Chan. Ca.* 115, 221, 2 *Vern.* 424 (*Culpepper v. Aston et c contra*), *Randall versus Bookey*, there was a legacy given to the heir at law, as in the present case, from whence it might be collected that it was not intended he should have any thing else; yet it was held, that no more of the land should be sold than was necessary, and that the residue should go to the heir. 2 *Vern.* 644, *Hobart versus The Countess of Suffolk*. 2 *Vern.* 645, *Bristol versus Hungerford* (2 *Vern.* 245, which case in 3 *P. Will.* 194, note (c), is said to be in *Vernon erroneously*, but in *Prec. in Chanc.* 82, accurately reported); these cases go farther than any other in favour of the heir, and even than the present case, for there the surplus was given to the executrix expressly; yet it was decreed to the heir at law. *Loader versus Loader* (*Mosely*, 356), there land was devised to one for life, with remainders to his first and every other son in tail, and so on to a second person in like manner; and for default of such issue the remainder in fee was devised to the testator's kinsman *Robert* (for so it is expressed) and his heirs paying £5000 to particular persons who were heirs at law of the testator; yet it was held there should be a resulting trust for the benefit of those heirs at law. *Heron versus Elford*, *Pasch.* 6 *Geo.* 2, 2 *Vern.* 571; 6 *Co.* 16. On the other hand it was argued for the defendant, it cannot be controverted but that the legal estate passes by this will; for, the very making one his heir is a devise of the fee to that person, as being put in the place of the heir at law: but though the legal estate does pass in point of law, yet when that has been done for a particular purpose, and that purpose is satisfied, it has been construed to be a resulting trust to the heir (*ante*, 254). Therefore the present point under consideration is what the testator intended; for, making a construction contrary to that would be making a new will instead of expounding one.

And a difference was taken between a will and a deed, the former importing a bounty, which the latter does not. -2 *Chan. Ca.* 115, 228, was of a deed; and it appeared more strongly to be a trust than in the present case: besides in that case there was no colour [270] for supposing a bounty; but here the testator has called the devisee his well beloved wife; which imports a kindness for her. 6 *Co.* 16, is not applicable to this matter; for, there a difference was taken between a sum in gross and one issuing out of the rents and profits, and this in order to determine what quantity of the estate the devisee was to have, and not whether a trustee or not. In this case the testator has given the heir at law a legacy of £5. But suppose it had been only a gift of a shilling, every body knows that would have implied a strong intention that he should have nothing else. If this be construed to be a resulting trust, there must be a different meaning put upon the same clause as to the personal estate and the land; for, as to the surplus of the former, it must be for her own benefit, when as to the latter she must be a trustee for the benefit of the heir at law; and that too when the testator has constituted his wife by his will to be his heiress. 2 *Vern.* 425 (*Randall v. Bookey*), was a devise upon trust; and as the testator had called the devisee a trustee, the Court would not determine him to be otherwise. The same answer may be given to 2 *Vern.* 644 (*Hobart v. the Countess of Suffolk*). But 2 *Vern.* 646 (*Countess of Bristol v. Hungerford*), Mr. Attorney General said, was a case too strong to prove any thing; for, there money was decreed against the executor, when the surplus was expressly given him. In *Loader versus Loader* there was an express trust; and in *Heron versus Elford* land was devised upon special trust and confidence to sell for payment of debts in case the personal estate should prove deficient, unless the devisees should think proper to raise the same by any other ways and means. The cases cited in favour of the defendant were *Chancery Cases* 196. *North versus Crompton*, (1) 2 *Vern.* 247; *Abr. Eq. Ca.* 273. (2)

Lord King, Lord Chancellor. I think here is no resulting trust for the benefit of the heir; though, perhaps, the cases on this head are not reconcilable to one another. The word *Heiress* on all sides is agreed to carry the fee; then what is there in the will to draw the estate out of her? It is true a limitation in a conveyance to a man [271] and his heirs, without declaring the use, will not pass the use for want of a consideration: but a devise implying a consideration in itself, there is no occasion to declare the use in order to convey the interest of the land; and if this were insufficient, yet being to a wife whom the husband mentions with affection, it is impossible to imagine he intended to give the land away from her, and make her a trustee for his heir: and though it is said that this is only a power to *sell or dispose of the real and personal estate*, yet it is as *she thinks proper*, either the one or the other at her election. Suppose the devise had been to a man and his heirs, to pay debts, the land would be assets at law; and there is no more in this case; only the testator hath in this case, by making her heiress, placed the devisee in the room of the heir, and made her absolute owner of the whole. Besides, the personal and real estate being mixed together, if there could be a resulting trust of the one, there must be the same of the other; which was never pretended where the executor had no legacy, or was not cut off by some express words. And (he said), 2 *Vern.* 247, and 1 *Chan. Ca.* 196, 7, were full in point, and decreed for the defendant.

(1) *Katherine Crompton*, spinster, seized in fee of the lands in question, made her will in the following words: "I ordain and constitute *Henry North, Esq.*, executor of this my last will, and I do give all my estate real and personal, to dispose of "for the payment of all my just debts, and for the performing of all such legacies as "I have herein, or by the codicil annexed, bequeathed unto my *executor above-named*"; and gives several legacies in money, and amongst others £200 to the defendant her uncle who was her heir at law: the Lord Keeper assisted by four of the judges all agreed, that a fee passed by the devise: and as to the implied trust all conceived there was not any implied trust for the heir of the surplus, for if there were, the devisee had no benefit; and to no purpose was the devise of the £200 to the heir if she had intended the surplus to the heir.

(2) *Coningham v. Mellish*, which was a devise of lands to A. and his heirs and assigns for ever, in trust, to be sold for payment of all his debts and legacies and makes A. executor. The surplus after debts and legacies was held to be no resulting trust for the heir, as it would have been on a like case, on a conveyance executed.

DE TERMINO PASCHÆ 6 GEO. II. IN CURIA CANCELLARIÆ.

Case 59.—CARTER *versus* CARTER.

Money devised to be laid out in land to the use of *B.* in tail, remainder to the use of *C.* in fee; *B.* (having no issue) agrees with *C.* by deed to divide the money, and before this agreement is executed *B.* dies: this agreement shall bind, in favour of his executors.

A. devised £8000 to be laid out in land, and settled to the use of *B.* in tail, remainder to *C.* in fee; *B.* and *C.* agreed by articles of writing to divide the money in the manner therein mentioned; *B.* the tenant in tail, died without issue soon after the making of the articles, and before they were executed by a division of the money. This came before the Court by way of appeal from the *Rolls*, where a specific performance of the articles was decreed in favour of the executor or administrator of *B.*

[272] *Note*: Some years before the articles were made, there was a decree obtained to have the money laid out in land, and settled according to the will; but the matter rested there.

Lutwyche, In support of the decree, said, that at the time of the agreement it was very beneficial to the person who had the remainder, because the tenant in tail might have barred the remainder, had the money been laid out in land, and settled as the will directed. It is a rule, if money is to be laid out in land and settled to one in tail, the remainder to another in fee, that he in remainder shall not be barred of his contingency by the payment of the money to tenant in tail; but in the present case he in remainder is consenting to the division. *Legat versus Sewell*, 2 *Vern.* 551. It has been held since in the case of *Colwell and Shadwell* (see this case stated in *Chaplin v. Horner*, 1 *P. Will.* 484), that if money is to be laid out in land and settled on one in tail, with remainder to the same person in fee, it shall be paid over to the (1) tenant in tail; because immediately after the money is laid out in land and settled, he may bar his issue.

A fine may be taken and completed so far, even in vacation time, as to bar the issue in tail; but a recovery to bar an estate tail, or remainder dependent on such estate, cannot be suffered but in term time; which is given as a reason why money may be paid to tenant in tail, with remainder in fee to himself, but not when the remainder is limited over to another.

Mr. Attorney General contra: there is no reason to make a distinction between the issue in tail and a remainder; for, the one is as much in the view and contemplation of him who made the settlement as the other; and the *majus* and *minus* of the time necessary to complete a fine and recovery will not alter the case.

[273] *Mr. Ryder* on the same side, insisted, equity will not decree money to tenant in tail, though he has a remainder in fee to himself. (2) And afterwards cited *Weldon versus Oxendon*, July 1731, at the *Rolls*. A man by will left £3000 to his wife, to be paid within six months after his decease, provided she would release all her right to dower of his real estate: she died before the end of the six months and before any release had been offered to her; yet it was decreed, that she not having performed the condition, no one would be intitled to the legacy, and therefore the bill was dismissed. If a husband before marriage covenants to make his wife a jointure, and she, in consideration thereof, covenants to convey her land to the use of her husband and his heirs, and the wife dies before the jointure is made, a court of equity will not compel a specific performance of those articles.

Mr. Solicitor General in his reply admitted the case of *Weldon versus Oxendon*, because the widow had an election; which never being made, she could not be intitled to the legacy: but distinguished it from the present case, because here both parties are bound by the mutual agreement.

As to the case of a covenant by the wife before marriage, he said a court of equity would compel a specific performance, though she died before a jointure was made; and that it was so determined in the case of *Cotter versus Layer & al'* (2 *P. Will.* 623).

Lord Chancellor. This is a mutual agreement between the parties to have the money divided between them; and there were no children of tenant in tail *in esse*. The tenant in tail died before any thing was done in pursuance of the articles; yet

every thing may be done now as well as it might in his life-time. The decree was affirmed.

[274] *Note* : He seemed to lay a good deal of stress on tenant in tail's dying without issue.

(1) So *Benson v. Benson*, 1 P. Will. 130. *Seely v. Jago*, *ibid.* 389. *Short v. Wood*, *ibid.* 471. *Edwards v. Countess of Warwick*, 2 P. Will. 173. *Trafford v. Boehm*, 3 Atk. 447. *Cunningham v. Moody*, 1 Ves. 176. *Bradish v. Gee*, Ambl. Rep. 129. *Oldham v. Hughes*, 2 Atk. 453.

(2) So *Eyre's case*, 3 P. Will. 14, and Mr. Onslow's case mentioned in the note to *Eyre's case* : but the present practice it should seem is conformable to the opinions contained in *Benson v. Benson*, and the other cases cited in note.

DE TERM. S. MICHAELIS 7 GEO. II. IN CURIA CANCELLARIÆ.

Case 60.—BROMHALL *versus* WILBRAHAM.

A. by will gives all his personal estate to his three sisters, equally to be divided between them, and (being indebted by simple contract, bond and mortgage) gives his real estate to his four sons, chargeable with his just debts ; and makes his sisters his executrices. The personal estate shall be applied in exoneration of the real ; especially as one of these funds must be exhausted.

Ralph Wilbraham, being seised and possessed of a real and personal estate, disposed of the same by will in manner following : " I give all my personal estate whatsoever to my three loving sisters, equally to be divided among them ; and I give " my real estate to my four sons, chargeable with the payment of my just debts " ; and after makes his three sisters his executrices. The testator died indebted by simple contract, bond and mortgages. The *Master of the Rolls* decreed, that the personal estate should be first applied towards payment of all the debts, and that the real estate ought to come in only to supply the deficiency, in case there should be any. From this decree the executrices appealed.

Mr. *Solicitor General* for the appellants said, on the face of the will it appeared the testator intended his real estate should be first applied to the payment of his debts ; and that though he could not with respect to creditors prevent them from taking advantage of the legal fund, yet since he had originally a power to direct out of which of his estates his debts should be paid, and he has provided another fund for that purpose, this Court will so marshal the assets, that his intent may take effect. And though in this case his sisters are made executrices, yet they do not take as such ; for, the direction in the will is, that the personal estate shall be equally [275] divided amongst them ; which is in a manner different from what they could have taken in as executrices ; for, that would have been jointly. It is the common doctrine of this Court, that the *Hæres Factus* (*Gower v. Mead*, *Prec. in Chanc.* 2, 3) shall have the same benefit of the personal estate in discharge of the real, as the *Hæres Natus* ; yet when the testator has subjected the gift to the payment of debts, then it ought *transire cum onere*.

Mr. *Peer Williams* and Mr. *Fenwick* on the same side, cited 2 *Vern.* 756, 718, 477, in the last of which cases the *Lord Keeper* says an express devise shall not be defeated by applying the personal estate to pay off a mortgage.

Mr. *Willes* for the sons. The testator was not obliged in law, equity or conscience to make such provision for his sisters, as he was for his children ; and it is the constant practice to allow them the same favour as creditors. It is a rule, that where a person is made executor, and comes to the personal estate in that right, it remains liable to be applied for the payment of debts in exoneration of the real estate, though the latter is charged by the will. So it is where the personal estate is devised to one by name, who afterwards is made executor in the will. 2 *Vern.* 43, 302. These two cases do not go so far as the present case, because there was no charge on the land by the will, but by the mortgage only. But 2 *Vern.* 153, 568, are full as strong. He observed, that the word in the will was *chargeable*, which he said was not so strong as if the word

charged had been made use of ; for the former may refer to the failure of the personal estate. 2 Vern. 112 ; 2 Vent. 349, were cited by Mr. *Stracy* on the same side.

Lord Chancellor King. Here is no clause to charge the real estate at all events ; the word is *chargeable*. The natural construction of a will, where the testator gives all his personal estate to one whom he makes his executor, is, that the personal estate must go to the creditors, and the gift must be intended after debts paid. The testator [276] has made his real estate subject, in case the personal estate fail.

The decree was affirmed.

N. B. In this case the real and personal estates were much of the same value, and the debts must have exhausted the one or the other fund ; so that had the judgment of the Court been otherwise, the man's children would have been left without any provision.

(*Vide ante*, 53, 202, and references ; also *Forrester v. Lord Leigh*, *Ambl. Rep.* 171.)

DE TERMINO PASCHÆ 8 GEO. II. IN CURIA CANCELLARIÆ.

Case 61.—LUTWYCHE *versus* LUTWYCHE.

25 March 1735.

A descent of lands in *Borough English* to the youngest son will not prevent his having a full distributive share of his father's personal estate.

Thomas Lutwyche, Esq., died intestate, possessed of a personal estate, and seised of a copyhold in fee at *Turnham Green*, which was in the nature of *Borough English*.

This cause came on by way of amicable suit to determine this question, whether the youngest son should have an equal share with the other children of the personal estate, exclusive of the copyhold, or only so much as with that copyhold would make his portion equal to that of the other children ?

Mr. Solicitor General for the plaintiff, the youngest son. This question intirely depends upon the statute 22 & 23 Car. 2, cap. 10, sect. 5, of *distributing intestates estates*. The *Borough English* estate by law descends to the plaintiff, and there are no express words in the statute to take it from him, or to exclude him from his share of the personal estate.

[277] *Mr. Green.* The words of the statute are to exclude such child, who shall have any estate by the settlement of the intestate, and the plaintiff takes this *Borough English* estate as his heir at law by the custom, and not by any settlement.

Mr. Attorney General for the defendants the other children. The statute of distributions was penned by civilians, without assistance of the common lawyers. The primary and ultimate intention of that statute was to make all the children of the intestate equal ; and if the plaintiff prevails, there will be an inequality.

A person may take by settlement and by descent also ; as, where an estate by settlement is limited to the heir of the body of a tenant for life, such heir comes in both by descent and settlement. The exception in the statute is, of the heir at law only ; the question then is, who is meant by heir at law ? In common parlance, heir at law means nothing but eldest son. According to the common law the eldest son is the heir at law, and distinguished from the heir by custom. The statute means only the eldest son. *Co. Lit.* 376, Title *Warranty*. Heir in *Borough English* is not heir at common law. *Hob.* A man may be heir to the land, and not heir at law to the person. There is no pre-eminence but to the eldest son by any law divine or human ; the act intended to put the heir in that sense. In the statute it is heir at law in the singular number. If any other but the eldest son had been intended to be excepted, it would have been heir or heirs at law. *Pratt versus Pratt*, May 11, 1732. Decreed *the Rolls*, that the heir in *Borough English* should bring his estate into *Hotch Pot*.

Mr. Brown. Before the statute of distribution all lands, as well as goods, were (by the civil law) distributable among the children equally ; and the intent of that statute is the same, except with respect to the heir at law. The word *settlement* is of various significations. Money advanced to a stranger to make a settlement on a child is not an advancement within the words of the act : yet in equity it has always

been held to be an advancement. [278] The act is to be construed in an equitable sense, and not according to the letter of it; and equality among younger children is intended by it. Personal advancement to the heir at law is not within the statute; yet he must bring it into *Hotch Potch*. *Phiney versus Phiney*, 2 Vern. 638. The son and heir intitled to £500 under a marriage agreement, decreed to bring it into *Hotch Pot*, upon the statute of distributions, though in nature of a purchaser. 2 Vern. 558, *Willcox versus Willcox*, the father covenanted to settle £100 *per annum* on his son, but did not; yet having suffered £100 *per annum* to descend upon him, that was decreed to be a good performance of the covenant, and the personal estate was ordered to be distributed among the other children according to the custom of the city of London. A person buying *Borough English* lands, knows the same will descend to his youngest son; which is the same thing as a settlement or provision for the youngest son. The act is only in favour of primogeniture. There are different *species* of heirs at law; the heir at law spoken of in the act by way of eminence, is the most worthy. The act comprehends only one heir, and that must be eldest, which is the most worthy. *Carter versus Crowley*, Raym. 553. All the representatives have the intestate for their correlative throughout the whole act. *Taylor versus Webb, Styles*, 207, where the act speaks of the wife, it means the wife of the intestate; of a child, the child of the intestate; of the heir at law, the heir at law of the intestate; &c. Heir at law in *Borough English* is not heir at law to the intestate, but only to the land; therefore such an heir at law cannot be meant by the act. Suppose the intestate had left only daughters: all the estate, both real and personal, would be equally divided amongst them. If the heir in *Borough English* is meant by the statute, he must be privileged throughout. The privilege is not annexed to the land, but to the person: and suppose the heir in *Borough English* had had a freehold estate of £1000 *per annum* settled on him by the intestate in his life-time, it could not have been said he should bring the freehold estate in *Hotch [279] Pot*, and not the *Borough English*: both or neither must be brought into *Hotch Pot*.

Reply. The intent of the statute to make all the children equal does not appear. The question is, if there are any words in the statute to exclude the heir in *Borough English* from having his share in the intestate's personal estate? There are none. Before the statute the heir in *Borough English* must by the common law have had the estate: it follows then that he must have it still; for, the law is not altered.

Lord Chancellor. The question is, whether the first words in the statute (*the residue to be divided by equal portions amongst the children of the intestate*) are extensive enough to bring the *Borough English* estate into *Hotch Pot*? The second question is, whether by the second words (*other than such child (not being heir at law) who shall have any estate by the settlement of the intestate, or shall be advanced by the intestate in his life-time, by portion or portions equal to the share which shall by such distribution be allotted to the others to whom such distribution shall be made*) the plaintiff can be excluded. It is proper to take into consideration what the law was before the statute. All the children had a right to administration if there was no wife; and if administration was granted to one, a prohibition went to compel the ordinary to distribute. The first clause specifies to what persons distribution shall be made, that is, amongst all the children equally, except those who had any estate by settlement, or should be advanced; and those which were advanced are totally excluded. The third clause is, if any child is advanced in part, such child is to have so much more as will make his share equal with the rest unadvanced: they are material words, *other than such child who shall have any estate by settlement from the intestate*. The question is, what is meant by the word *settlement*? There was no settlement made by the intestate in this case; it was only a common purchase made by him. The [280] plaintiff took the estate by descent, and not by any settlement. The act of law throws the estate upon the youngest son; not the act of the father: he has permitted the land to descend to the youngest son, but he is not by the words of the act thereby excluded from his share of the personal estate. It is a *casus omissus*. I cannot supply any clause in an act of parliament, though I may explain doubtful words. The exception in the statute was intended for one person; I cannot say it was so intended throughout. The last clause is explanatory, and shews what was intended to be excepted, *only land which the heir at law would have by descent or otherwise*; not pecuniary advancement. In common parlance the heir at law is the eldest son, in relation to the intestate, and is only one person; and not the heir in *Borough English*:

the exception extends only to the eldest son. But there is no law for the plaintiff to bring the *Borough English* estate into *Hotch Pot*, only this statute; and there are no words here that oblige him to it.

Decreed on account of the personal estate of the intestate, and that the plaintiff have an equal share, without regard to the value of the *Borough English* estate.

N.B. The case of *Pratt and Pratt* (*Fitzgibbon Rep.* 284) came after this case before the Lord Chancellor *Talbot*; and he reversed the decree of the *Master of the Rolls*, and decreed agreeably to this case. *Vide Appendix to Robinson of Gavelkind.*

[281] DE TERM. S. HILLARIJ 10 GEO. II. IN CURIA CANCELLARIÆ.

Case 62.—BARBUI'T'S Case in Chancery.

[See *Magdalena Steam Navigation Company v. Martin*, 1859, 28 L. J. Q. B. 311. *The Charkieh*, 1873, L. R. 4 Adm. & Ecc. 89.]

Of foreign ministers, consuls, &c. Whether privileged by the statute, which is declarative of the law of nations; there is no prescript form of appointing them. A foreign minister who uses merchandizing does not thereby lose his privilege; though any of his retinue in such case would. Matters of commerce may be proper objects for the employment of ambassadors. Yet *quere* Whether Consuls have such privilege?

Barbuit had a commission, as agent of commerce from the King of *Prussia* in *Great Britain*, in the year 1717, which was accepted here by the *Lords Justices* then the King was abroad. After the late King's demise his commission was not renewed until 1735, and then it was, and allowed in a proper manner; but with the recital of the powers given him in the commission, and allowing him as such. These commissions were directed generally to all the persons whom the same should concern and not to the King: and his business described in the commissions was, to do and execute what his *Prussian Majesty* should think fit to order with regard to his subjects trading in *Great Britain*; to present letters, memorials, and instruments concerning trade, to such persons, and at such places, as should be convenient, and to receive resolutions thereon; and thereby his *Prussian Majesty* required all persons to receive writings from his hands, and give him aid and assistance. *Barbuit* lived here near twenty years, and exercised the trade of a tallow-chandler, and claimed the privilege of an ambassador or foreign minister, to be free from arrests. After hearing counsel on this point (*vide Triquet and others v. Bath*, 3 *Burr.* 1480. S. P. 1 *Black. Rep.* 471, S. C.),

Lord Chancellor. A bill was filed in this Court against the defendant in 1725, upon which he exhibited his cross bill, stiling himself merchant. On the hearing of these causes the cross bill was dismissed; and in the other, an account decreed against the defendant. The account being passed before the master, the defendant took exceptions to the master's report, which were over-ruled; and then the defendant was taken upon an attachment for non-payment, &c. And now, ten years after the [282] commencement of the suit, he insists he is a public minister, and therefore all the proceedings against him null and void. Though this is a very unfavourable case, yet if the defendant is truly a public minister, I think he may now insist upon it; for the privilege of a public minister is to have his person sacred and free from arrests, not on his own account, but on the account of those he represents, and this arises from the necessity of the thing, that nations may have intercourse with one another in the same manner as private persons, by agents, when they cannot meet themselves. And if the foundation of this privilege is for the sake of the prince by whom an ambassador is sent, and for sake of the business he is to do, it is impossible that he can renounce such privilege and protection: for, by his being thrown into prison the business must inevitably suffer. The question is, whether the defendant is such a person as 7 *Anne*, cap. 10, describes, which is only declaratory of the antient universal *jus gentium* (*vide* 1 *Black. Com.* 255, where the circumstance which occasioned the making this act is stated at large); the words of the statute are (*ambassadors or other public Ministers*),

C. v.—25*

and the exception of persons *trading* relates only to *their servants*; the parliament never imagining that the ministers themselves would trade. I do not think the words *ambassadors*, or *other public ministers*, are synonymous. I think that the word *ambassadors* in the act of parliament, was intended to signify ministers sent upon extraordinary occasions, which are commonly called *ambassadors extraordinary*; and *public ministers* in the act take in all others who constantly reside here; and both are intitled to these privileges. The question is, whether the defendant is within the latter words? It has been objected that he is not a public minister, because he brings no credentials to the King. Now although it be true that this is the most common form, yet it would be carrying it too far to say, that these credentials are absolutely necessary; because all nations have not the same forms of appointment. It has been said, that to make him a public minister he must be employed about state affairs. In which case, if state affairs are used in opposition to commerce, it is [283] wrong: but if only to signify the business between nation and nation the proposition is right: for, trade is a matter of state, and of a public nature, and consequently a proper subject for the employment of an ambassador. In treaties of commerce those employed are as much public ministers as any others; and the reason for their protection holds as strong: and it is of no weight with me that the defendant was not to concern himself about other matters of state, if he was authorised as a public minister to transact matters of trade. It is not necessary that a minister's commission should be general to intitle him to protection; but it is enough that he is to transact any one particular thing in that capacity, as every ambassador extraordinary is; or to remove some particular difficulties, which might otherwise occasion war. But what creates my difficulty is, that I do not think he is intrusted to transact affairs between the two crowns: the commission is, to assist his *Prussian Majesty's* subjects here in their commerce; and so is the allowance. Now this gives him no authority to intermeddle with the affairs of the King: which makes his employment to be in the nature of a consul. And although he is called only an agent of commerce, I do not think the name alters the case. Indeed there are some circumstances that put him below a consul; for, he wants the power of judicature, which is commonly given to consuls. Also their commission is usually directed to the prince of the country; which is not the present case: but at most he is only a consul.

It is the opinion of *Barbeyrac*, *Wincquefort* and others, that a consul is not intitled to the *Jus Gentium* belonging to ambassadors.

And as there is no authority to consider the defendant in any other view than as a consul, unless I can be satisfied that those acting in that capacity are intitled to the *Jus Gentium*, I cannot discharge him.(1)

Note: The person was after discharged by the *Secretary's-Office*, satisfying the creditors.

(1) In the discussion of this case the Court seems to have determined, that a person residing in this country in the capacity of foreign minister, cannot by any act or acts of his own, waive that privilege or protection which *the law of nations* has annexed to a situation so important.—That a foreign minister, being or becoming a trader, does not thereby lose, or forfeit the privilege personally annexed to him; and therefore, the only reason why the Court in the present instance did not think the defendant entitled to the protection which he claimed, was, that the employment which he was invested with, could at most be considered only as the same with, or equal to that of consul, which according to the best writers upon the subject, was not entitled to the *Jus Gentium*, or privilege belonging to ambassadors or ministers who are entrusted to transact matters of state or other affairs between *two nations*.—That the law of nations (which in its fullest extent was and formed part of the law of *England*) was the rule of decision in cases of this kind; and that the act of parliament was declaratory of it, and occasioned by a particular incident.

[284] DE TERM. S. TRINITATIS 7 GEO. II. IN CURIA CANCELLARIÆ.

Case 63.—TANNER *versus* MORSE.(1) 1734.

A devise in the following words : *as to my temporal estate, I bequeath to my nephew T. (the testator's heir at law) £50. Then after several legacies, and all the rest and residue of my estate, goods and chattels whatsoever, I give and bequeath to my beloved wife M. C., whom I make my full and sole executrix.* This is a devise of the fee simple estate of the testator.

Thomas Carter, March 10, 1725, made his will, whereby he devised in the following manner : "As to my temporal estate, I bequeath to my nephew Tanner [the testator's "heir at law] the sum of £50." Then he gives several legacies : "And all the rest and "residue of my estate, goods and chattels whatsoever, I give and bequeath to my beloved "wife Mary Carter ; whom I make my full and sole executrix."

The heir at law brought this bill against the devisee and executrix, who married the defendant *Morse*, to have an account of what deeds, belonging to the testator, she had got in her custody ; and to set forth what right she claimed to the real estate of *Thomas Carter*, and whether he made any will ; and if so, to set it forth. And the plaintiff to make himself proper in a court of equity, had charged in his bill, that the defendants refused to let him have a sight of the deeds ; and that they threatened, if he brought an ejectment, to set up some old incumbrances to bar it. The question was, whether any and what estate in the testator's lands passed to the defendant by this will ?

For the plaintiff it was said, that there were no words in the will that could be construed to extend to the inheritance ; or if any, it must be the words, *as to my temporal estate*, which (in the strictest sense) relate only to the estates of a certain duration, that are to continue for a time only, and have never been held to pass an estate of inheritance. As to the [285] words, *all the rest and residue of my estate*, they must have relation to somewhat that went before ; and there is nothing disposed of in the will before this clause, but only some legacies charged upon the personal estate. So held in the case of *Markant and Twisden*, *Abr. Eq. Ca.* 212 (*Gilb. Rep.* 30), where, notwithstanding there was the word *devise*, yet it was decreed not to pass the inheritance : whereas in the present case there is no such word as *devise* ; nor even the word *heir, land* or *tenement*. It was farther urged, that the words of the will were not certain or positive enough to disinherit the heir ; *Bowman versus Milbank*, 1 *Lev.* 130, a devise of *all to his mother* was held to be uncertain, and not sufficient to disinherit the son.

It was said on the other hand for the defendant, that even if the case would admit of any doubt, yet the plaintiff was not proper to come into this Court. That here were no mortgages, leases or trusts, that could have been set up by the defendant ; which he has told the plaintiff in his answer : so that whatever the plaintiff did at first, yet upon the coming in of the answer, he might safely have proceeded by ejectment.

Then as to the merits it was said, that the words *temporal estate* have been construed, and very properly, to extend to all the estates, both real and personal ; and that in opposition to the word *eternal*. The word *temporal* is the same as *worldly* ; and as such, it comes within the reason of the Lord Warrington's case, where the words were, *as to my worldly estate, I will that all my debts be paid, &c.* And by virtue of these words, *worldly estate*, it was held that his real estate was liable to his debts. But the latter clause itself would be sufficient to pass a real estate of inheritance : and so are the opinions of the Court in the old reports. There is a case in *Styles*, where the words *all my estate* were held to pass an inheritance. And another in *Skinner's Reports*, where *all my estate* passed every thing the testator had. *Hyley versus Hyley*, 3 *Mod.* 228. *All the remaining part of my estate.* So in 1 *Chan. Cases*, *Tyrrel versus Page*, 262. And in 4 *Mod.* 89. *Carter versus Hor*-[286]-*ner*, *Salk.* 236. *Bridgewater versus Bolton*, 2 *Vern.* 564. *Murry versus Wise*, 687. *Ackland versus Ackland*, 690. *Beacroft versus Beacroft*. And likewise the case of *Audrey versus Middleton*, in 1716, where the words were, *as to all my worldly estate, I give (some legacies) and all the rest of my goods, and chattels, and estate, I give to Middleton* ; and the question was, whether the real estate passed by that will ? The Lord Cowper held, that from the frame of the whole will the testator intended it ; and accordingly decreed the real estate should pass : and that case does not vary in any particular from the present,

except the word *worldly* instead of *temporal*. All my concerns has been held to pass a real estate, and that upon a point reserved upon a trial at an assise. So, and whatever else I have in the world has passed an estate of inheritance.

Lord Chancellor King (before whom this cause was first heard). You have cited no case where the word *temporal* has been used. But to me it seems clearly to relate to every estate of this world: for, there is nothing here but what is *temporal*; every thing must have an end; and the testator certainly intended all the remaining part of his estate to go to his wife, as well real as personal. But then, whether she will take an estate for life, or in fee, I do not determine; that point is not before me. If they have a mind to try it, they must stay till she is dead.

The plaintiff (being heir at law) insisted upon trying the validity of this will at law, and likewise what would pass by it. And accordingly the *Lord Chancellor* retained the bill till they had a trial.

On the 29th of June 1734, *Trin.* 8 G. 2. This cause was reheard by the *Lord Talbot*, who affirmed the *Lord King's* decree; and decreed an estate in fee simple to pass by the words of the will. (2)

See the case of *Reeves versus Winnington*, 3 Mod. 45, where a devise of all his estate was held to pass a fee by the whole Court.

(1) 3 P. Will. 295, S. C. but reported by the name of *Tanner v. Wise*, *Trin.* 1744, on a rehearing (before *Lord Talbot*) from a decree of the *Lord Chancellor King*.

(2) *Vide ante*, 160, 163, and references. Also *Wheeler v. Walroone*, *Anley*, 28: (cited) *Tufnell v. Page*, *Ambl. Rep.* 182; (cited) *Hope* on the demise of *Brown v. Taylor*, 1 Burr. 270.

[287] ADDENDA.*

[HELLIER v. TARRANT. 1791.]

Mallabar v. Mallabar, page 79, to note (1) add the case of *Hellier v. Tarrant*, determined by the Court of Exchequer, at the sittings after *Trinity* term 1791, which case was this.

[288] The testator Sir *Samuel Hellier*, by his last will bearing date the 10th day of September 1784, devised as follows; "I give and devise unto my friend the Reverend *Thomas Shaw* of *Wolverhampton*, in the said county of *Stafford*, and his heirs, all and every my customary or copyhold messuages or tenements, lands and hereditaments, whatsoever and wheresoever, situate, lying and being in the several counties of *Stafford* and *Worcester*, or elsewhere; and also all and every my freehold messuages or tenements, tythes and hereditaments whatsoever, situate, lying and being at *Featherstone*, in the parish of *Wolverhampton*, and in the several parishes of *Busbury*, *Brewood* and *Shareshill*, in the said county of *Stafford*; to hold the same and every part and parcel thereof unto the said *Thomas Shaw* his heirs and assigns for ever upon trust, that the said *Thomas Shaw* and his heirs, shall so soon as conveniently may be after my decease, sell and dispose of all and singular the said estates, and every part thereof, and apply the money arising by such sale in payment and discharge of all principal monies and interest as shall be then due and owing to any person or persons whomsoever upon mortgage of any of my estates, and also on bond, and also all my just debts of what nature or kind soever. I also give and devise to the said *Thomas Shaw* and his heirs, all that my manor of *Broom*, in the county of *Stafford*, with the rights, members and appurtenances to the same belonging; and also all and every my messuages or tenements, lands and hereditaments whatsoever with their appurtenances, situate lying and being in the several parishes of *Broom*, *Clent*, *Bell Broughton*, *Chaddesley*, *Corbet*, *Rushock* and *Elmbridge*, in the said counties of *Stafford* and *Worcester*, to hold the same, and every part and parcel thereof unto the said *Thomas Shaw*, his heirs and assigns for ever, upon the trusts nevertheless, and to and for the intents and purposes hereafter mentioned; that is to say in trust in the first place, with all convenient speed after my decease to sell and dispose of the

* See Prefatory Note.

"said manor, messuages, lands, tenements and hereditaments, and every or any part or parcel thereof for the best price that can be got for the same, and pay and apply the money arising from such sale, in the full payment and discharge of all such principal money and interest as shall then remain due and unpaid upon all or any of the said mortgages of any of my estates, and upon any of my bonds or other [289] just debts and demands whatsoever, and also in the payment of the several legacies or sums of money by me hereinbefore given and bequeathed, and likewise my several expences and the costs and charges attending the probate of this my will; and if it shall happen that the monies to be raised by the sale of the aforesaid estates, shall not prove sufficient to pay and discharge the aforesaid debts, legacies and expences, then I will and direct that that deficiency shall be supplied out of the residue of my estates, and as, to all the rest, residue and remainder of my real and personal estate and effects whatsoever and wheresoever, and of what nature or kind soever that I have power to dispose of or am entitled to, and not hereinbefore by me otherwise effectually disposed of, I give, devise and bequeath the same, and every part thereof to the said Thomas Shaw, his heirs, executors and administrators, to hold the same unto the said Thomas Shaw, his heirs, executors, administrators and assigns for ever, to and for his and their own proper use and benefit."

The devisee, as standing in the place of creditors, brought his bill against the heir at law of the testator to prove the will, and to have the estates (including the copyhold) which were charged in the first instance with the payment of debts, sold, and the debts and legacies paid according to the will; and charged, that the testator had not surrendered the copyhold estate to the use of his will, and therefore that the surrender should be supplied.

The defendant, the heir at law, admitted the intention of the testator to be, to charge the copyhold in the first instance with the payment of debts; and it was insisted for him that a court of equity, though it interposes for the benefit of creditors, and those who stand in their place, carries its interposition not a step farther than is necessary to secure to them the payment of their debts, and, that point being effected, never interferes between an heir at law, and a volunteer, to the disadvantage of the former; that the rule which the court had prescribed to itself in cases like the present, was, to subject the copyhold only to make up what the freehold estate was found deficient to pay: it was then urged, that there was more than sufficient (excluding the copyhold, which was not surrendered) to pay all the debts, and therefore insisted that the surrender should not [290] be supplied. At the hearing of this cause it was admitted by the plaintiff that the residue of the testator's estates (exclusive of the copyhold not surrendered) was more than sufficient to pay all the testator's debts.

Lord Chief Baron. The question in this cause arises upon the will of Sir Samuel Hellier, by which he devised specific estates (including the copyhold in question) for the payment of his debts. He devised a second class of estates subject to pay what the former should be deficient to pay, and he devised the whole residue to pay so much of his legacies and simple contract debts, as the two former classes should be found deficient to satisfy. The intention of a testator is doubtless to be carried into execution if possible; but it is also clear, that if a testator expresses an intention to devise from his heir at law his estate, and his will is not executed in the manner required by law, viz. in the presence of three witnesses, or if the estate devised be a copyhold, not surrendered to the use of the will, such intent cannot be carried into execution; and it will be of no avail to say that the arrangement of the testator's bounty will be greatly disappointed, or even totally defeated, since he is not permitted by law to do that which he intended, and consequently his intention must fail. But though the rule of law is universal upon the subject, yet in certain cases, and under certain circumstances a court of equity by its power over the conscience of the parties interested in a copyhold estate (so devised) will interpose; not by saying that the will operates at law, but by saying to the heir at law, "you on whom the interest descends shall be bound by the trusts of the will, and shall do that which the testator's intention alone could not effect." The cases I allude to are where the copyhold is devised for a provision for a wife or children, or for payment of debts as in the case now under consideration. The present then is a devise for payment of debts, and therefore the plaintiff standing as he says in the place of creditors, calls on the heir at law to execute the trusts of the will: and I think there is no difficulty in the case arising from the circumstance of the plaintiff not having been originally a creditor, and then praying to stand in the

place of creditors. It seems to me to be very fair to consider him exactly in the same light, as if the creditors were now applying to have the trusts of this will carried into execution. It has been insisted for the plaintiff, that the doctrine of [291] supplying the want of a surrender of a copyhold for the benefit of creditors, is not to be understood with the qualification or restriction contended for on the part of the defendant, *viz.* that a surrender is to be supplied in cases only of a deficiency of the freehold estate; but that on the contrary if a copyhold not surrendered be subject either by way of charge or devise to the payment of debts, it follows of course that the surrender is to be supplied, and that the copyhold when the surrender is once supplied, becomes then on a footing with every other estate, and will be applied *pari passu* with the other estates charged with the payment of debts. But they touch very lightly on another part of the argument, *viz.* what is to be done with the surplus of the copyhold, if any: indeed the fact in this case is that upon an application of the estates in the *first class*, *pari passu* there would be no surplus; but I think it will be necessary for them to maintain that if there had been a surplus, the devisee would have taken it, and not the heir at law. A further argument was intended to be raised for the plaintiff, on the arrangement which the testator has made for payment of his debts, and the disappointment of his general intention; if the argument stops there, it has not much weight, because it has only a voluntary devisee for its object, but if carried a little further, *viz.* to this point, that the effect of the arrangement and general intention of the testator was, that the copyhold should be first applied, and that until it had been applied the charge on the second and third classes cannot take effect at all: this argument if supported, would certainly weigh much for the plaintiff, and indeed would be decisive. Another argument was that the simple contract creditors would be deprived of the payment of their debts; but this is only the former argument in other words, unless it is determined that the residue would not be sufficient to pay the simple contract creditors, but it is now admitted that the residue of the testator's estates (exclusive of the copyhold) will be sufficient for the payment of *all* his debts. A great number of cases were cited; but the cases material to be considered are those in which it is clear a court of equity will interpose, supposing there was a necessity for its interposition from the circumstances of there being creditors to be satisfied, or a wife and children provided for; and in the examination of these cases, the matter to be enquired into seems to be, to what extent has a court of equity carried its interposition? It has determined that if creditors happen to have any interest in [292] the devise, the devise shall take effect, but not beyond that point to which the interest of creditors has a relation; and consequently a court of equity will not interpose further than is necessary to secure to creditors the payment of their debts, and will leave the residue of the same interest to go in that channel in which the whole interest would have gone, if the devise had been in favour of a volunteer, in which case there would have been no doubt at all, but the devise would have been void, and the heir at law taken the whole. Now,

I take it to have been pretty uniformly determined in courts of equity, since the decision of *Mallabar v. Mallabar* by the Lord Talbot, that the want of a surrender of the copyhold estate is not supplied against the testator's heir at law, where the testator's other estates made liable to his debts are sufficient to satisfy those debts; and upon which proposition that whole case rests. It will follow from them, as a necessary consequence, and it certainly has been so considered by courts of equity, in many cases, that the freehold estates are first to be applied; for if they are not first applied, how are we to know whether they are sufficient, or no; it is therefore a necessary consequence that any part of such copyhold estate which shall happen not to be exhausted by the debts, shall be considered as remaining untouched by the court of equity supplying that want of surrender, and shall go to the heir; for if the whole so devised is to remain with the heir, if not wanted, it will be difficult to find a reason why *a part*, if not wanted, should not also remain with the heir. This is not a mere speculative consequence; the cases of *Welch v. Cook*, in 1745 or 1746, of *Backridge v. Slater*, at the Rolls 1766, and of *Masters v. Gouell* before the present Lord Chancellor, 10th November 1790, are to the same effect: in these cases in particular the freehold and copyhold estates were devised for the payment of debts and legacies, and the copyhold (not surrendered) was applied to satisfy such debts as the freehold would not extend to pay, and the surplus of the copyhold decreed to go to and remain with the heir at law to the disappointment of that part of the devise, which meant to subject

the copyhold as well to the payment of legacies as of debts. If it was demonstrated that the second and third classes of the testator's estates were so entirely auxiliary to the first class, that unless the first class was first applied to the payment of debts, the [293] estates comprized in the second class could not be applied at all, the principles I have been urging would oblige me to conclude that the want of a surrender ought to be supplied in the present case, for that otherwise the creditors would lose their debts. I put it to the Solicitor General, whether he would argue that proposition ; he did not argue it, and he put a case upon it which was a very clear one, but unfortunately for him it was not the case now under consideration. He supposed a testator indebted to the extent of a given sum, viz. £1200, charged his estates in the first class with £400, his copyhold not surrendered with £300, and the rest of his estates with £500 : I agree with him that in that case the want of a surrender must be supplied, because otherwise the creditors to the amount of £300, would lose their debts, for there is no other provision ; and indeed I can imagine that this testator might have some calculation of this kind in his mind, when he divided his estates into classes, but the difference is this, in the case put, the testator has set down his calculation, and has in express terms proportioned the charges upon his estates accordingly, but in the present case, it is but conjecture what specific proportions he meant to throw on the particular parts of his estates, and he has made the second class of his estates liable indefinitely to make good what the estates comprized in the first class should fall short. Another case was put, viz. suppose the testator had devised in the first class estates to which he had no title, it was agreed that the estates comprized in the second class, must have made good the deficiency. Now, the present is that very case, for this testator had no disposing power over the copyhold in question, not having surrendered it to the use of the will ; but it is said that this defect in his title was only a defect in form, and not in substance ; on the contrary, so substantial was the defect, that the devise became void to all intents and purposes, not only at law, but also in equity, except in the particular cases I have already noticed in which a court of equity will supply the defect, viz. in favour of creditors, or a wife or children left unprovided for.

It will be necessary in this place to make a few observations upon the case of *Harris v. Ingledew*, 3 P. Will. 91 ; and certainly in that case the *Master of the Rolls*, did on great consideration decree that freehold and copyhold estates (not surrendered) should be applied for the benefit [294] of creditors *pari passu*. This decision has been relied upon as in point for the plaintiff ; and undoubtedly if this is to be understood to be a case in which a court of equity interposed to supply the want of a surrender for the benefit of the creditors, and then that the copyhold is to be applied equally with the freehold, it is a case (though not in point) of some weight with the plaintiff, and this without driving the plaintiff to the necessity of arguing from the will ; but if this is to be considered as a case in point, it is somewhat extraordinary that Lord *Talbot* in *Mallabar v. Mallabar* (which was decided in *Easter* term 1735, within five years after *Harris v. Ingledew*) should have taken the case to be so clearly the other way as to dismiss the plaintiff's bill, and with costs, from some circumstances in which he thought the party had not behaved well, and also that the other decisions which I have before noticed should ever have obtained, the same being altogether evidently in direct opposition to the principle of this case of *Harris v. Ingledew* so understood. It leads me therefore to suspect that in this case either the principle of it is misunderstood by us, or that there is something in the report of that case not perfectly correct : but however it cannot be denied but that the opinion of the *Master of the Rolls*, does stand in some degree of opposition to Lord *Talbot*, and the other judges in equity : I say in some degree of opposition, for there are circumstances of considerable weight, which distinguish this from the other cases : the *Master of the Rolls* certainly laid the stress upon two circumstances. 1st. That the whole estate was devised to volunteers, some to the heir, with other estates, in which respect the heir would be a volunteer. 2d. That the whole estates were charged with payment of debts, and that the respective devisees could take only after the debts were paid ; but upon the whole, if the case of *Harris v. Ingledew* cannot be reconciled with the subsequent cases, it may be said it has been over-ruled by them, and in my judgment over-ruled rightly. A court of equity, if it interposes at all, ought to interpose only for objects who have a particular merit in the judgment of a court of equity ; and it seems perfectly reasonable, nay I think absolutely necessary, that those objects should be confined, lest the court should break in upon the common law unnecessarily.

[295] Upon the whole, I am of opinion that the defect of the surrender in this case ought not to be supplied, and therefore the bill must be dismissed, and being against an heir at law, with costs.

The rest of the Barons concurred.

[See Prefatory Note.]

[WORLIAGE v. CHURCHILL. 1792.]

Rudge v. Barker, page 124, to the cases already cited add *Worliage v. Churchill*, at *Westminster, Hil. 1792, coram Mr. Jus. Buller*, sitting for the Lord Chancellor. *Edward Worlidge* by his will, gave, devised and bequeathed all his real and personal estate to his three executors upon trust to sell the same, and to lay out the monies arising therefrom after payment of his debts and legacies in government security, in trust for the benefit of his children *Rosalba, Edward, William and John Worlidge*, to be equally divided amongst them on their attaining the ages of twenty-one years, but if any of them should happen to die before attaining such age of twenty-one years, then such deceased child's share to go to the survivors or survivor of them; and in case all the said four children should happen to die before attaining the age of twenty-one years, and leave *Mary Worlidge* (another of the testator's daughters, and for whom he had provided otherwise by his will) living, then he directed his said trustees to pay her the interest of such trust money, from time to time as the same should grow due; and after the decease of all, subject as aforesaid, he gave and bequeathed the said trust money to the children of his late uncle, to be equally divided between them.

John Worlidge, one of the children named in the will, died an infant in the testator's life-time, by which his share in the residue of the testator's estates survived amongst his two brothers and sister *Rosalba*.

In 1783 *William*, another of the children died, having survived the testator, but did not attain his age of twenty-one years; the defendant *Townsend* administered to him, and thereby became his personal representative.

[296] Afterwards in 1786, *Rosalba* died at the age of eighteen years, having made her will, and appointed the defendant *Porter* sole executor of the same.

The plaintiff *Edward Worlidge* having attained his age of twenty-one years, brought his bill to have the usual accounts taken, the trusts of the will carried into execution, and the residue of the testator's estates paid to him, insisting, that he was entitled thereto, as being the only surviving child of his father, the said testator, who had attained his age of twenty-one years. And,

The question was, whether the shares which *William* and *Rosalba* had taken respectively by survivorship upon the death of their brother *John*, should survive to the plaintiff, as well as their original shares in the residue abovementioned, or whether the shares so taken by survivorship should go to the defendants *Townsend* and *Porter*, their respective representatives?

Mr. Jus. Buller was of opinion that the shares taken by survivorship, as well as the original shares of *William* and *Rosalba*, survived to the plaintiff, and decreed accordingly.

[DEL MARE v. REBELLO. 1792.]

Brown v. Selvin, page 240, to the cases already cited, add *Del Mare v. Rebello* and others, at *Westminster, February 3d, 1792, coram Lord Chancellor*.

Jacob del Mare made his will, whereby he bequeathed unto the defendant *Rebello* and two other persons, and the survivors and survivor of them all his the said testator's government securities, annuities, or funds, in the Bank of *England*, which should be standing in his name at the time of his death, unto all the children of the said testator's sisters, *Estrela del Mare Jalson* and *Reyna del Mare* to be equally divided between them, share and share alike, for and during their respective lives. And he directed that from and after the death of either of his said sister's children, the issue or children of such children so dying should be entitled to their parent's share.

The testator at the time of his death left three sisters, viz. *Estrella del Mare Jalson*, wife of *Zaccarias Jalson*, *Reyna dell Mare*, and *Rebecca del Mare*, wife of *Samuel del Mare*.

[297] *Reyna del Mare*, one of the sisters named in the will, had at the time the same

was made, and many years before, adopted the Roman catholic religion, become a professed nun in a convent at *Genoa*, and had besides been baptized in the year 1755, when she was about fifteen years old, according to the rites of that religion, by the name of *Maria Hyeremina*.

The plaintiffs, who were the children of *Samuel* and *Rebecca del Mare*, brought their bill to have an equal share of the interest and dividends of the residue of the testator's effects (amounting to a large sum) paid to them jointly with the children of *Estrella Jalfon*; and it was urged for them, that *Reyna del Mare* having changed her name, and become a nun professed at the time of making the will, and having no children, nor likely ever to have any, she could not be supposed to have been in the contemplation of the testator, and to be the sister whose children he was anxious and intended to provide. And in support of this argument, parol evidence was offered to shew that the testator had on many occasions declared his intention to provide for the children of his sister *Rebecca*, and that the name of *Reyna* was inserted in the will through mistake, and contrary to the intention of the testator; further, that the testator had always corresponded in a friendly manner with *Samuel* and *Rebecca del Mare*, the father and mother of the plaintiffs, but that he had held no correspondence with *Reyna*, now *Maria Hyeremina*.

On the other hand it was insisted for the defendant *Jalfon*, who was one of the children of the testator's sister *Estrella*, that the testator could not be mistaken in the names of his sisters, and that as *Reyna* is positively named in the will, and there is a person to answer that description, and capable of taking under it, the court could not give a different construction to the express words of the will; and that consequently, as *Reyna* had no children, the whole residue belonged solely to the children of *Estrella*.

The question was, whether the parol evidence offered on the behalf of the plaintiff was admissible under the circumstances of this case? But the Lord Chancellor refused to admit it, or make any reference, and dismissed the bill, saying, he could not presume from such evidence, that the testator had inserted his sister *Reyna*, for *Rebecca*, through mistake.

Reports of CASES ARGUED and DETERMINED in the HIGH COURT OF CHANCERY, from 1736 to July 1739, from the Original Manuscripts of LORD CHANCELLOR HARDWICKE and the Contemporaneous Reports, Compared and Corrected by LORD HARDWICKE'S Notes. By MARTIN JOHN WEST, Esq., Barrister-at-Law. 1827.

[1] HILARY TERM, 1736.

PARTERICHE *versus* POWLET.(1)

Feb. 26, 1736.

1 Atk. 467, S. C.

In this Case the *Lord Chancellor* laid down the following Rules :—

Where a husband is left sole executor, he is entitled to the surplus, and it shall not be construed as a resulting trust.

[2] If two tenants in common put out money as joint executors, it shall not survive, but shall go respectively to those persons who are the proper representatives of each.

[3] A devise of the rents and profits of an estate to the husband for life without impeachment of waste, shall not be considered as annual profits only, but will empower him to cut timber. (See Co. Litt. 4 b.)

Tenant for life pays one third of interest upon debts and legacies, and reversioner two-thirds.(2)

(1) The rules here stated to be laid down by the *Lord Chancellor* are taken from *Atkyns*. They do not appear in *Lord Hardwicke's* Note-book ; But the following statement of the case is taken from *Lord Hardwicke's* Note-book and the Register's Book.

John Ward by his will of the 16th of November 1717, devised his estates (after certain limitations which were determined) to his two daughters *Elizabeth* and *Sarah* as tenants in common in fee, and gave £2000 equally between them, to be raised by sale of timber to be felled from any of his lands, and appointed them executrixes and residuary legatees, and soon afterwards died, leaving his wife, *Ann Ward*, *John Ward* his son, *Elizabeth*, *Sarah*, *Mary*, and *Ann Ward*, his daughters him surviving. *Mary Ward*, one of his daughters, being possessed of considerable personal estate, on the 23d of June 1726, made her will, and after giving some specific and pecuniary legacies, gave the residue of her personal estate to her two sisters, *Elizabeth* and *Sarah*, and appointed them executrixes of her will ; and on the 23d of June 1726 died. Part of *Mary Ward's* personal estate at the time of her death, consisted of several outstanding mortgage securities. On the 28th of April 1728, *John Ward*, the brother, died intestate, possessed of considerable personal estate. *Sarah* being thus entitled to the

moiety of a real estate and considerable personal estate, both in her own right, and as joint-tenant with her sister (though the same was not actually in her possession). Upon a marriage with the plaintiff, he, by indentures of the 1st and 2nd days of June 1730, in consideration of the marriage, and of the sums of £4500 and £800, making together £5300, agreed by her to be paid to trustees in discharge of incumbrances upon the plaintiff's estates, conveyed certain estates to trustees, in trust for the use of *Sarah Ward*, in case she survived him, for her life, for her jointure, with other remainders over. And by Indentures of lease and release of the same dates with the last mentioned indentures, the said *Sarah Ward*, after reciting the intended marriage, and that the plaintiff was to have the sum of £5300 as her marriage portion, and that the plaintiff had contracted and agreed with her, that, notwithstanding the marriage, she should hold and enjoy, to and for her separate use and disposal, and for want of such disposal, and for want of issue of her own body, her heirs and next of kin respectively of her own family of the *Wards*, should have and enjoy all the manors, land, and hereditaments, with all the appurtenances, and all her personal estate whatsoever, except the said £5300, and the rents, issues, interest, and profits thereof, whereto she had any estate, right, title, claim, or demand whatsoever, or whereto she had any claim upon the death of *Ann Ward* her sister, or *Ann Ward* her mother, in consideration of the said intended marriage, and for settling and conveying the said lands and hereditaments, in trust for her the said *Sarah Ward*, and her heirs and assigns for ever, and that the same might be for the sole and separate use of her the said *Sarah Ward*, without the control of the plaintiff, her husband, granted and conveyed to the trustees and their heirs, all the said moiety or half part of the said manor, to the use of herself and her heirs till marriage, afterwards to permit her to receive the rents and profits to her own separate use during her life without impeachment of waste, remainder to the use of such person or persons, and for such uses as she should direct, limit, and appoint. Remainder in default of appointment to her right heirs. *Ann Ward*, the mother, died on the 25th of March 1731, intestate, and possessed of considerable personal estate, and which, upon her death, was taken possession of by her daughters, *Elizabeth* and *Sarah*. *Sarah* on the 22nd of May 1731 made her will, and devised all the moiety of her lands comprised in the settlement to trustees, upon trust, first to satisfy and pay all her just debts, and afterwards to apply the rents and profits for the benefit of such child or children as she should leave, and for want of such issue she directed that the rents thereof should be to the use and behoof of the plaintiff for life without impeachment of waste, and appointed him sole executor of her will, and died in the year 1731 without issue.

In November 1731, a commission of lunacy was taken out against *Ann Ward*, the sister of *Sarah* and *Elizabeth*, and *Elizabeth* having intermarried with the defendant *William Powlet*, *William Powlet* and *Elizabeth* his wife were appointed her committees. The plaintiff brought his bill against *William Powlet* and *Elizabeth* his wife, and *Ann Ward*, the lunatic, for an account of the personal estates of *John Ward* the father, *John Ward* the brother, *Mary Ward*, *Ann Ward*, the mother of his late wife, and for an account of his late wife's real and personal estate. And the plaintiffs in a cross cause, brought their bill for an account of the same personal estates, so far as the plaintiff's wife possessed them.

Mr. *Brown* for the plaintiff.

The Attorney General, Mr. *Verney*, Mr. *Fazakerly*, and Mr. *Clark*, for defendants.

The Lord Chancellor directed an account of the personal estate of *John Ward* the father, and after payment of his debts and legacies, directed the surplus to be divided into two moieties, one moiety to be considered as part of the personal estate of the plaintiff's late wife *Sarah*, and the other was to be paid to or retained by the defendants *Powlet* and his wife. And he directed an account of *Mary Ward*'s personal estate, and as to so much as was received in the lifetime of the said *Sarah*, the Master was to see whether any act was done to sever the joint-tenancy of such part, and such part as was received by *Sarah* in her lifetime was to be a debt upon her estate, and the plaintiff was to account for what he had received. And he directed an account of the personal estate of *John Ward* the brother of the plaintiff's wife, and after payment of debts, directed it to be divided into four parts: One-fourth part to be paid to the plaintiff as standing in the place of his late wife, and to be considered as part of the personal estate of his late wife, one-fourth part to be paid to defendants *Powlet* and his wife; one other fourth part to be paid to the committees of *Ann Ward* the lunatic for her

benefit, and the other fourth part was to be considered as part of the personal estate of the mother *Ann Ward*. And an account was directed of the personal estate of *Ann Ward* the mother, and after payment of debts, he directed the residue to be divided into three parts: One-third part thereof to be considered as part of the personal estate of the plaintiff's late wife; one other third part to be paid to defendants *Powlet* and his wife; and the other third part to be paid to the committees of *Ann Ward* the lunatic, for her benefit. And it was further ordered that an account should be taken of the personal estate of the plaintiff's late wife come to the hands of the plaintiff or any other person. And it was ordered that the personal estate of the plaintiff's late wife, should be applied in the satisfaction of her debts, and of the said sum of £5300, or so much as should remain unsatisfied. And so much as should appear due to the plaintiff for the sum of £5300, or for the surplus of his late wife's personal estate was to be paid to or retained by the plaintiff, and in case the personal estate should be deficient to pay debts, his Lordship declared that the residue was to be raised by a fall and sale of timber growing on the trust-estates devised by her will, and he directed that the defendants should account for the rents and profits of the real estate devised to the plaintiff for life, which were to be applied in the first place to keep down the interest of the surplus of *Sarah's* debts not satisfied by her personal estate, and the residue was to be paid to plaintiff.

And it was further ordered that the plaintiff in the original cause and defendant in the cross cause should come to an account with the lunatic and her committees for such part of the personal estate, and the rents and profits of the real estate of the said lunatic, and what had been received by the plaintiff was to be paid over to the said lunatic and her committees, and what had been received by his late wife was to be considered as a debt upon her estate. And his lordship directed a partition to be made of the devised estates, and that the plaintiff was to hold such part as was allotted to him, according to his wife's will, subject to the order of the court, but not to fell timber without leave of the court, unless for necessary repairs and botes. Reg. Lib. B. 1736, fo. 223. Reg. Lib. B. 1741, fo. 443.

(2) No such principle is warranted by this case, nor does any such rule now prevail. Tenant for life is obliged to keep down the interest upon incumbrances. *Bridgman v. Dove*, 3 Atk. 201. *Revel v. Watkinson*, 1 Ves. 93. *Amesbury v. Brown*, 1 Ves. 480. *Buckeridge v. Ingram*, 2 Ves. jun. 652. *White v. White*, 4 Ves. 33, and 9 Ves. 559.

[4] MICHAELMAS TERM, 1740.

PARTERICHÉ v. POWLET.(1)

[See *Caldwell v. Fellowes*, 1870, L. R. 9 Eq. 418.]

Upon the Master's Special Report.

October 14, 1740.

S. C. Ante, p. 1; S. C. 2 Atk. 54.

Sarah Ward, being entitled to real estate, and as joint-tenant with her sister *Elizabeth Powlet* to personal estate, amongst which were mortgage securities, by settlement upon her marriage, after reciting that it had been agreed by her husband that she should enjoy to her separate use and disposal her real and personal estate, and for want of such disposal, and for want of issue of her own body, her heirs and next of kin respectively of her own family should have and enjoy the same, conveys her real estate to the uses of the settlement, but makes no assignment of the personal property. The whole of the money due upon one of the mortgage securities, called *Cutfield's* mortgage, was received by her husband, who together with his wife gave a note promising to be accountable to *Elizabeth* for half the sum upon *Cutfield's* mortgage, and interest until *Newland's* and *Croucher's* two of the other mortgages, were made over to *Elizabeth*; held that there was a severance of the joint-tenancy as to *Cutfield's*, *Croucher's*, and *Newland's* mortgages; but that the settlement was no severance of the joint-tenancy of any part of the personal estate; and that there was no sever-

ance as to the joint-tenancy of one of the mortgages, by one of the joint-tenants having advanced an additional sum to the mortgagees, and taken a conveyance in her own name.

The Master, by his report of the 2d of May 1739, found that £410, 2s. 1d. part of the personal estate of *Mary Ward* had been equally divided between the plaintiff *Parteriche* and his late wife, and the said defendant *Powlet* and his wife, in the plaintiff's late wife's lifetime, and he found that £847, 16s. had been received by plaintiff on *Cutfield's* mortgage, and that a moiety thereof amounting to the sum of £423, 18s. belonging to the defendants *Powlet* and his wife was retained by the plaintiff, and that the plaintiff and his late wife gave to the defendants *Powlet* and his wife, a note bearing date the 4th day of February 1730, thereby promising to be accountable to the said defendant *Elizabeth* for half the sum that should be paid upon *Cutfield's* mortgage and to carry interest for the same from the time they received it till they made over their share of *Newland's* and *Croucher's* security; but it did not appear to the Master that the plaintiff or his late wife ever made over their interest in the said *Newland's* and *Croucher's* securities, and that the said *Croucher's* security was originally made to the said *Mary Ward*, for the sum of £200. That after the said *Mary's* death, the said *Croucher* wanting the further sum of £50, applied to the said defendant *Elizabeth*, who advanced the same, and that the said security was then altered and [5] made to the said defendant *Elizabeth* and the plaintiff's late wife for £250, and that *Billinghurst's* security was originally made to *Mary Ward* for the sum of £200, but that since *Mary Ward's* death, there being due thereon for principal and interest £222, 4s. 6d., and the said *Billinghurst* wanting the further sum of £27, 15s. 6d. applied to the said defendant *Elizabeth* to supply him therewith, which she accordingly did, and then the said security was altered and made to the defendant *Elizabeth* for £250:—and the Master further certified, that the defendants *Powlet* and his wife insisted that the several sums of money mentioned by him in the schedule and his report to be received by them since the death of the plaintiff's late wife, and the mortgages and money due thereon, belong to him and his said wife by survivorship:—and the Master further certified, that it did not appear to him that there was any other act done to sever the joint-tenancy of *Mary Ward's* personal estate received in plaintiff's late wife's lifetime, but that the plaintiff insisted that the joint-tenancy was severed by the deed of the 2nd June 1730. (This deed is stated in the note (1) to *Parteriche v. Powlet* [ante, West. temp. Hard. 1], when it came on to be heard in 1736.)

The case came on to be argued upon the Master's report (14th Oct. 1740).

Mr. *Brown* and Mr. *Murray* for the plaintiff contended that there had been a severance of the joint-tenancy, first, by the settlement made by *Sarah* of her own property upon her marriage with the plaintiff: secondly, by the acts done between the two sisters. That the settlement was declaratory of *Sarah's* intention to sever the joint-tenancy. That the receipt of £847 by the plaintiff on *Cutfield's* mortgage, and the note given by him and his wife to Mrs. *Powlet* amounted to an agreement to sever the joint-tenancy in respect of *Cutfield's*, *Croucher's*, and *Newland's* mortgage; and as to *Billinghurst's* security, that the alteration of the security by *Elizabeth* having taken a conveyance in her own name, had severed the joint-tenancy both in law and equity.

The *Attorney-General* and Mr. *Capper* for the defendants, insisted, that in order to make a severance in equity, there must be an agreement between the joint-tenants.

That the end of the settlement was not to sever the joint-tenancy, but only to take away the power of the husband over the property of the wife. That there was no act done [6] by the wife to give it to the issue. That the note was not intended to sever the joint-tenancy with respect to the securities mentioned in the note, and they cited *Collins v. Harris*, 3rd May 1737. *Moyse v. Giles*, 2 Vern. 385. *Musgrave v. Dashwood*, 2 Vern. 63. (*Musgrave v. Dashwood* has been over-ruled by *Hinton v. Hinton*, 2 Ves. 632, and by *Brown v. Raindle*, 3 Ves. jun. 257.)

Lord Chancellor (17th Oct. 1740). There is a severance of the joint-tenancy in *Cutfield's*, *Croucher's*, and *Newland's* securities, and they must be divided equally between the plaintiff and the defendant *Powlet* and his wife, but as to the rest of *Mary Ward's* personal estate there is no severance; for first, here is no agreement for that purpose: secondly, if no agreement, then there must be an actual alienation (alienation by devise does not sever joint-tenancy. Litt. 287; 1 Inst. 185 a. *Moyse v. Giles*, 2 Vern. 385) to make it amount to a severance; the declaration of one of the

parties that it should be severed, is not sufficient, unless it amounts to an actual agreement; (2) and here is nothing in the marriage settlement which amounts to an alienation, either in law or equity, for the real intention was to preserve [7] the right of the wife as it was, so that her property might not be altered by the interposition of the husband; and, for any thing that appears to the contrary, it might likewise be intended to preserve the right she might have of survivorship, upon Mrs. *Powlet's* dying before her.

There is besides another reason, the other joint-tenant was no party to the deed.

The only thing that could give the least colour to the supposition of [a severance of the] joint-tenancy are these words in the marriage agreement, for want of issue of her own body, then it shall go to the next of kin of her own family. (The words within brackets above are not in *Atkyns*, but are inserted in order to make the passage intelligible.)

But I do not think they are sufficient to make the issue of her body purchasers, or to give them a right to come into this Court as purchasers, to have the agreement carried into execution in their favour; if it had, I should have inclined to think it a severance; but, notwithstanding these words, it still leaves it at large, and absolutely at the wife's disposal.

A joint-tenancy is undoubtedly no favourite (*Rigden v. Vallier*, 2 Ves. 258) of a court of equity, though otherwise at law; but, in the present case, here is no pretence of an alienation, either in law or equity. *Moyse v. Gyles*, 2 Vern. 385.

Alienatio rei prefertur juri accrescendi, is a maxim in equity; but then it must appear to be an actual alienation, and not from inference and implication only, without any express declaration of the parties.

(1) The statement of this case by Mr. *Atkyns* is incorrect. The Master's report in this case is taken from the Register's Book; the arguments of counsel from Lord *Hardwicke's* Note-book; and the judgment, with an addition from Lord *Hardwicke's* Note-book, from *Atkyns*.

(2) But a severance of joint-tenancy may be inferred either from the nature of the transaction or the acts of the parties. From the nature of the transaction,—as where persons are joint purchasers of land, with a view to a hazardous undertaking; *Lake v. Craddock*, 2 P. Wms. 158,—or where the transaction partakes of the nature of trade, as the purchase of stock upon a farm; *Jefferies v. Small*, 1 Vern. 217,—or where the lease of a farm itself is taken only for the same purpose as the stock, and the lease is only considered as the substratum, per Lord *Thurlow*, in *Elliott v. Brown*, cited in 9 Ves. 597,—or where two persons lay out money upon mortgage, and take the mortgage to themselves jointly; *Petty v. Styard*, 1 Ch. Rep. 57,—or where two make a joint purchase, and the purchase-money is not paid in equal proportions. *Lake v. Gibson*, 1 Eq. Ca. Ab. 291. A severance may likewise be inferred from the acts of the parties; as a covenant by a joint-tenant to sell; dict. per Lord *Alvanley*, *Brown v. Raindle*, 3 Ves. 257. But an agreement by an infant is not a severance. *May v. Hook*, Harg. Co. Litt. 246, note 1. So where two parties took under a will both in the capital and the profits of a trade as joint-tenants; but carried on the trade for twelve years, as partners, one advancing more capital than the other, one taking more profit than the other, holding themselves out in all their transactions as partners from the death of their testator; a severance was inferred both as to the capital and profits. *Jackson v. Jackson*, 9 Ves. 591. *Quære*, whether persons merely acting as partners in trade for twelve years, would not sever a joint-tenancy created by a will; ib. So where two persons had divided equally between themselves all the property to which they were entitled as joint-tenants under the will of their testator, except a sum of £350, set apart to answer an annuity given by the will, and a sum of £8000 set apart to answer the contingencies of the testator's will: It was held that their general dealing with respect to that part of the property of the testator divided between them was sufficient evidence of their intention to divide the whole. *Crooke v. De Vandez*, 11 Ves. 330.

HILARY TERM, 1736.

Sir BIBYE LAKE v. Sir THOMAS HALES, and others.(1)

28th February 1736.

S. C. 1 Atk. 281.

Every indorser is a new drawer.

Lord Chancellor. His Lordship said, there had been a difference of opinion amongst judges; whether a demand [8] must be made upon the drawer of a bill of exchange, to entitle an indorsee to an action, but that he was very clear in his own judgment. there is no occasion to make that demand, for he considered every indorser as a new drawer.(2)

It was adjudged by the late *Master of the Rolls*, that a bill in Chancery, which had been depending almost six years, ought not to be considered as a sufficient demand of the debt, so as to take it out of the statute of limitations.(3)

(1) What Lord *Hardwicke* is stated to have said in this case is taken from *Atkyns*, where it is reported, under the names of *Lake v. Hayes*.

The following statement of the case is taken from Lord *Hardwicke's* Note and the Register's Book:—

Sir *B. Lake* brought his bill against the defendants, who were the personal representatives of *William* and *Robert Hales*, for payment of a note of £800; and the bill stated, that *Wm. Hales* being possessed of two negotiable notes, both bearing date the 6th of April 1726, under the hands of *Robert Hales* deceased, both payable to *Robert Hales*, three months after date, one for £440 and the other for £430, and both indorsed by *Robert Hales*; and thinking that he could get a bill of the plaintiffs more easily discounted than he could the two notes, requested the plaintiff to give him his note for £800 payable at a future time, and that he would for the plaintiff's security, leave *Robert Hales's* notes with the plaintiff, in order that he might pay himself the £800 out of the two notes when they became payable, and return the overplus to *Wm. Hales*; and he promised, that in case the two notes were not punctually paid, that he would take care to discharge the plaintiff's note. That the plaintiff thereupon delivered to *Benjamin Wilcock*, a person whom he employed, a note for £800 payable on the 2d May 1726, and directed *Wilcock* to indorse, and deliver the same to *William Hales*, which he accordingly did; and *William Hales* delivered to *Wilcock* in trust for plaintiff, the two notes of the 6th of April 1726, and signed a paper, promising to indemnify both the plaintiff and *Wilcock* against the £800, and that he had left the two notes as security for the £800. That the £800 was paid to *William Hales*, and that *Wilcock* thereupon being discharged from the £800 note, delivered up the two notes to *William Hales*. The defendants put in their answer to the bill, and denied any knowledge of the circumstances stated in the bill. And the plaintiff entered into evidence to shew that the £800 was advanced. The only point insisted upon in argument by Mr. *Browne*, the counsel for the defendant, was, as to the insufficiency of the evidence of payment of the £800, whereupon the Lord *Chancellor* directed an issue, to try whether any sum of money had been advanced by the plaintiff in satisfaction of the note of the 2d May 1726; and the jury having found that the plaintiff had advanced £800 in satisfaction of the note, the cause came on to be heard, on further directions on the 17th June 1737; when it was ordered, that the £800 and interest, should be paid to plaintiff out of the assets of *Robert Hales*. Reg. Lib. B. 1736. fo. 223. Reg. Lib. B. 1737, fo. 397.

(2) And it is now settled that there is no occasion to make that demand. *Harry v. Perritt*, 1 Salk. 133. *Bromeley v. Frazier*, 1 Strange, 441. *Lawrence v. Jacob*, ib. 515. *Heylyn v. Adamson*, 2 Burrow, 674. *Bayley on Bills of Exchange*, 4th Ed. 374. Though *Sidebotham v. Smith*, 1 Stra. 649. *Collins v. Butler*, 2 Stra. 1087, are *contra*.

(3) If there be a suit in equity for a demand, for which an action at law is afterwards brought, but during the pendency of the suit the statute of limitations becomes a bar to the plaintiff's demand at law, a court of equity will not interfere to prevent the defendant's pleading the statute of limitations in bar to the action, *Cradock v.*

Marsh, 1 Ch. Rep. 109. *Hurdret v. Callador*, ib. 114. *Anon.* 2 Ch. Ca. 217. *Contra Anon.* 1 Vern. 73.

But where a court of equity directs an action to be brought in a matter concerning which a court of equity and court of law have a concurrent jurisdiction, and during the pendency of the suit the statute becomes a bar, *Mackenzie v. Marquis of Powis*, 4 Bro. P. C. 337 [2nd ed. 7 Bro. P. C. 282]; or where the party is stayed from proceeding at law by the act of the court; *Anon.* 2 Ch. Ca. 16. *Pulteney v. Warren*, 6 Ves 73; or where it is necessary for a party to ask the assistance of a court of equity, in order to aid him in his legal remedy, that outstanding terms may not be set up, or that deeds in the possession of the party, against whom he seeks to recover at law, may be produced; in such cases a court of equity will prevent the statute from being pleaded, *Pinche v. Thorneycraft*, 4 Bro. P. C. 92 [2nd ed. 4 Bro. P. C. 92]. *Bond v. Hopkins*, Scho. & Lef. Rep. 413.

[9] AFTER HILARY TERM, 1736.

The Duchess of MARLBOROUGH v. Sir THOMAS WHEAT.

S. C. 1 Atk. 454.

Masters in Chancery in reports, are only to state bare matters of fact.

Lord Chancellor laid it down in this case, that Masters in Chancery in reports which are special, are not to set forth the evidence with their opinions upon it, but only to state the bare matter of fact for the judgment of the court, in the same manner as in courts of law, they only state the facts allowed by both sides in a special verdict, but never meddle with any part of the evidence on either side. (This case does not appear in *Lord Hardwicke's* Note-book, but is taken from 1 Atk. 454.)

[10] AFTER HILARY TERM, 1736.

The ATTORNEY GENERAL v. HAYES.

S. C. 1 Atk. 356.

Lord Chancellor: Where a legacy is given to a charity, interest shall be paid from the death of the testator.(1)

(1) This proposition which is taken from *Atkyns*, is neither warranted by *Lord Hardwicke's* Note-book, where this case appears, nor by the decree in the Register's Book. By the decree in the Register's Book it appears, That *Judith Cole*, bequeathed £100 to the ministers and churchwardens of Chelsea, in trust, to invest the same, in the purchase of lands or other good security, and to distribute the yearly interest thereof among six poor widows of Chelsea. *Lord Hardwicke* decreed, that the charity should be established; and directed the master to compute what was due for the said legacy of £100, with interest for the same, after the rate of 4 per cent. from the end of one year, after the death of the said *Judith Cole*; such interest to be added to the principal, and laid out in government or other securities, in the names of the said ministers and churchwardens, in trust for the charity. Reg. Lib. A. 1736, fol. 346. A similar decree was made in the *Attorney-General v. Pearce*, as it appears in the Register's Book. Reg. Lib. A. 1740, fol. 216, and in *Lord Hardwicke's* Note-book.

OXLEY v. LEE.(1)

28th February 1736.

S. C. 1 Atk. 625.

The court will not decree a voluntary conveyance to be delivered up to a purchaser for valuable consideration, unless obtained by fraud.

Lord Chancellor said in this cause, he did not remember that this court ever decreed a voluntary conveyance to be delivered up to a purchaser, upon a valuable consideration, unless it appears there are some circumstances of fraud, [11] attendant upon such conveyance.(2) A case was mentioned to be determined by the late *Master of the Rolls*, where a voluntary conveyance was decreed to be delivered up, though no circumstance of fraud appeared.

(1) What *Lord Hardwicke* is reported by *Mr. Atkyns* to have said in this case, does not appear in *Lord Hardwicke's* Note-book; but the case, as stated in his Lordship's Note-book, corresponds with the report of it in the Register's Book, where it is stated, "That *Joseph Stevens*, being entitled to a lease of the premises in question, in consideration of the natural affection he bore his daughter, the wife of *Richard Lee*, and in consideration of 5s. paid by *Lee*, assigned over the lease to him. This lease being subject to a mortgage, was, after the marriage, assigned to a trustee, in trust for *Lee* for life; remainder to his wife for life; remainder to the issue of the marriage. *Oxley* purchased of *Lee* these premises for a valuable consideration, and without notice of the settlement or mortgage. Decreed, that the trustee should convey the legal estate to the purchaser, that the settlement should be delivered up, and that *Lee* should pay off the mortgage money." Reg. Lib. 1736, fol. 188.

(2) It is now settled, that a voluntary conveyance, though it be for a good and meritorious consideration, is fraudulent within the stat. of the 27th Eliz. c. 4, against a subsequent purchaser for a valuable consideration, *Lord Townsend v. Windham*, 2 Ves. 11, Dict. per *Lord Hardwicke*. *Doe, dem. of Otley, against Manning*, 9 East's Rep. 59, and the cases there cited.

And a court of equity will, on behalf of a purchaser, decree the specific performance of an agreement for a purchase of lands, even when the purchase has been made with notice of a prior voluntary settlement, *Leach v. Dean*, 1 Ch. Rep. 78. *Parry v. Curwarden*, 2 Dick. 544. *Buckle v. Mitchel*, 18 Ves. 110.

But it will not assist a vendor by decreeing a specific performance on his behalf, to defeat his own prior voluntary settlement, *Smith v. Garland*, 2 Mer. Rep. 123.

Yet it will not interfere by injunction, to prevent a person, who has made a voluntary settlement on his wife and children, from selling, *Pulvertoft v. Pulvertoft*, 18 Ves. 84.

SUMNER v. THORPE.

1st March, 1736.

S. C. 2 Atk. 1.

Where the defendant sets up a stated account to a bill brought for a general one, the plaintiff must amend.

Where a bill is brought for a general account, and the defendant has set forth a stated one, the plaintiff must amend, but pays only the costs of the day.

There is no rule more strictly adhered to in this court, than that when the defendant sets forth a stated account, he shall not be obliged to go on upon a general one, because very often a stated account would unravel a perplexed affair, which might otherwise remain in the dark if left to a general one. (This case is taken from 2 Atk. 1. It corresponds with *Lord Hardwicke's* note of the same case, except as to the direction about costs, in respect of which nothing is stated.)

[12] HENRY STAPYLTON an Infant, by ANN his Mother, *Plaintiff*; and PHILIP STAPYLTON, MARGARET STAPYLTON Widow, EDWARD THOMSON, and FRANCIS TAYLOR, *Defendants*.

[See *Fane v. Fans*, 1875, L. R. 20 Eq. 708.]

March 8th, 1736.

S. C. 1 Atk. 2.

Where upon an issue directed to try the legitimacy of an infant, the jury found the infant illegitimate. The Court granted a new trial upon payment of costs.

By a deed dated the 21st of August 1661, *Philip Stapylton* was tenant of the premises in question for ninety-nine years, if he so long live, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to his right heirs.

Philip having two sons, *Henry* and *Philip*, they by deeds of lease and release of the 9th and 10th of September 1724, reciting, that for settling and perpetuating all manors, &c., in the name and blood of the *Stapyltons*; and for making provision for his two sons, &c.; for preventing disputes and controversies that might possibly arise between the said two sons, or any other person claiming an interest in all or any of the estates thereafter mentioned, and for barring all estates tail, and for answering all and every the purpose and purposes of the parties thereto, and for and in consideration of the sum of 5s., release and confirm to *Thomson* and *Fairfax* all those manors, &c. To have and to hold to them, their heirs and assigns, to the use (as to part) of *Philip* the father, his heirs and assigns for ever, and as to another part, to the use of *Philip* the father for life, remainder to *Henry* the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and every other son in tail male, remainder to *Philip* the son for life, remainder to trustees to preserve contingent remainders, remainder to his first and other sons in tail male, remainder to the daughters of *Henry* in tail, remainder to the daughters of *Philip* the son in tail, remainder to the right heirs of *Philip* the father. And as to the remaining part, to the use of *Philip* the father for life, with [13] like limitations in the first place to *Philip* the son and his issue, and then to *Henry* and his issue, remainder in fee to the father.

There were covenants by the father and his two sons to suffer a recovery within twelve months, to the uses in the said deed of the 10th of September 1724, and there were covenants likewise for farther assurances. *N.B.*—To this deed, the heirs of the surviving trustee in the deed in 1661 were not parties.

But by deeds of lease and release dated the 28th and 29th of September 1724, to which the heirs of the surviving trustee of the deed of 1661 were parties, the father and two sons make *Thomson* and *Fairfax* tenants to the præcipe, in order to suffer a recovery for the purposes mentioned in the former deeds of the 9th and 10th of September 1724.

Before any recovery suffered *Henry* died, leaving issue the plaintiff.

Afterward by lease and release the 12th and 13th of April 1725, to which the heirs of the surviving trustee of the deed of 1661 were parties, *Philip* the father and *Philip* the son covenanted to suffer a recovery, in which *Thomson* and *Fairfax* were to be tenants to the præcipe, to the use, as to part, of *Philip* the father, his heirs and assigns, and as to the other part to the use of *Philip* the father for life, remainder to *Philip* the son in fee.

In Trinity Term 1725, a recovery was suffered, in which were the same tenant to the præcipe, the same demandant, and the same vouches (except *Henry*, who was dead), as were covenanted to be by the first deed, it was likewise suffered within twelve months after the first deed.

The father *Philip Stapylton* being dead, the plaintiff, as son and heir of *Henry*, brought his bill to establish his title to the premises in question, and for the whole estate as tenant in tail under the settlement of 1661, and to be let into possession, and for an account of rents received by *Philip Stapylton* the son, due since the death of the plaintiff's grandfather, and to have the same applied for the plaintiff's benefit during his infancy, and for an injunction to restrain the defendants from receiving any more rents.

The defendant *Philip* the son by his answer confesses the several deeds before mentioned, but says, *Henry* was a bastard, and that by virtue of the deed of 1725, and of the recovery, he was entitled to the whole estate in question.

After an issue directed, and a verdict by which the plaintiff [14] *Henry* was found to be illegitimate, a motion was made for a new trial.

The *Attorney-General*, Mr. *Browne*, and Mr. *Hamilton* for the infant plaintiff, contended—

1st.—That there were several facts material to the point in issue, which had not been laid before the jury.

2nd.—That this was a case in which an inheritance was to be bound, and that the question therefore ought not to be concluded by one trial. *Edwin v. Thomas*, 2 Vern. 75. *Tritton v. Earl Macclesfield*, 1 Vern. 287.

That at law it might be tried several times in ejectment, but that there being an outstanding term of 500 years, the title cannot be tried at law without the aid of a court of equity.

That this is a question of legitimacy which is favoured both at law and in equity, and is also the case of an infant whose right ought not to be concluded by a single trial.

That if the infant should bring a new bill after he came of age, this dismissal might be pleaded. In *Pittard v. Pittard*, Hill. 1732, the Judge certified for the trial, but it being the case of an infant, and a term being to be assigned, a new trial was granted. *Crew v. Arderne*, April 1733.

Mr. *Verney*, Mr. *Pounceforte*, and Mr. *Fazakarley* for the defendant, argued—

1st.—That the new evidence which had been mentioned furnished no ground for a new trial.

2nd.—That this was not a case which was to bind the inheritance or to bar the plaintiff of his remedy at law. That though the bill should be dismissed, it would not be conclusive. That an infant is not bound when defendant, but a day is given him to shew cause, and he may put in a new answer. *A fortiori* therefore he cannot be bound when he is plaintiff, because any person may file a bill in the name of an infant, as *prochein amy*.

In *Lomax v. Holmden*, the bill was by a plaintiff, who insisted that he was the legitimate son of *Cabel Lomax*, the verdict was found for him, and a new trial was refused; and it was declared by the *Master of the Rolls*, that the infant might bring a new bill after he comes of age. *Lady Effingham v. Sir John Nappier*, 2 P. Wms. 481. In *Tritton v. Earl of Macclesfield* one of the trials only related to the will. In *Pittard v. Pittard* the state of the case does not appear. In *Bury v. Bury* the question was tried thrice. *Durrant v. Durrant*.

[15] It cannot be laid down as a rule, that a second trial should be granted, and here the heir of the surviving trustee of the term having joined in the new settlement, the term is out of the case.

Lord Chancellor (March 8, 1736). The question before me is, whether there ought to be a new trial in this case. The application may be supported—

1st.—For any defect or objection against the former trial.

2nd.—Because new evidence has been discovered since.

3rd.—From the nature of the case, inasmuch as the decree will bind the inheritance, and that there will be no further opportunity of trying it at law, on account of the term of years and the possession of the deeds and writings.

Upon this subject there is no general rule, but each case must be judged of by its own peculiar circumstances. This is the case of an infant, and the question is that of legitimacy, which is always favoured. The circumstance of infancy has been made use of on both sides, on different suppositions. On the one side it is contended, that the infant will be bound by the dismissal of his bill, and on the other that he will not. If it were clear that the infant would not be bound, it would afford an objection against a new trial; but if he will be bound, and it is doubtful whether he will or not, it is a strong reason why I should grant it. It is indeed far from clear, that he will not be bound, and though he should have the right, the death of witnesses may deprive him of the means of hereafter proving his legitimacy. Second trial granted on payment of costs.

(The statement of this case is taken from *Atkyns*. The arguments of counsel and the judgment from *Lord Hardwicke's Note-book*.)

[16] SMITH v. READ.

March 18, 1736-37.

S. C. 1 Atk. 526 ; 3 Vin. Ab. 540, pl. 21 ; 3 Bac. Ab. 799.

A bill brought to discover whether *Ann Payne*, under whose will the defendant claims, was a Papist at the time of a purchase made by her of the estate from the plaintiff's ancestor. Defendant pleads as to the discovery the stat. of the 11th and 12th of Wil. 3, by which, if *Ann Payne* was a Papist, she was disabled to take.

Under the rule, a man is not obliged to accuse himself, is implied, that he is not to discover a disability in himself ; and as *Ann Payne* would not have been obliged to discover, the defendant, who claims under the same title, is entitled to the same privileges, and takes the estate under the same circumstances. The plea allowed.

Bill by a Protestant claiming title, *and insisting upon* and praying a discovery, whether *Ann Payne*, under whom the defendant claims by devise was a Papist at the time of the purchase by her of the estate in question from the plaintiff's ancestor.

As to the discovery whether *Ann Payne* was a Papist, the defendant pleads the statute of 11th and 12th of W. 3, by which, if *Ann Payne* was a Papist, she was disabled to take.

Mr. *Verney* and Mr. *Browne* for the defendant, argued that a person shall never be obliged to discover any matter which may subject him to any forfeiture. That the disability created by this statute amounts to a forfeiture, and that a person standing in the place of the original owner, must be entitled to the same privilege. The legislature did not conceive that persons were obliged to discover such facts as these, and therefore in the acts relating to presentations to livings, inserted a clause to prohibit all persons from pleading those forfeitures and penalties.

In the case of copyholds, the tenants are not obliged to discover waste or other facts whereby they may have forfeited their estates, Comyns, 671. A person who has bought goods after a bankruptcy may plead and deny notice. If an estate be limited to a widow during widowhood, the court will not compel her to discover whether she is married or not. *Monings v. Monings*, Ch. Cas. 68, and vid. *South Sea Company v. Doliffe*. (Cited 2 Ves. 376.)

[17] The *Attorney-General* and Mr. *Fazakerly* for the plaintiff, contended that the bill did not seek to discover a forfeiture, but to shew that there never was any title to the estate. That it was not like the case of taking away an estate once vested, but more like that of a bastard or an alien. In the case put of bankruptcy, the defendant must make discovery, if he had notice of it. But suppose this were a forfeiture, it cannot be the forfeiture of the defendant, but of some other persons by which his title would be defeated, but which does not amount to any personal disability in himself. It resembles the case of a man claiming by lease and release from a tenant in tail, without a fine or recovery.

Lord Chancellor. I think the defendant is not bound to discover ; for there is no rule more established in equity, than that a person shall not be obliged to discover what will subject him to a penalty, or any thing in the nature of a penalty.

Under the rule, a man is not obliged to accuse himself, is implied, that he is not to discover a disability in himself ; and there is no difference between a forfeiture of a thing vested, and a disability to take, inflicted as a penalty ; and the 11th & 12th of Wm. 3d is a penal statute.

If this bill had been brought against the person himself, and there was no other penalty than this, I think he would not have been obliged to discover.

Therefore they who claim under the same title are entitled to the same privileges, and take the estate under the same circumstances.

As to its being a defective title only, it is true ; but then it is a defect arising from a penalty.

The laws of bankrupts are not all penal laws ; and in the cases of aliens, bastards, &c., there is a difference where the disability arises from the rules of law, and where it is imposed as a penalty.

If this plea was not allowed, it would affect numberless inheritances, and protestants more than papists. And where the legislature have intended discoveries of what

is penal, they have put in clauses for that purpose, as in the statute of the 12th Anne, c. 14, of the livings belonging to papists.

The plea allowed.

(The statement of this case, and the arguments of counsel, are taken from Lord *Hardwicke's* Note-book. The judgment from Mr. *Atkyns's* Report, which is nearly in the same words with that attributed to Mr. *Forrester*.)

[18] JEFFERIES v. HARRISON, Executor of Sir THOS. TRAVEL.(1)

18th March 1736.

S. C. 1 Atk. 468.

If an executor has paid simple contract debts in preference to a bond debt, of which he had notice, he must pay costs *de bonis testatoris, si non de bonis propriis*.(2)

Lord Chancellor said in this cause, that when an executor is defendant at law, and fails in his defence, the rule is, that he must pay costs *de bonis testatoris, si non de bonis propriis*; [19] and as in this case, the executor has misbehaved himself, by paying simple contract debts, preferable to a bond creditor with notice, the court of Chancery has no occasion to vary it from the common course.

(1) What Lord *Hardwicke* is stated to have said in this case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book; but it appears from the Register's Book, where it is reported under the names of *Jefferies v. Stevenson*, that the executor was made to pay costs *de bonis propriis*, under the following circumstances:—"The plaintiff brought his bill to have satisfaction for a bond entered into by *Thomas Framwell* deceased, the defendant's testator, to the plaintiff, on the 19th of January 1726, for payment of £954, 16s. with interest, out of the assets of the said *Thomas Framwell*, come to the hands of the defendant, his surviving executor; and the defendant by his answer, insisting, that a judgment obtained against him and his brother, *Samuel Stevenson* deceased, his co-executor, for £256, 10s. debt, and £5, 10s. costs, ought to take place before the plaintiff's debt; and the plaintiff admitting, that the sum of £363, 16s. 1d. part of the sum of £954, 16s. for which the said bond was given, was not advanced, the cause came on to be heard on the 15th day of Novr. 1734, when it was ordered and decreed, that the defendant should be at liberty, if he thought fit, to examine the plaintiff upon interrogatories, before Mr. *Eld*, one of the Masters of the Court, whether the sum of £590, 19s. 11d. residue of the money due on the said bond, or any and what part thereof was advanced by the plaintiff, or any person by his order, to *Thomas Framwell*, as the consideration of the said bond, and to inspect the books and papers of the plaintiff for that purpose, which were to be produced before the Master by the plaintiff upon oath; and if it should appear to the Master by the plaintiff's examination, or by the said books and papers, or by any proof to be made before the Master, that any part of the said sum of £590, 19s. 11d. was not advanced, then the Master was to take an account of what was due for the residue of the said sum of £590, 19s. 11d., and the interest thereof; but unless it should appear as aforesaid, that the said full sum of £590, 19s. 11d. was not advanced, then the same was to be considered as advanced as the consideration of the said bond; and the said Master was likewise to see, whether any thing, and what, had been paid towards satisfaction of the said principal and interest due on the said bond, and what, upon taking the said accounts, should appear to be remaining due on the said bond, it was ordered and decreed, that the defendant should pay the same to the plaintiff out of the assets of the said *Thomas Framwell*, in a course of administration; and, in case the said defendant should not admit assets for that purpose, then the defendant was to account before the said Master in the usual manner, and the consideration of costs was reserved till after the report. The Master made his report, dated 15th July, 1736, and certified, that there was due to the plaintiff on the said bond, from the estate of the said *Thomas Framwell*, for principal and interest, £871, 14s. 5d., and that there remained in the defendant's hands a balance of £302, 3s. 8d. due to the said testator's estate, and there were other debts, goods and effects belonging to the said testator, in the island of Barbadoes, which the defendant had not got in; but the defendant in his discharge, exhibited before the Master, insisted he had paid unto Mr. *John Norman*, the sum

of £256, 10s. for a debt, and £5, 10s. costs, making together £262, on a judgment recovered against the defendant and his brother, *Samuel Stevenson*, as executors of the said *Thomas Framwell*, in the Court of King's Bench, as of Easter term, in the first year of his present Majesty's reign, and he claimed an allowance of the same out of the said *Thomas Framwell's* estate; but such judgment appearing to the said Master to have been obtained in the name of the said *John Norman*, in trust, and for the use and benefit of the defendant and his said brother *Samuel Stevenson*, and the debt whereon the same was so obtained being, at the time of the death of the said *Thomas Framwell*, only a debt upon simple contract, the Master conceived, the same ought not to be paid out of the said *Thomas Framwell's* estate till after satisfaction of the said plaintiff's bond, and had, therefore, as against the said plaintiff, disallowed the defendant's payment of the said £262 to the said *John Norman*. And the cause coming on this present day to be heard before the *Lord Chancellor*, as to the matter of costs, in the presence of counsel learned on both sides, upon hearing the defendant's answer, an agreement between the plaintiff and defendant relating to the said bond of the 19th January 1726, the decree made on the cause, and the Master's report, his Lordship doth order, that the defendant do pay unto the plaintiff the sum of £302, 3s. 8d., reported to be in his hands, towards satisfaction of the plaintiff's demands, and do also pay unto the plaintiff his costs of this suit, to be taxed by the said Master; and in order to a satisfaction of the residue of the plaintiff's demands, it is ordered, that a proper person be appointed, with the approbation of the said Master, at the plaintiff's expence, to get in the debts and effects of the said testator *Thomas Framwell*, remaining beyond sea, and, in order thereto, that the defendant do give unto such person a proper authority, the plaintiff indemnifying the defendant therein; and when any the debts and effects of the said testator remaining beyond seas shall be got in, the plaintiff is to be at liberty to apply to this court, touching satisfaction of the residue of his said demand, whereupon such further order shall be made in relation thereto, as shall be just." Reg. Lib. A. 1736, fo. 236.

(2) It is stated by Lord *Thurlow* to be a general rule, that where interest is given against executors for a breach of trust, costs follow of course, *Seers v. Hind*, 1 Ves. jun. p. 294. But Sir *Wm. Grant* was not prepared to accede to that general proposition, as he said there may be many cases in which executors must pay interest, which could not be cases for costs, *Ashburnham v. Thompson*, 13 Ves. 402.

Executors have been made to pay costs where they have been guilty of fraud, or great misbehaviour; as when they refused to sell the good-will of a house, unless they were employed in their trade, *Hide v. Haywood*, 2 Atk. 126; or upon an attempt to support a discharge by forgery, *Parnell v. Price*, 14 Ves. 502; or to conceal the testator's property, *Avery v. Osborne*, Barnard. 352.

Or where money has been kept in their hands without cause; or contrary to the directions in the will; or has been called in and employed for their own purposes, *Littlehales v. Gascoyne*, 3 Bro. C. C. 73. *Ashburnham v. Thompson*, 13 Ves. 404. *Tebbs v. Carpenter*, 1 Mad. 308. *Roche v. Hart*, 11 Ves. 58. *Piety v. Hall*, 4 Ves. 620. *Mosley v. Ward*, 11 Ves. 581; or where the executor has put his defence on a wrong footing, and his answer has been evasive and contradicted, *Keech v. Kennegal*, 1 Ves. 126; or where he has obtained a release from a legatee without consideration, *Hensley v. Chaloner*, 2 Ves. 85; or where he has denied that he has assets, there being sufficient for the payment of a debt, *Sandys v. Watkins*, 2 Atk. 79; but *secus*, where he has been the representative of two estates, and from that circumstance a confusion has arisen, and his denial of assets has not been positive, *ib.*

An executor, however, may be entitled to costs as to part of the suit, though he may be charged with costs for his misconduct as to the remainder; as where it is necessary to submit a point to the opinion of the court, *Tebbs v. Carpenter*, 1 Mad. 308. *Rashley v. Masters*, 1 Ves. jun. 205. *Blount v. Burrow*, 3 Bro. C. C. 90.

And he is generally entitled to the costs of taking the account, *Newton v. Bennett*, 1 Bro. Ch. Cases, 362, unless the account or inquiries be made necessary by his own misconduct; and even in these cases, where there has been a difficulty in separating the costs; *ib.* Or where there has been great uncertainty in respect of the rule by which the executor ought to be charged, the court has neither given or allowed costs, *Raphael v. Boehm*, 13 Ves. 590.

It is a settled rule, that the executor of an insolvent shall not have costs, *Adair v. Shaw*, 1 Sch. & Lef. 280. *Humphry v. Morse*, 2 Atk. 408.

[20] BETWEEN THE SEALS AFTER HILARY TERM, 1736

ANONYMOUS.

2 Atk. 1.

A bill depending six years in Chancery, not sufficient to take a debt out the statute of limitations.

Lord *Hardwicke* said, that a bill, though depending in Chancery almost six years, was not allowed to be such a demand as to take a debt out of the statute of limitations ; and Sir *Joseph Jekyll*, in a case before him at the Rolls, declared himself to be of the same opinion. (This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book.) (*Craddock v. Marsh*, 1 Cha. Rep. 205. *Hurdrett v. Calladon*, ib. 214. *Anon.* 2 Cha. Ca. 217. *Lake v. Hales*, ante, page 7. *Sturt v. Mellish*, 2 Atk. 615. Contra, *Anon.* 1 Vern. 73.)

[21] AFTER HILARY TERM, 1736.

BENSLEY v. BENSLEY.

S. C. 1 Atk. 97 [sub nom. *Beasley v. Beasley*].

Joint commission against two partners does not abate by the death of one ; but if one be dead at the time of taking out the commission, it is void.

Lord *Chancellor*. Where there is a joint commission against two partners they must be each found bankrupt, and though one of them should die, the commission may still go on ; but if one of the joint traders be dead, at the time of taking out the commission, it abates, and is absolutely void. (What Lord *Hardwicke* is stated to have said in this case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book.)

BROWNE v. HIGDEN.

March 19, 1726.

S. C. 1 Atk. 291.

It is a constant rule, that matters subsequent to the original bill, must come by way of supplemental bill and revivor. (See *Jones v. Jones*, 3 Atk. 217.)

An original bill was now brought by a creditor against Mrs. *Higden*, as administratrix of A., who being a married woman, her husband was also made a party.

Before the cause was heard the wife dies, and the husband took out administration to his wife, and also *de bonis non, &c.*, of A., upon which the plaintiff amended his bill against the husband ; to which amended bill the defendant demurred. *For any matter which happens subsequent to the original bill cannot be put into an amended bill ;* but a bill of revivor and supplemental bill ought to be brought.

Mr. *Verney* for the plaintiff, insisted, that in equity the suit abated only against the wife, and cited the case of *Humphreys v. Humphreys*, 3 P. Wms. 349, there the bill charged, by way of amendment, matters which arose after filing of the bill, and therefore seemed a proper case for a supplemental bill, and though this was pleaded to the bill, yet the plea was over-ruled ; for that such matters may be charged either by way of supplemental, or by way of amended bill.

[22] Lord *Chancellor*. I am of opinion, that the demurrer ought to be allowed (Reg. Lib. A. 1736, fo. 211) ; for I take it to be the constant rule, that matter subsequent to the original bill, must come by way of supplemental bill and revivor. Besides the suit abated entirely by the death of the wife ; for the husband, who was before joined for conformity only, has an interest now, and though by the statute of the 8th Will. 3rd a suit shall not abate upon the death of one defendant, but shall

go on against the others : yet it must be taken with this restriction, provided the subject matter of the bill is not hurt by the death of such defendant.

(There is no mention of this case in Lord *Hardwicke's* Note-book ; but the above report in *Atkyns* corresponds in every respect with a manuscript report of Mr. *Forrester*.)

KELSALL v. BENNETT.

March the 19th, 1736-7.

S. C. 1 Atk. 522.

A. devises the estate in question to B. in tail, remainder to C. in fee, the bill brought by the heir of the body of B. for deeds and writings, and possessions.—The defendant pleads he is a purchaser for valuable consideration from C. and had no notice of plaintiff's title.

The bill set forth, that A. made his will, in which he devised the estate in question to B. in tail, remainder to C. in fee, and is brought by the heir of the body of B. against the defendant, for deeds and writings, and to have possession of the estate.

The defendant pleads, that he is a purchaser for a valuable consideration from C., that the plaintiff's father lived in Virginia at the time of the purchase ; that C. was in possession of this estate, and that he had no notice of the plaintiff's title ; for that C. at the time of the purchase, made affidavit, that B. was dead abroad, without issue, and therefore insists he is a purchaser without notice, who may protect himself by plea.

Mr. *Attorney-General* for the plaintiff. Both parties claim under one will, and it appears by the plea, that the defendant knew the plaintiff's father was alive, or that the plaintiff himself, if there was such a person, must of course be entitled.

Besides, it is a denial only of the knowledge of the plaintiff's being in *esse*, not of his title, which they were bound to take notice of at their peril.

[23] *Lord Chancellor*. If the defendant claims under a conveyance, where there was an estate tail prior to the estate under which he purchased, it is incumbent on him to see if that estate is spent. The question here is, therefore, Whether a purchaser can protect himself by plea, without denial of notice of the plaintiff's title. Denial of notice is what gives him power of protecting himself by plea.

Plea over-ruled.

(There is no mention of this case in Lord *Hardwicke's* Note-book, but the above report of Mr. *Atkyns* corresponds in every respect with the manuscript report of Mr. *Forrester*.)

ANGUS v. ANGUS, 1736-7.

March 21, 1736-7.

To a bill brought for possession of lands in Scotland, and for discovery of the rents and profits and deeds, and fraud in obtaining them ; plea to the jurisdiction of the court bad, on account of not averring that the parties were resident out of the jurisdiction.(1)

As to so much of the bill as seeks possession ; the plea over-ruled, without prejudice to the defendant's insisting by way of answer upon the same matter. (The Court of Chancery in *England*, respecting lands out of its jurisdiction, cannot enforce its decree in *rem*, but enforces it by process of contempt in *personam* and *sequestration*, *Penn v. Lord Baltimore*, 1 Ves. 454.)

To a bill brought for possession of lands in *Scotland*, and for discovery of the rents and profits, deeds and writings, and fraud in obtaining the deeds, &c., the defendant pleaded the 19th article of the treaty of union, and that the lands in question, and the matter prayed by the bill were out of the jurisdiction of the court. Mr. *Green* for the plaintiff, cited the case of the *Earl of Arglasse v. Muschamp*, 1 Vern. 75, where relief was granted against a fraudulent conveyance obtained here of lands in *Ireland* ;

and *Toller v. Carteret*, 2 Vern. 494, respecting a mortgage of the island of *Sark*; and *Sumner v. Acton*.

Lord Chancellor. This court act upon the person as to the fraud and discovery, therefore the plea must be over-ruled. To have made this a good plea, there ought to have been a farther averment, that the defendant was resident in *Scotland*. This had been a good bill as to fraud and discovery if the lands had been in France, if the persons were resident here; for the jurisdiction of this court as to frauds, is upon the conscience of the party.

[24] I am in doubt as to parts of the bill for relief; for I cannot give the plaintiff possession any other way than by compulsion on the defendant's person, whilst it is within the jurisdiction of the court. However, at present, the plea must be over-ruled, without prejudice to the defendant's insisting, by way of answer, on the same matter against any decree or order being made relating to the possession of the lands in *Scotland*, as he shall be advised.

(This case is taken from Lord *Hardwicke's* Note-book, and a manuscript report of Mr. *Forrester's*.)

(1) If the parties be resident in *England*, the Court of Chancery entertains jurisdiction respecting lands in *Scotland*, *Ireland*, and the *Colonies*, *Toller v. Carteret*, 2 Vern. 494. *Penn v. Lord Baltimore*, 1 Ves. 455. *Lord Cranstown v. Johnson*, 3 Ves. 182. But where a charity is to be administered in *Scotland*, the Court of Chancery in *England* does not take upon itself the administration of the charity. *Provost and Bailiffs of Edinburgh v. Aubrey*, Ambler's Reps. 236. *Attorney-General v. Lepine*, 2 Swanston's Reps. 181.

TREBLECOCK'S CASE.

March 22nd, 1736-7.

S. C. 1 Atk. 633.

The writ *de homine replegiando* is an original writ, and the party may sue it of right.

A motion to discharge an order for superseding a writ *de homine replegiando*.

Lord Chancellor. The writ *de homine replegiando* is an original writ, and the party may sue it of right, and granted here on a motion or petition, without shewing cause.

It is properly returnable in the courts of law, and may be there declared upon; and, as it is remedial, the defendant, against whom it is sued, is obliged to assign some cause why he does not comply with the writ.

Therefore, after it is sued, I do not know that I can supersede it; and if the party who sues out the writ is not entitled to it, it must be pleaded to below: in this case it is the writ of the infant, and there is no suit about the infant here, and therefore the order made to supersede the writ must be discharged.

It might be otherwise, if the infant was in court, by being a party to the suit here.

If this writ is brought by an infant against his testamentary guardian, or by a villain against his lord, I think they may plead the special matter to the writ, and defend themselves at law.

His Lordship granted the motion. (This case is taken from *Atkyns*; it corresponds with a manuscript report of the same case by Mr. *Forrester*.)

[25] *Ex parte* BLUNT. *Ex parte* HENCHMAN.

March 25th, 1736-37.

Where, by the sentence of the Court of Chivalry, it was decided, that pedigrees entered in the books of the College of Arms need not be signed by the parties requesting such entries to be made, for the purpose of making them valid:—this Court will not grant a Commission of Delegates upon an appeal from such sentence, this sentence being neither a definitive sentence, nor such a sentence as is termed in the civil law *gravamen irreparable*.

This was a suit instituted in the Court of Chivalry against Sir *Henry Blunt*, Baronet, for assuming and usurping without right certain ensigns of arms and crest, contrary to the laws of arms, at the promotion of his Majesty's advocate of this court.

In the progress of that cause an allegation was exhibited on the part of Sir *Henry Blunt*, setting forth that all pedigrees must be signed by the proper hands of the parties requesting such entries to be made in the books belonging to the College of Arms, and objecting to the validity of some of the entries in the said books, as not being so signed, and insisting that therefore no credit ought to be given to them.

This allegation the Court thought fit to reject, whereupon Sir *Henry Blunt* preferred his petition to the *Lord Chancellor*, appealing from this act of the Court as erroneous and a grievance, and praying a Commission of Delegates.

On the other side a cross petition was presented by Dr. *Henchman* as his Majesty's advocate in the Court of Chivalry, insisting that no appeal lies from that Court for any grievance done therein, but only from a definitive sentence or final interlocutory decree having the force and effect of a definitive sentence.

On behalf of the appellant, Drs. *Paul* and *Cotterell* contended, that an appeal to the King in Chancery lies from all determinations in the court of honor; That if an appeal lies from a definitive sentence, it follows that it lies for a *gravamen*, and that the act complained of amounts to a definitive sentence, and they cited *Gregory King's* case in 1702.

[26] He was articulated against for irregular practice as a herald. The prosecutor exhibited a libel. He gave a general negative answer. The Court decreed that he should put in a special answer in writing on oath. From this order he appealed, and the result was, that a Commission of Delegates issued, and they reversed the order.

In *Gowne v. Grandall*, the appeal was for a grievance in the rejection of a plea by the Court of Admiralty.

Dr. *Henchman*, advocate for the Court of Chivalry, Dr. *Strahan*, Mr. *Fazakerley*, and Mr. *Murray*, *contra*. The Court of Chivalry is very ancient. The stat. of Rich. 2. gives a power to the privy counsel to prohibit in certain cases. This court is governed by the rules of the civil law, 4 Co. Inst. 125; and by the civil law an appeal does not lie from any grievance, unless it conclude the party. The rule of the Ecclesiastical Courts is, *a quolibet gravamine licet appellare*, but that rule does not extend to courts proceeding by the civil law. *Perezius* calls them *appellationes moratorias*. In Gale's *Praxis*, lib. i. obs. 129, the same doctrine is laid down. Lanfranc, *tit. Interlocutoria Appellationes, In quibus casibus quis potest appellare? In quolibet causa fallit in sententia interlocutoria*. So much for foreign practice. The rules of the Court of Admiralty are applicable to the Court Military; and in *Clarke's Praxis Curia Admiralitatis* it is said, *appellare licet a quolibet sententia definitiva et interlocutoria habente vim sententiæ definitivæ; non licet appellare*, for rejecting an allegation, denying a commission to examine witnesses, because these grievances may be set right on an appeal from the definitive sentence.

The question then is, whether this interlocutory order will conclude the parties, or whether it will be examinable upon an appeal from the definitive sentence. Now this allegation may be offered upon such appeal. The books must be laid before the Court, and the objections will then appear. The case of *Gregory King* was of a criminal matter. The Delegates determined that he was not obliged to accuse himself; if he had done so, it would have been irreparable, and he could not have been relieved upon appeal. In *Arthur v. Arthur* a commission of appeal was prayed for, and denied for a grievance.

Lord Chancellor states the case (9th June 1737).

This matter has been argued by counsel on both sides, and two questions have properly arisen:—

[27] 1st.—Whether an appeal will lie from any sentence or decree of the Court of Chivalry but a definitive sentence, or from such a grievance as is described in the civil law by the term *gravamen irreparabile*, i.e. such an one as if submitted to at first can never be set right after a final sentence in the principal cause.

2dly.—Supposing it will not, whether the order or act of Court now appealed from be either a definitive sentence, or *gravamen irreparabile*.

1st.—As to the first question. It has been admitted on all hands that this Court proceeds according to the rules of the civil law, except in cases where any special course or practice of the Court breaks in upon it.

Lord Coke in his 4th Inst. 125, is express upon this point. They proceed according to the customs and usages of that Court, and in cases omitted according to the civil law, *secundum legem armorum*.

Fortescue *de Laud. Leg. Angl.* in his 32nd Chapter is to the same effect, and in this respect he puts it on the same footing with the Court of Admiralty. As to the custom or course of this Court of Chivalry no precedents have been cited, nor is it pretended, that there is any particular course or practice on this head to distinguish it from the general rule of the civil law.

This brings the question then to the rule of the civil law concerning appeals, but that must be understood of the civil law as used and practised in *England*.

It appeared by all the authorities cited, and was fully admitted by the learned Doctors on both sides, that in this the civil and canon law totally differ. That by the civil law no appeal lies but from a definitive sentence or *gravamen irreparabile*; but that by the canon law the party may appeal either from a definitive sentence or any grievance whatsoever.

The authorities upon this subject are numerous and clear, and it is unnecessary for me to repeat them.

To shew this general rule of the civil law to have been received and allowed in *England*, the course of the Court of Admiralty was referred to, and Clarke's *Praxis Curiae Admiraltatis*, a book of very good authority on that head, was cited.

De appellatione a sententia definitiva.

Tit. 53. *Appellare licet a quacunq[ue] sententia definitiva sive decreto interlocutorio habente vim definitivæ sententiæ [28] sive viva voce apud acta coram iudice tempore latæ sententiæ vel interpositi decreti hujusmodi sive coram notario publico.*

Tit. 54. *Quod non licet appellare a gravaminibus seu decreto interlocutorio non habente vim sententiæ definitivæ. Licet dederis materiam concludentem defensionis tuæ vel concludentes exceptiones contra testes adversarii; vel infra terminum probatorium petieris commissionem ad partes pro testibus examinandis vel similia, et iudex ea omnia admittere recusaverit, semper practicum fuit quod non licet ab istis gravaminibus nec a quocunq[ue] decreto interlocutorio non habente vim sententiæ definitivæ appellare; quia hæc omnia possunt reparari in appellatione a sententia definitiva, et licet non allegata allegare et non probata probare.*

This is clearly the rule of the civil law as received and practised in *England* in the Court of Admiralty, and is founded on the wisest reason, as it prevents that unnecessary delay which a power of appealing from every imaginary grievance would occasion. I directed precedents to be searched for in the Court of Admiralty, and am informed by the proctors on both sides, that no instance is to be found of an appeal from grievances of this nature.

One case however in the Court of Admiralty, that of *Grandall* and Others against *Gowne* and Others, has been mentioned on the part of the appellants, and of the particulars of that case I have therefore thought it right to obtain the fullest information.

This suit was commenced in the High Court of Admiralty on the 17th of January 1705, and was heard on appeal before the Delegates on the 7th of March 1706. It was brought by *Grandall* and Others against *Gowne* and Co. late owners or part-owners of a ship called *Speedwell*, for wages due to them as mariners on board the said ship. They gave in a summary petition or libel, wherein they set forth that the ship was bound on a voyage from the port of London to the East Indies. That they were hired on the part of the owners of the said ship, to proceed on the said voyage, and did their duties on board the said ship accordingly, and set forth that *Gowne* and Co. were owners or part-owners of the ship at the time they were hired and shipped for the said voyage. This libel or summary petition was admitted. *Gowne* and Co. put in their answer upon oath to the said libel, and therein amongst other things insisted, that as to so much of the summary petition as seeks discovery of [29] their property or interest in the said ship or lading they were not obliged by law to answer, for that by the act of parliament 9 & 10 William 3, it is enacted, that all persons who shall trade to the East Indies without being authorised are subjected to the forfeiture of the ship, cargo, and proceeds, and double the value, one-fourth to the informer, and three-fourths to the Company; and further, that in that they were not qualified to trade there, the discovery tended to subject them to the forfeitures and penalties of that act, in case they had any interest in the ship or lading, and to render them liable to prosecutions in respect of that voyage, which statute they therefore pleaded in bar to the discovery sought for by the summary petition. To these answers exceptions were taken as not being full and plain. On the 16th April 1706, the Judge decreed the answers not to be full, and that the defendants should answer as to their respective interests in the ship, and whether they

were or were not owners at the time of the summary petition. From this act *Gowne* and Co. appealed to the Delegates, and the cause was heard before Lord Chief Justice *Trevor*, Mr. Justice *Tracey*, Mr. Baron *Smith*, and others, who pronounced against the appeal, and remitted the cause, and condemned *Gowne* and Co. in costs.

This sentence itself is not to be found, so that it does not appear, whether the cause was remitted by reason that no appeal lay from a grievance, or on the merits; and it must be observed, that the case differs widely from the present, for the order or decree there complained of, if it had been a grievance at all, would have been fatal and irreparable, if once submitted to.

Of the like kind is the case of *Gregory King*, on an appeal from an interlocutory decree of this Court in 1702. That was in the nature of a criminal cause against a herald for misbehaviour in his office, in having, contrary to his oath and duty, set up a false inscription, with a fictitious pedigree of a family, forging and giving out false arms, and endeavouring to procure false certificates to support all this. His proctor put in a general negative answer. The prosecutor insisted that he should answer on oath. The Court of Chivalry determined that he should answer on oath. From this decision he appealed to the Queen in Chancery, and the appeal was allowed.

But that case is very different from the present. That was a *gravamen irreparable*, for if he had once answered [30] it would have been too late, and the grievance could never have been redressed upon appeal.

The next question then is, admitting that an appeal will not be from any sentence but a definitive sentence, or such a grievance as is *gravamen irreparable*, whether the order or decree appealed from in this case be either the one or the other? I am of opinion that it is not. It is from an act of the Judge rejecting an allegation upon a point of evidence. The substance of the allegation is this, that by the laws of the College of Arms all pedigrees must be signed by the proper hands of the parties requesting such entries, to be made in their books, that some of the entries produced are not so signed, and therefore not entitled to any credit.

Consider the nature of this allegation. It is rather of a matter of law than of fact, and if so, it must necessarily be open on an appeal from a definitive sentence. The law of the College of Arms is strictly so. The usage and practice of the College of Arms is inquirable of from the officers both in the inferior and in the superior court on appeal. On trials at common law, the question of admitting or rejecting heralds' books as evidence is always treated as a point of law, and is determined on reasons of law, and authorities without any examination of fact. So in 1 Salk. 281, the case of *Stainer* and the Burgesses of *Droitwich*, on a trial at bar, Mich. 7 W. 3, B. R.

But it may be said, that this question of law may possibly be mixed with fact; it may be necessary before you can come at the law to enquire into usage, and usage is fact. If that should be so, then this may be set right on an appeal from the definitive sentence, and the Judges delegates on that appeal may admit this allegation, or an allegation of the like import, and give the party leave to examine upon it.

This case is not near so strong as some of the cases put by Mr. Clarke in his 54th Title, which I have cited.

It is objected, that the *Lord Chancellor* is not to try the merits of the cause in order to determine whether an appeal lies. True; but he must determine whether an appeal lies or not. It is not proper for me to determine whether the Judge below has done right or wrong in rejecting this allegation on the merits of it, neither do I; but it is proper for me to determine whether, supposing he has erred, an appeal will lie at present or not. These are two distinct questions.

It is no doubt proper in doubtful cases to let a commis-[31]-sion go, and possibly it will be said, that no great mischief will ensue from so doing in the present case. It may be so, but what weighs greatly with me as to that part of the case is, the precedent which I should thereby establish. It would be of ill consequence, to allow these dilatory appeals. The same rule must hold for the Court of Admiralty, where cases of great value, and in which dispatch is most necessary, sometimes come.

For these reasons I am of opinion that no commission ought to issue, and that the petition of Sir *Henry Blunt* must be dismissed.

(The whole of this case is taken from a manuscript report in Lord *Hardwicke's* hand-writing, except the arguments of counsel, which are taken from his Lordship's Note-book.)

EASTER TERM.

EDWARD JACKSON, an Infant Son of EDWARD JACKSON and MARY his Wife, and FRANCES JACKSON, Executors of MARY, *Plaintiffs*; and ANN JACKSON, Widow, WILLIAM JACKSON and EDWARD JACKSON, the Father, *Defendants*.

April 28, 1737.

S. C. 1 Atk. 513.

Where stock standing in the name of a trustee was by marriage articles (to which the trustee was a party) settled as money at the value which the stock then bore, and was therein stated to have been paid to the trustee who gave a receipt for the money indorsed upon the marriage articles, but which stock had never in fact been sold out: Held that the trustee was not liable for a loss which was incurred by the stock not having been then sold out. The stock in the mean time having fallen in value.

The bill was for the performance of the trust of the marriage articles of plaintiff's father and mother, and that the sum of £3500 might be paid and placed out for the benefit of the infant, notwithstanding the disposition in *Mary Jackson's* will.

In May 1720, the plaintiff's mother purchased £500 South Sea Stock, which was transferred to her mother, the defendant *Ann Jackson*, as a trustee for her daughter.

In June 1720, the marriage between plaintiff's father and [32] mother was treated of, and by the marriage articles bearing date the 9th of April last, but which were admitted to be antedated, and to which *Ann* and *William Jackson* were parties, after reciting that *Mary Jackson* was, amongst other effects, possessed of the sum of £3500 principal money, and that it was agreed that all the produce thereof should be applied to her sole and separate use, and that she had that day paid and deposited the said sum of £3500 in the hands of *Ann* and *William Jackson*, on the trusts thereafter mentioned. It was by this deed agreed, that the said *William* and *Ann Jackson* should place out the said sum of £3500 at interest, and should pay the interest to the sole and separate use of *Mary Jackson* for her life. The trustees were empowered, by the direction of *Mary Jackson* to call in the £3500, and to place it out again on new securities; and *Mary Jackson*, was empowered, with the consent of the said *William* and *Ann Jackson*, by writing under her hand, or by will, to dispose of this money as she should think fit; and there was a proviso therein contained, that no part of the principal money should be disposed of to the use of the said defendant *Edward Jackson* the father, without the consent of the defendants *Ann* and *William Jackson*, in writing under their hands and seals first had and obtained for that purpose; it being the intent of all the said parties that the said principal money should, as much as might be, be preserved entire, to be disposed of by the said *Mary Jackson* among the children that she might have by her husband, and not to be lessened or disposed of for any other purpose in the lifetime of the said *Mary*, unless the same, by any unforeseen accident became needful in the judgment of the said *Ann* and *William Jackson*, for the necessary support of the said *Edward Jackson* and *Mary Jackson*. On the back of the marriage articles there was a receipt under the hand of the said *Ann Jackson* for the sum of £3500.

Mary Jackson lived only about four years after the marriage, and by her will she directed the £3500 to be placed out upon good security, and gave the interest of the £3500 to her husband for his life, and the principal to the infant plaintiff; and if the infant should die, she gave the whole to the plaintiff.

Some short time before *Mary's* death, £1000 of South Sea stock was sold by the trustees, and part of the produce, amounting to £500, with the consent of *Mary Jackson*, was paid to her husband, for the purpose of making up his stock [33] in a trade which he was about to carry on, but the residue of the South Sea stock was not sold out. *Ann Jackson* paid to her daughter several sums of money in her lifetime, on account of the South Sea stock, but they were not such sums as amounted to the dividends of the stock, or the interest upon the money, and *Mary* gave receipts to her mother for the sums she received, but the receipts did not express on what account they were given. The plaintiff alleged by his bill, that prior to the articles it was proposed by *Mary Jackson* that the South Sea stock should be settled, but that upon proposing the same to her mother she disapproved of it; but declared that they should send to the exchange,

and as the price of the stock then happened to be, she the said *Ann* would warrant the same, and that the settlement should be made, not of the stock, but of the money. That *Mary* and *Edward Jackson* agreed to the proposal, and a person was sent to the exchange, who brought back the price, and that the £3500 was settled according to the price of the stock. *Ann Jackson* by her answer admitted that a sum certain was agreed to be inserted in the settlement according to the then value of the stock, but denied that she ever agreed or intended to warrant the price or value of the said stock. *Ann Jackson* admitted that she had sold £100 South Sea stock, but deried that she had sold the residue of the said stock. The only evidence produced at the hearing was the receipts given by *Mary Jackson* to her mother, and the marriage articles.

The stock having greatly fallen, one question was whether *Ann Jackson* should be answerable for the whole sum of £3500, or for the present value of the stock only; and on her behalf it was contended, that as *Mary Jackson's* fortune laid in that specific stock, it ought to be considered as consisting of such stock, and not of money.

Lord Chancellor (April 28, 1737). This is a mere falling of stock without the trustees' neglect, and therefore comes under the last clause of the statute of Geo. 1, made for the indemnity of guardians and trustees, which provides, "That if there be diminution of the principal," without the default of the trustees, they shall not "be liable."

It has been said, that after the stocks fell, the trustees paid interest for £3500, amounting to much more than the produce from the dividends, and therefore to a demonstration it appears to be a trust for money.

But it is well known, that during the golden dream, people [34] were so infatuated as to look upon imaginary wealth as equally valuable with so much money.

It has been said, that long after the falling of the stock, the defendant, *Ann Jackson*, continued paying the same interest.

But still it does not answer either way, for it does not amount to the common rate of interest, and yet is more than the dividends of the fallen stock; and to compel trustees to make up a deficiency, not owing to their wilful default, is the harshest demand that can be made in a court of equity.

Notwithstanding, antecedent to the marriage, it was agreed by the defendant to take the stock at 750, and a transfer made accordingly; yet this court will never oblige a trustee to acquiesce under so hard and unreasonable a contract.

Mary Jackson in her will recites the deed of settlement, and her power of devising.

The counsel for the plaintiff insist the devise to the husband is illegally made, and not pursuant to the power, and have endeavoured to shew, from the whole tenor of the marriage articles, she had no power of disposing of any part of the money for the benefit of her husband, to the prejudice of the infant, the plaintiff, and rely principally upon the following proviso:

"Provided nevertheless, that no part of the principal money shall be applied to the use of the said *Edward Jackson*, without the consent of the trustees under hand and seal, to the end that this sum may be kept intire for the advantage of the infant."

I am of opinion that Mrs. *Mary Jackson* had no power to dispose of the principal, to the prejudice of the infant, but in one particular circumstance; therefore the disposition she has made is not pursuant to the power.

The father of the plaintiff appearing to be sufficiently competent, his Lordship would give no direction with regard to her maintenance, for he said, that whether an infant should have an allowance of maintenance during the life of the father, depends always upon the particular circumstances of the case. (1)

[35] His Lordship ordered that the plaintiff's bill, so far as it seeks to compel *Ann Jackson* and *William Jackson* to answer for the sum of £3500 principal money, as the value of the £500 South Sea stock be dismissed, and his Lordship doth declare, that the sum of £500, part of the produce of £1000 South Sea stock sold, and which was paid to the father of the plaintiff, the infant, was not paid pursuant to the trust, and ought not to be allowed out of the trust-money, and that as to the disposition made by the will of *Mary Jackson* of the principal trust-money, so far as the same concerns her husband, is a void disposition, not being according to the marriage articles; and his Lordship doth order, that the said *Ann Jackson* answer before the Master for what is due for the dividends of the £400 South Sea stock, and all the additional stock and the annuities which have been the produce thereof, and for the interest of the £500 at 4 per cent. from the death of *Mary Jackson*. And it is ordered, that what is coming from the

said *Ann Jackson* on the said account, together with the said sum of £500, the produce of the said £1000 South Sea stock sold, be placed out at interest in the names of the said *William and Ann Jackson*, for the benefit of the infant plaintiff on the trust in the said articles; and they are to declare the trust accordingly. (Reg. Lib. A. 1736, fo. 412.)

(This case appears in Lord *Hardwicke's* Note-book, but being incorrectly stated by Mr. *Atkyns*, it is corrected by Lord *Hardwicke's* Note-book and the Register's Book. The judgment is taken from *Atkyns*.)

(1) Whether children shall have an allowance for maintenance in the lifetime of the father, depends upon the situation, circumstances, and ability of the father, and the fortunes of the children. See *Buckworth v. Buckworth*, 1 Cox's Reports, 80. *Jervoise v. Silk*, Cooper's Reports, 52. *Maberly v. Turton*, 14 Ves. 499.

Sir RICHARD FRANCIS MOORE, Bart., *Plaintiff*; and Lady MOORE his Wife, and Lord SCARBOROUGH, a Trustee of their Marriage Settlement, *Defendants*.

April 28, 1737.

S. C. 1 Atk. 272.

Sir *Richard Francis Moore*, in consideration of marriage and a portion conveys lands to trustees for ninety-nine years if he should so long live, upon trust to pay £100 *per annum* for the separate use of his wife. The wife, in 1728, many years after the marriage, upon disputes with her husband relative to her pin-money, and the legacy given to her by her mother, eloped from her husband and went to live in France. In 1734, the annuity being considerably in arrear, the trustees bring an ejectment to recover the term. At a subsequent period in the same year the husband brings a suit in the Ecclesiastical Court for restitution of conjugal rights, in which a sentence of excommunication is passed against the wife for not appearing. Upon a bill brought by the husband for an injunction to restrain the proceedings in ejectment, Held, under the circumstances of the suit in the Ecclesiastical Court being not instituted until eight years after the elopement, and subsequent to the ejectment brought by the trustees, of the husband having never made any offer to the wife that she should return, and of his having paid the money to his wife some time after the separation, that the Court would not interfere to prevent the payment of the annuity, notwithstanding the husband by his bill offered to receive his wife again, and in that case to pay her the annuity.(1)

By the marriage settlement, upon the marriage between Sir *Richard* and Lady *Moore*, he, in consideration of marriage, and her portion of £6000, conveyed certain pre-[36]-mises to the Earl of *Scarborough* and another trustee for 99 years if the husband and wife should so long live, upon trust to raise and pay £100 *per ann.* for the separate, personal and particular use of the wife, to be paid half yearly, free from taxes, &c.

The marriage took place in 1707; they lived together twenty years, and there were fourteen children of the marriage, of whom eleven were living.

In 1713, Lady *Moore's* mother died, and by will bequeathed a moiety of her personal estate to Lady *Moore*, of which £1500 was to be for her separate use.

In January 1728, Lady *Moore* privately eloped from her husband, and from that time continued to live in France. Sir *Richard* continued to pay the £100 *per annum* up to the end of that year, and in 1729, in a petition presented in a cause relative to the personal estate of Lady *Moore's* mother, he complains of his wife's elopement, but states that he pays her £100 *per annum* pin-money, and that he is ready to continue the payment thereof.

In Easter Term 1734, a declaration in ejectment was delivered on the part of the Earl of *Scarborough*, the executor of the surviving trustee of the late Earl of *Scarborough*, for the purpose of recovering the term by which the annuity was secured, considerable arrears being then due. And at a subsequent period of the same year, Sir *Richard* commenced a suit in the Ecclesiastical court for a restitution of conjugal rights, in which a sentence of excommunication was passed against Lady *Moore* for contumacy, in not appearing.

[37] The object of the present bill was for an injunction to restrain the proceedings in the action of ejectment, upon the ground that Lady *Moore*, by her elopement, had

forfeited her title to the annuity. That the plaintiff is ready to receive her again, and in that case is willing to pay her the annuity, and that as she is out of the jurisdiction of the spiritual court, a temporary suspension of the payment of the annuity will be the only means of compelling her to return to her family.

On the part of the plaintiff, evidence was produced of general good conduct on his part towards his wife, and of want of temper, but no improper conduct on hers, except that some of the witnesses stated that she kept up a private correspondence without her husband's knowledge, to which they attributed some of their quarrels. On the part of the defendant, several witnesses deposed that the pin-money and the legacy from Lady Moore's mother were the principal causes of their disagreement. The plaintiff, insisting that the two together amounted to more than she ought to receive, and wishing her to give one up; and she expressing her apprehensions that he wished to take her money from her, and that he had given strict orders to the servants not to go on any messages for his wife without first coming to him, and had been heard to express himself with much bitterness against her for not giving up the pin-money.

For the plaintiff in this case, Mr. Attorney-General and Mr. Taylor insisted upon these two points,

First, That his wife, by her misbehaviour, in causelessly deserting her family, had forfeited her pin-money.

Secondly, That it was intended for her only to spend in her family.

Upon which it was argued, that by the marriage contract she is obliged to cohabit, and that failing in this, she had broken the contract on her part, and ought not to have her annuity, and that therefore it is equitable to restrain her till she returns and lives with her husband, and behaves as she ought to do, and that he has no remedy to get her back, but by stopping this pin-money.

That this allowance was only to promote harmony between the plaintiff and the defendant, and to enable her to do acts of bounty to her family, therefore, when the reason for it ceases, the allowance ought to cease likewise.

That in many cases the Court has interposed to make a provision for a wife, on the misbehaviour of the husband; [38] *pari ratione*, they ought to interpose where the wife misbehaves, as in the cases of *Colemore v. Colemore*, and *Ozenden v. Ozenden*, 2 Vern. 493; and that, in the present case, the lady's deserting her family in the manner she has done, is a sufficient reason for the Court to interfere so far as to stop the payment of the pin-money, in order to induce her to return to her duty.

Mr. Brown, Mr. Fazakerley, and Mr. Cox, for the defendant, argued, that these three considerations naturally arose upon the case:

First, Whether the settlement shall be taken strictly; or whether it shall be taken to intend a benefit to the defendant, on condition only of cohabitation.

Secondly, If to be construed conditionally only; then, whether on cruel usage, she is not justifiable in separating from her husband.

Thirdly, Whether the usage here has been such as may justify her separation.

They argued, that, according to the words and legal operation of the deed, there is a provision at all events for the defendant of £100 a-year, and *quoad hoc*, she is to be considered as a *feme-sole*, and as a stranger to the plaintiff; and to take in other matters extrinsic, and not appearing from the words of the deed, would be judging of another deed, not of this. In the case of wills, which generally allows the greatest scope, in order to let in the intent, the construction has always been bounded and circumscribed to the words, for the general rule has uniformly been, that unless the intent can be collected from the words, it is in vain to urge it, for that otherwise it would be making a man's will, not construing it, and deeds are to be construed more strictly, and the rule of law is, that they are to be taken most strongly against the grantor, and most beneficially for the grantee (Co. 7 b, and Co. Lit. 183 a, and 197 a). That *nemo contra factum suum proprium venire potest*, 2 Inst. 66; but to come into the construction contended for on the part of the plaintiff, would be to invert both these rules.

In *Astry v. Ballard*, 2 Mod. 183, it is said, men's grants must be taken according to usual and common intentment, and where words may be satisfied they shall not be restrained further than they are generally used, for no violent construction shall be made to prejudice the right of any one, contrary to the plain meaning of the words.

[39] If the words then in the present case are to govern, they are so express and plain, that they leave no room for construction, and to put a meaning upon them, contrary to the plain sense, would be bringing things to the utmost uncertainty. In

Edricke's case (5 Co. 118 b), the judges said they would not make a construction against express words, and yet there was a strong equity in that case, to induce them to do it.

If, in the present case, the defendant stood in need of the aid of this Court, from any defect in her settlement, it might with some colour of reason be said, that she had forfeited her right to it by her elopement ; but even in such a case, though it appeared that a wife had lived in open lewdness, yet she was not dismissed with such an answer ; for in the case of *Mildmay v. Mildmay*, 1 Vern. 53, and 2 Chan. Cases, 102, the plaintiff, a *feme covert*, who had £50 *per annum* settled on her by her husband, to be paid out of certain rents, suggested by her bill that he had, on purpose to defraud her of this annuity, procured the tenants to surrender their estates, on which the said rents were reserved, and prayed that it might be made good to her by a decree of the Court ; and notwithstanding it appeared that she was a very lewd woman, and had eloped, the *Lord Chancellor* ordered, that the husband should stand in the place of the tenants, and admit the rent payable, and she to recover it at law as well as she could ; there the settlement was merely voluntary, and after marriage, and the wife charged not only with elopement, but open lewdness, and yet it was thought reasonable to decree in her favour, and give her such relief, that without it she must have failed at law. In the present case, the settlement appears to be upon the highest considerations, that of marriage, and a large portion, and the utmost charged upon the lady is a bare elopement ; if therefore, in *Mildmay's case*, it was reasonable to aid her legal remedy, *a fortiori*, it would be unreasonable, in the present case, to restrain her from pursuing it.

As to the offer of the plaintiff to receive her, and on her return to pay the annuity, there are many cases, where such an offer, against the express contract of the party, has been rejected, as in the case of *Seeling v. Crawley*, 2 Vern. 386 ; and numberless more to the same purpose : For if a man will, with his eyes open make a bargain, that he afterwards finds reason to repent of, he is not entitled to relief here, it [40] is the effect of his own folly, and he must take the consequences.

It may besides be material to consider, what species or kind of offence it is that the defendant stands charged with ; it is at most but a simple elopement, which is an offence not taken notice of, or any way punishable by the law of the land. By the common law, a wife was entitled to dower, notwithstanding an elopement accompanied with adultery, and though by the statute of *Westminster* (West. 2, ch. 34) adultery and elopement are made a bar to dower, yet it has always been taken so strictly, that the one without the other, has often been held to be not within the statute (Perk. pl. 335. Fitz. Abr. tit. Dower, pl. 153. Fitz. N. B. 150, let. H), certainly both together, though a bar to dower, would be no bar to her claiming a provision made for her by a jointure ; and though, in the Spiritual Court, the husband may sue her for restitution of conjugal rights, and for refusal she may fall under the censures of the church, yet that is not in respect of elopement, for such a suit may be as well where there is a cohabitation, as otherwise.

To say then, that in equity she is punishable, or that she might in this respect be deprived of any legal privileges, would be to set up an arbitrary legislative power in the Court to declare offences, and to punish them by no other measure than its own discretion.

That a woman is justifiable in deserting her husband where he uses her with cruelty, cannot be disputed ; but then another question will arise, whether the usage which the defendant hath met with in the present case, be sufficient to justify her conduct or not ?

It appears evident from the proofs on both sides, that there were continual quarrels between the plaintiff and the defendant about the pin-money, and they became so public, that one witness swears, the plaintiff himself declared, his wife had been advised by a clergyman to go away from him ; and many of the witnesses fully prove, that the plaintiff divested her of all kind of management, and made her not only as a cypher in his family, but took from her even the respect due to her from his servants ; whether this be such usage as may justify her conduct, must be submitted.

It is observed in *Puffendorff*, in his book of the law of nature and nations, in the chapter of marriage, that in case a [41] husband denies his wife the respect due to her sex, and her relation, so as to shew himself not so much a kind partner, as a troublesome enemy, it should seem very equitable that she might be relieved by divorce. *Barbeyrac*, in his note, cites, to confirm this, the *Theodosian Code*, Lib. 5, tit. 17.

In the laws of our own country, there are hardly any footsteps to go by, or on which it may be said with any certainty, what is cruelty in the husband. In the case of the wife of one *Cloborne*, Hetley, 149, it was so far held, that spitting in her face was cruelty in the husband, that the Court refused to grant a prohibition to the Spiritual Court, on a suit for a separation, and alimony, founded on this cause, and said by *Richardson*, chief justice, certainly the matter alledged is cruelty, for spitting in the face is punishable in the *Star-Chamber*.

There is no ground for this Court to interfere ; the defendant is a purchaser of this annuity for a valuable consideration. The husband has contracted to pay it at all events, and has given a legal remedy for it. The defendant asks nothing of this Court, but stands upon her legal title.

There is no proof of any application to her to return. As to the secret correspondence by letter, without the privity of her husband, there is no such charge to be found in the bill. The excommunication for contumacy was subsequent to the ejectment, and it does not appear that any notice was given to her, or to any attorney or agent for her.

Lord Chancellor. This is entirely a new case, and I do not remember any like it that hath ever yet come in question ; none have been cited, and I believe there are none ; but it is not this, or any other difficulty in the case itself, that makes it necessary for me particularly to speak to it, but because some things have been mooted of a much higher nature that require it.

The points to be considered are,

First, Whether in any case this Court ought to restrain a legal remedy, which a wife, or her trustees have, to recover a separate maintenance against the husband ?

Secondly, If from the evidence, in the present case, there be any reason to lay this restraint upon the defendant ?

Upon the first it has been argued, that the defendant has causelessly deserted her family, and stood out contumaciously against the proceedings in the Spiritual Court.

Though this be a bill *primæ impressionis*, I incline to think, though I do not give any opinion to bind myself, [42] there may be cases, where a husband would be entitled to come into this Court, to restrain the trustees of his wife, by a decree here, from proceeding at law for her separate maintenance ; and it would be reasonable to do this, especially when she elopes, and lives in adultery out of the jurisdiction of the Ecclesiastical Court, for that would be defeating their power ; and there have, I believe, been cases where there has been a sentence for alimony in the Spiritual Court, in which this Court has awarded *ne exeat regnum* in aid of the spiritual jurisdiction.

These separate maintenances are not to encourage a wife to leave her husband, whatever his behaviour may be ; for, was this the construction, it would destroy the very end of the marriage contract, and be a public detriment.

If a wife should elope, and be guilty of adultery, or a criminal conversation, or should leave her husband without any cause, and the Ecclesiastical Court can only punish her for contumacy, but she is entirely out of their reach as to any other punishment, I should think a husband right in his application to this Court, to prevent her trustees from proceeding at law to recover her separate maintenance ; but then the relief must arise from a very plain case, where there is a criminal conversation plainly proved, and plainly put in issue.

But this is not the present case, for here is no incontinence, and nothing but the bare elopement is put in issue. I do not like the evidence of private correspondence, nothing of that sort is charged, I therefore can take no notice of it, but it looks like an attempt to cast an aspersion without any ground. This case then will turn upon the second point, whether, upon the circumstances of this case, there is any reason to lay such a restraint upon the defendant.

Two things have been urged in behalf of the plaintiff :

First, That the wife has eloped without any cause.

Secondly, That she has been duly summoned in the Ecclesiastical Court on the part of the plaintiff, for restitution of conjugal rights, and has continued in contumacy ; and as she has been thereupon excommunicated, which is all the Ecclesiastical Court can do, as she is out of their jurisdiction, the husband cannot have any fruit from his suit there.

As to the first, I am afraid these separate provisions do often occasion the very evils they are intended to prevent ; [43] and if the plaintiff hath made his wife uneasy in respect of the pin-money, and the legacy given by her mother, as there is great reason to believe he did, though this will not justify her going away, yet it may be an excuse.

This bill seeks to deprive the wife of a legal right, on account of her voluntary elopement, when probably that very right may have been designed for that very purpose, and to provide for the wife, if such dissension should happen between the parties as would be a just inducement for them to separate, though their quarrels should not be of such a nature as to enable her to obtain a legal separation for cruelty, and that seems to be the present case.

As to the objection, that the plaintiff can have no effect from his ecclesiastical suit, I lay no great stress upon it, for it was not instituted in the Spiritual Court till eight years after her going away, and after the ejectment brought by the trustees; and though the Spiritual Court only fix citations upon the church door, or some other place, yet the husband, who knew where she was, might have given notice to her, or at least to her attorney who was employed in the suit in law. It has therefore the appearance of not being founded on any desire in Sir *Richard Moore* that his wife should return, but on an attempt to prevent the payment of the annuity.

I do not find that the husband has ever made any application to the wife, since she separated, to induce her to return, and therefore this case is distinguished from *Whorwood v. Whorwood*, 1 Ch. Ca. 250, because there the husband, before the bill brought, offered to be reconciled, and desired to cohabit with her and use her as his wife; nor was there any separate maintenance in that case on the contract of the parties.

There is another thing that has great weight with me, the husband's paying the annuity since the separation, for six months after the wife was gone from him; when she petitioned the Court for other money upon a different trust, he, upon an application by a cross petition to stop this, expressly says, that he had constantly paid her the annuity ever since she left him, and offered to continue it; This is a strong presumption that he thought at least she was excusable in separating herself from him.

These being the circumstances of the case, I am of opinion and declare, that on the proofs and circumstances in this cause, there is not any sufficient foundation for the general relief prayed by the bill, against the payment of the annuity [44] or rent-charge of one hundred pounds a-year, but that the plaintiff is entitled to be relieved against the ejectment already brought on the terms hereafter mentioned. I therefore decree, that the Master take an account of the arrears of the annuity, and tax the defendant's costs at law, and upon the plaintiff's payment of what shall be found due for such arrears and costs, at such time and place as the Master shall direct, and continuing the growing payments of the said annuity, according to the marriage settlement, the injunction to be continued; but in default of payment of the arrears of her annuity and costs at law, the injunction to be dissolved, and the plaintiff's bill dismissed with costs; and in case the plaintiff shall make default in continuing the growing payments of the annuity, then Lady *Moore* is to be at liberty to apply to the Court. Whereupon such order shall be made as shall be just, and it is ordered, that the plaintiff do, in a fortnight's time, pay to the defendant's solicitor £100 on account of the arrears of her annuity now due to her. (Reg. Lib. B. 1736, fo. 314.)

Mr. Attorney-General, after the decree was pronounced, said, this was so uncommon a case that probably it would never happen again.

Lord Chancellor replied, if you think so, you must have a very good opinion of the ladies; for—

In amore haec omnia insunt vitia, injuriæ,
Suspiciones, inimicitiae, induciæ,
Bellum, pax rursum.

(The statement of this case is taken from Lord *Hardwicke's* Note-book. The arguments of counsel, and the judgment (with some additions and corrections from Lord *Hardwicke's* Note-book) from *Atkyns*.)

(1) See *Mildmay v. Mildmay*, 1 Vern. 53. See *Sidney v. Sidney*, 3 P. Wms. 269; 2 Eq. Ca. Ab. 29, pl. 37, S. C. *Blunt v. Winter*, 3 P. Wms. 276, note 2. *Watkins v. Watkins*, 2 Atk. 96. *Clarke v. Periam*, 1 Atk. 337. *Lee v. Lee*, 1 Dickins. 321. *Ball v. Montgomery*, 4 Bro. C. C. 339; S. C. 2 Ves. jun. 191. *Atherton v. Nowell*, 1 Cox's Rep. 229. *Wright v. Morley*, 11 Ves. 12. *Seagrave v. Seagrave*, 13 Ves. 439. *Buchanan v. Buchanan*, 1 Ba. & Be. 203.

GRAVES v. EUSTACE BUDGEL, Esq.

May the 5th, 1737.

S. C. 1 Atk. 444.

This Court will allow the proving of exhibits *viva voce* at the hearing, but not to let in other examinations, and this only at the application of the party who is to make use of the exhibits, but no instance where it is allowed on the application of the contrary party.

It was moved on the defendant's behalf, that certain witnesses of the plaintiff's who were to prove exhibits, might be examined *viva voce* at the hearing of the cause; and that an order of the late *Chancellor*, for a commission to examine them in the country, might be discharged.

[45] The motion was founded on two things :

First, The great importance of these exhibits to the merits of the cause, being receipts of the defendant, which he insisted were forged, and had denied in his answer.

Secondly, The ill state of health of the defendant disabling him to go down into the country to attend the commission, in support of which an affidavit of his physician was read.

On these matters it was prayed, that the witnesses might be examined *viva voce* at the hearing, that the defendant might have an opportunity of cross-examining them, and sifting their evidence; and a case of the Duchess of *Newcastle* was mentioned by Mr. *Fazakerley*, where it was so allowed. This was also prayed in honour of the defendant, he having denied the receipts.

Lord Chancellor. I cannot allow the motion; the constant and established proceedings of this Court are upon written evidence, like the proceedings upon the civil or canon law. This is the course of the Court, and the course of the Court is the law of the Court; and though there are cases of witnesses being so examined, yet they have been allowed but sparingly, and only after publication, where doubts have appeared in their depositions, and the examination has been to clear such doubts, and inform the conscience of the Court.

There never was a case where witnesses have been allowed to be examined at large at the hearing; and though it might be desirable to allow this, yet the fixed and settled proceedings of this Court cannot be broke through for it.

The utmost latitude the Court has taken in this, is to allow the proving of exhibits, *viva voce* at the hearing, but not to let in other examinations; and this is allowed only where the application is by the party who is to make use of the exhibits; but there never was a case where it was allowed on the application of the contrary party; if he is suspicious of fraud, he has notice, and may cross-examine the witnesses.

(This case is taken from *Atkyns*; it is not to be found in Lord *Hardwicke's* Notebook.)

[46] WARNER and Others, Executors of EDWARD HENKIN Deceased, and THOMAS HYAM, Plaintiffs; and WATSON and VILLERS, Assignees of EZEKIEL WOOLLEY, a Bankrupt, Defendant.

May 6th, 1737.

S. C. 2 Atk. 4.

The bill was brought in order to have an account of the dealings and transactions between *Henkin*, *Hyam*, and *Ezekiel Woolley*, and to be admitted as creditors to a proportionable share of the dividends under the commission of bankruptcy against *Woolley* for what shall appear to be due on that account.

On the 25th February 1717, *Woolley* borrowed £500 of *Henkin* on bottomree, and agreed to pay £26 *per cent.*, which he secured on bills of sale and bills of parcels of the cargo of a ship belonging to him, and which was to be paid from the time of the loan until the goods were safely landed in London; and the principal was to be discharged, when the remittances from the ship and produce were sold; and after the

landing of the goods in London, till such sale was completed, only £5 *per cent.* interest was to be paid by the borrower ; and if the goods and returns should prove not to be sufficient to pay the principal and interest, *Woolley* was to make good the deficiency, and it was agreed that *Henkin* should have notice from the factors in what ships the returns were sent, so that he might insure, and in case such notice should not be given then he was not obliged to make any deduction in respect of any loss which might happen ; *Woolley* executed a bond in the penalty of £1000 for performance of covenants, and the lender was to choose the goods on which the risk was to be run ; there was a proviso, if the whole goods were lost, then the principal was to sink entirely, or, if only a part of them, then to abate proportionably. On the 26th January 1718, [47] 29th of April 1719, and the 24th of July 1719, three other sums of £500 each were borrowed at the same rate of interest, and subject to the same stipulations, and in which three last-mentioned loans *Hyam* was equally concerned with *Henkin*.

In 1722, Mr. *Woolley* became a bankrupt, his assignees insisted this was a very unreasonable agreement, and ought not to be carried into execution ; that the covenants were very unusual ones, and the interest very exorbitant, especially as *Henkin* was to have £5 *per cent.* on the goods after they were actually come home, and therefore they insisted they have done right in refusing to admit the executors of *Henkin* as creditors, as they have ordered a sum to be retained to satisfy the demand, if they should be eventually entitled to it. In November 1729, Mr. *Henkin* preferred a petition to be admitted a creditor, which Lord *King* dismissed. In 1735, the creditors preferred a petition to have this claim disallowed.

Lord *Talbot* ordered that it should be disallowed unless *Henkin* filed a bill within a certain time, which being done by the present suit,

Mr. *Brown*, Mr. *Owen*, and Mr. *Belcher*, for the plaintiffs, argued, that it must not be considered as a case of common interest, because this is a casualty, where the principal is risked and may be lost ; that £25 *per cent.* was the common and ordinary interest on bottomree to the East Indies, and £22 *per cent.* to the West Indies.

That the voyage to the West Indies, where this ship was bound was a very dangerous one ; and besides there is a very great hazard of the sugars being very considerably damaged by the sea washing away a great part of it.

Though goods are lost in bottomree contracts, yet if the bottom of the ship come home, the contractor here is liable to make them good.

That common bottomree agreements run for a certain time, as suppose for eight months, though the ship return in six months, yet the £26 *per cent.* still goes on, till the eight months are expired.

Or the bottomree interest is paid, till the whole remittances and produce are sold, though the ship be returned ; but here, as soon as the ship arrives in the harbour, the bottomree interest was to cease, and only common interest to commence.

That the risk here was double, for it was run upon the [48] goods that were sent out, and likewise upon the goods that were to be remitted.

That *Woolley* continued in trade till 1722, and never complained of this agreement, and that it had been in part performed by the plaintiff's receiving several sums by returns of goods.

Lord *Chancellor*. I do not at all wonder that *Woolley* is broke, and then turning to Mr. *Attorney-General* said, do you insist for the assignees under the commission of bankruptcy, that this is an usurious contract ; for if you can make it doubtful whether it is usury or not, I will direct an issue to try it at law.

Mr. *Attorney-General* for the defendants the assignees. We do not insist that in strictness of law this contract is usurious, but that it is unreasonable and unconscionable,—the money lent was only £2000, and yet £1455 is now claimed.

One hundred and seventy-nine pounds *Henkin* actually received, and £500, 19s. 4d. was all the produce from £900 worth of goods carried out.

The contract seems to be quite of a new nature, for the counsel of the other side do not pretend to shew any instance of such an agreement.

They endeavour to compare it to the case of a bottomree bond ; if it was really so, I would not dispute the point with them, because in that case, the custom of merchants has made it a reasonable and proper contract.

There is no hazard at all run here by any loss which might ensue from the insolvency of a factor ; for if that had been the case, the 26 *per cent.* does not cease, but *Henkin* is still entitled to have it continued till the principal is satisfied.

The goods returned, whether of sufficient worth or not, were to satisfy fully the money lent at 26 *per cent.*, and the fact was, they fell short in value: and if Woolley had not been a bankrupt, he must have paid the 26 *per cent.* to this day.

Therefore the terms of this contract are upon the face of it unreasonable.

There is a time too during the time the goods are in port when there is no hazard run, and yet the lender shall have his 26 *per cent.* notwithstanding; besides too, the time is uncertain when the contract shall end.

By the common form of bottomree bonds, your Lordship will see what merchants think a reasonable contingent security.

If the ship return in a stipulated number of months, as in [49] the case of an East India voyage, in 36 months, and in the case of a West India voyage, in 16 months, the contract may possibly run at 26 *per cent.* for the 36 months, but then it cannot possibly be extended any further, but ought to be confined to so many of the 36 months as are run out before the ship arrives.

Here the risque is run during the whole time the ship is in port, as well as out of port; and, in the present case, the lender runs no risque if the goods are lost, for there is a proviso in the present agreement, that Mr. Henkin shall have notice on what ship these goods are put on board, so as he may insure them, which he might do at £6 *per cent.* at most.

In this case here was no risque run upon the loss of the ship; but in the common case, though the goods are saved, and the ship lost, the lender must suffer.

Lord Chancellor. Mr. Attorney-General, will you agree to allow the executors of Mr. Henkin, upon the contract, interest at 26 *per cent.* during all the time, except when the goods were upon land?

Mr. Attorney-General, on behalf of his clients, desired time to consult them as to this proposal: Lord Hardwicke said, I tell you beforehand, I will not carry this contract one jot further than I am compelled to do by the strict rules of this Court; and in the mean time adjourned it to the first day of causes in the next term.

In Trinity term 1737, the cause came on again, when Lord Hardwicke was pleased to order, by the consent of the defendants, and of the plaintiff Hyam, that it be referred to Master Edwards to take an account of what is due from Ezekiel Woolley, the bankrupt, to the plaintiffs, the executors of Edward Henkin, and to the plaintiff Thomas Hyam, on the several contracts; and in taking the account, the Master was directed to allow the plaintiffs 26 *per cent.* for the sums lent in respect of the risque of the goods mentioned in the contracts during the voyages outward and homeward; and as to the homeward bound voyages, the 26 *per cent.* is to be computed only in proportion to the value of the goods remitted in such respective voyages; and at the rate of 5 *per cent.* only for the rest of the time mentioned in the contracts, during which any allowance of interest was thereby agreed to be made down to the time of the bankruptcy of Ezekiel Woolley; and the Master is also to take an account of what the plaintiffs or Edward Henkin received in money or goods toward the said principal and [50] interest, which is to be applied first to sink the interest, and then the principal; and for so much as shall be found due to the plaintiffs on this account, they are to be admitted creditors under the commission of bankruptcy against Woolley, and to receive a satisfaction for the same, in proportion to the rest of his creditors. (Reg. Lib. B. 1736, fol. 524.)

(This case is imperfectly stated in *Atkyns*. It is corrected by Lord Hardwicke's Note-book and the Register's Book. The judgment is taken from *Atkyns*.)

ATTORNEY-GENERAL at the Relation of the Master, &c., of University College, Oxford, Plaintiff; and Dr. STEVENS, Dr. RIDLEY, and EDWARD HARLEY, and the other Trustees of Dr. RATCLIFFE'S Will, Defendants.

May 11, 1737.

S. C. 1 Atk. 358; 2 Eq. Ca. Ab. 196, pl. 17.

Dr. Stevens having been elected under Dr. Ratcliffe's will a travelling-fellow, receives the salary for five years, and instead of travelling abroad for five more, as the will requires, upon ill health resigns, after having been absent from England only six weeks, and the trustees accept the resignation, and put another in his room. This

is a dispensation with the condition ; it might have been otherwise if they had refused to accept the resignation.

Whether the travelling-fellows must be members of a particular college, and whether they have power to let their chambers, are not objects of the Court's decision, but ought to be determined by the visitor.

Doctor *Ratcliffe* by his will dated 13th September 1714, gave all his estate in Yorkshire to his executors, upon trust to pay thereout yearly £600 to two persons, Masters of Arts, and entered on the physic line, to be elected out of the University of Oxford, by, &c., for the maintenance of such two persons for ten years, and no longer ; the half of which time they are to travel beyond sea for their better improvement : and he gave the surplus of that estate to University College. He also gave £5000 to his executors for building the front of University College, the master's lodge, and chambers for these two fellows.

Dr. *Stevens* was regularly elected to one of these travelling-fellowships on the 17th July 1725, and from that [51] time till the 17th July 1730, received the salary of £300 *per annum*.

During that time, Dr. *Stevens* lived in a noble family, and received a salary for his employment therein, and on the 17th of July 1730, having been absent from *England* only six weeks, he tendered his resignation in writing to the electors on a suggestion of ill health, which was accepted by a majority of them, and another person was elected in his place.

The object of the information was to make Dr. *Stevens* account to University College for what he had received since his election, and to have the directions of the Court as to the manner of holding and repairing the chambers. The latter part related to Dr. *Ridley*, the other travelling-fellow, who admitted that he had let his chambers, although he was resident in *England*, and the questions as to him were, whether he had a right so to do, and whether the travelling-fellows were bound to repair their chambers.

On the part of Dr. *Stevens* evidence was adduced to shew that he had, since his election, applied himself to the study of physic—that he had really intended to travel, and that he was now unable so to do, from the bad state of health into which he had fallen.

The *Attorney-General* and Mr. *Pauncefort* in support of the information, contended that the travelling was a condition annexed to the gift of the £300 *per ann.* and had not been performed.

Mr. *Broune*, Mr. *Fazakerley*, Mr. *Green*, and Mr. *Murray* for Dr. *Stevens*, contended that Dr. *Stevens* had been prevented from travelling by ill health, by necessity, and not from choice. That the will gives to the fellows the option of what period of the ten years to begin their travels. That the time not to be employed in travelling was given to enable them to go through a proper course of studies which would naturally precede the travelling, and in which it is proved that Dr. *Stevens* was employed. He was never called upon by the electors to proceed upon his travels.

If he had died the claim now set up might have been as well insisted upon against his executors, and if it had prevailed in this case would affect all those Fellows who after the limited time resign their fellowships instead of taking orders. Here the intention of travelling was *bona fide* en-[52]-tertained, and there is no evidence of fraud. That the acceptance of the resignation by the trustees amounted to a dispensation with the obligation to travel, and this information was not filed until five years afterwards.

The *Attorney-General* in reply, admitted that there might be a reasonable excuse for not travelling ; but that in this case, there was not sufficient evidence of ill health, and as to the resignation, contended that the electors had only a power of nomination, and no right to accept of a resignation ; and that they might not have been aware of the circumstances of this case.

Lord Chancellor (11th May 1737). The *Attorney-General* is certainly a necessary party, and the information is properly brought in his name.

Nothing, to be sure, should be done in this Court, to invalidate the design of this donation ; and on the other hand, I must proceed in such manner as I am warranted to do, by the rules of law or equity.

There are three considerations in this case :

First, What is the intention and true construction of Dr. *Ratcliffe's* will.

Secondly, Whether that has been complied with by the defendant Dr. *Stevens*.

Thirdly, If not, whether the non-compliance with it has been such as to give a right to the relators to recover back the money in a court of equity.

Dr. *Ratcliffe* by his will gives several manors, upon trust, *inter alia*, to pay £600 yearly, to two persons, who shall be elected out of the physick line, by the Archbishop of Canterbury, &c., for their maintenance for the space of ten years, in the study of physick, and to travel half the time for their better improvement; and in case they should die, or the place be vacant, then the vacancy to be filled up by two others, and the whole overplus to University College.

I think if the defendant had forfeited, the College would certainly be entitled to it, let it come to them by any means whatsoever. But as to the construction of Dr. *Ratcliffe's* will, it was manifestly the design, that they should travel, and that they should travel five years; but it is truly said, there is no particular time appointed when they should begin their travels.

The words are, "the half of which time they shall spend in travelling for their better improvement," and therefore it [53] is most natural to intend that he meant the last five years for their travelling, because he imagined they would, in the first part of the time, be laying in a proper stock of knowledge.

But then it can never be understood that he intended in all events they should travel, for there might be accidents which would utterly incapacitate them for travelling, and therefore he did not expect they should refund when such accidents happened, but left it at large to be judged of by the circumstances; besides, this is given not only for the expence of travelling, but for other views likewise, for maintenance, &c.

The next question, whether Dr. *Stevens* has complied with the intention of the donor.

Now it cannot be said, that Dr. *Stevens* has complied with Dr. *Ratcliffe's* intention; but then it must be considered, whether he has a reasonable excuse for not doing it, and upon this there is no doubt, but that natural disabilities will excuse, such as becoming *non-compos*, sickness, or other natural disabilities. But then it has been insisted upon, that the defendant has fraudulently accepted of this employment, in order to put the money in his pocket, without any intention ever to do the duties of it. If this had been proved, I should have no doubt but that I might decree the defendant to refund; but this is not the case, for there is not one single circumstance given in evidence to shew he took it upon such a fraudulent design; instead of that, there is very strong proof to the contrary, even by persons of good credit in the profession, that he had diligently applied himself to the study of physick, and besides, that he was in an ill state of health, in a wasting and decayed condition, which threatened a consumption; and even supposing he was actually able to travel, but in his own mind did not think himself capable, yet he would not be guilty of a fraud, for an imaginary as well as a real distemper would equally incapacitate him.

I do not think the clause in the will can possibly amount to a condition, but is merely directory, that half of the time they shall travel, and is not like an executory consideration: as where A. pays money upon such a consideration, and it is not performed, an action at law lies for A. for money had and received to his use, which is expressed thus by the Scotch law, *causa data sed non secuta*.

The agreement is to pay £300 *per annum* for ten years, if during that time he travel five years: will the not travelling [54] oblige him to refund? No! unless the electors had suffered him to continue in this post the whole ten years, then possibly the relators would have had a right to call him to an account, and might have obliged him to refund for five of the years.

Doctor *Stevens* communicated his illness first to the Archbishop of *Canterbury*, and lodged a formal resignation with him. I think the trustees are the electors, and the persons whom Doctor *Ratcliffe* intended should have the whole management of this donation. They stand in his place in this respect and they have accepted of this resignation, without insisting upon Doctor *Stevens's* going on, and it is certainly a dispensation of the condition. If they had said we will not accept of this resignation, but you must comply with the terms, or refund, then the case would have appeared quite different; but, instead of that, they have accepted of the resignation, and actually put another in his room.

Therefore I think as Doctor *Stevens* has taken the burthen of this upon him, and

as at the end of five years the trustees accepted a surrender from him, and did not insist then on his refunding, it would be unreasonable to require it now.

But even if it was a condition, yet suppose this case, a patron presents to a benefice, and takes a bond, as he may, from the presentee to reside for ten years, and he after five years are expired, should resign the living for the residue of the term, and the patron accepts it, and presents another, no one will say that he has forfeited the annual income of this living, during that part of the ten years he was resident upon it, for the acceptance of the patron has dispensed with the breach of the condition, and no action could be maintained on the bond.

Therefore I should think it too hard in the present case, to decree an account against the defendant.

There are two other points.

First consideration, Whether the travelling-fellows must be members of the college.

Secondly, Whether they have a power to let the chambers which they hold in the right of their fellowship.

[55] As to these matters, they are not properly the objects of this court's jurisdiction, but ought rather to be determined by the visitor, and the will besides is extremely incorrect in this respect.

As to the being members of *University College*, it is natural to suppose no body would reside in the college, unless they were actual members ; but this is out of the case, for Doctor *Stevens* has complied with that part of it.

And as to the power of letting their chambers, I do not think that Doctor *Ratcliffe* has laid his fellows under greater restrictions than those of other colleges are liable to ; and if I was to inquire whether a fellow of a college has a right to let his chambers, I should make wild work, and give an opportunity to half the University to bring bills against particular persons to discover, whether they have not forfeited their fellowships by thus letting out their chambers.

Decreed the information to be dismissed, but without costs, as against Doctor *Stevens* who has had a very large benefaction already from Doctor *Ratcliffe's* donation, and University College, but the information to be dismissed with costs as against Doctor *Ridley*.

(The statement of the case is taken from Lord *Hardwicke's* Note-book. The judgment from *Atkyns*.)

ATTORNEY-GENERAL at the relation of the OVERSEERS of the Parish of St. NICHOLAS, and two of the Principal Inhabitants, *Plaintiffs* ; and the MAYOR, ALDERMEN, and BURGESSES of the BOROUGH of WARWICK, and several of the ALDERMEN in their private capacity, *Defendants*.

May 13 and 20, 1737.

Where by a royal charter two markets, two fairs, a court-house, and a booth-hall for the sale of merchandizes, together with the tolls and profits of the market are granted to a corporation to be held *ad usum et proficuum burgi et burgentium* : This cannot be considered as a grant for a charitable purpose, but must be applied to the public use of the corporation ; but to what use it must be applied the members of the corporation are the judges uncontrolled by this court.

A decree in a suit against a corporation made with their consent upon a report of two judges of assize, to whom the court had referred it, cannot upon an information founded upon that decree be varied, the corporation by their plea and answer relying upon that decree.

Where the funds of a charity had not been applied or the accounts passed pursuant to the directions of a decree ; under the circumstances of there then being no fund, and of the present members of the corporation having only followed the steps of their predecessors, and in order to avoid litigation and expense, the court directed the accounts to be taken from the period of six years before the filing of the information.

The information was brought in relation to three estates or funds, which were called and insisted upon to be charity estates.

[56] 1st. Certain lands and tithes granted to the corporation by charter of 15th of May, 37 Hen. 8.

2d. The tolls and profits of markets, and rents and profits of the booth-hall, granted by a charter of 12 November, 1 & 2 Philip and Mary.

3rd. Sir Thomas White's charity.

The information complained of great abuses and misapplication of these estates by the corporation, and that no accounts had been regularly taken, and prayed that a general account might be taken, with a retrospect for an indefinite space of time. That the corporation might make satisfaction in their corporate capacity in the first place, and that the members of the body who were made defendants in their natural capacities, might make satisfaction for the particular misapplications they had been personally concerned in.

The property under the first head, at the time of the grant, was worth only £58, 13s. 4d., but had encreased to above £600 *per annum*, and was granted by the Charter of Incorporation, in which the incorporating clause is *pro universo commodo et communi utilitate inhabitantium burghi prædicti*, and afterwards the lands are said to be granted *pro consideratione prædicta*.

The property under the second head, was held under the charter of Philip and Mary, which grants two markets, and several other franchises, a court-house, and a booth-hall, for the sale of merchandizes, together with the tolls and profits of the market, and these are expressed to be held *ad usum et proficuum dicti burghi et burgentium burghi prædicti*.

Sir Thomas White's charity consisted of money secured to the corporation by a deed of 6th of July, 5 Edw. 6, for the purpose of being lent upon loans without interest, to a certain description of persons for the term of nine years, without taking any profit to themselves for so doing.

In the year 1613, a bill was exhibited by one Hunt and others against the bailiff and several of the principal inhabitants of the town of Warwick, relative to certain funds, including those granted by the charter of Hen. 8, but not mentioning those granted by the charter of Philip and Mary; and on the 10th of November, 12 Jac. 1, 1614, the cause was heard, and a commission was directed to Sir Clement Fisher and others, who by their certificate, proposed a scheme for occupying the charity estate, and managing the charity for the future; and on the 30th of October 1615, it was decreed by Lord Ellesmere, that the certificate should be confirmed and established, and the several matters therein contained be performed by all parties, with some variations and explanations.

An information was afterwards filed by the Attorney-General against the corporation in their corporate capacity, charging a misapplication of certain of the charity revenues and estates comprised in the charter of Hen. 8, which, when it came on to be heard, the court referred it to two justices of assize, who on the 4th of June, 4th Car. 1, made their report, prescribing a proper application and management of the charity funds; and amongst other things, that the accounts should be annually passed before two justices of the peace for the county of Warwick. This certificate of the justices of assize, the bailiff and burgesses of Warwick, by a petition to the Lord Keeper, prayed might be carried into effect by a decree, and on the 17th of July, 13 Car. 1, a decree was pronounced accordingly.

The defendants to the present information, as to the fund under the charter of Hen. 8, insisted by plea and answer, upon certain stated accounts as having been properly passed according to this decree of 13 Car. 1.

The Attorney-General and Mr. Broune, in support of the information, contended that the fund under the charter of Philip and Mary, had not been applied at all to charitable uses.

2dly. That the fund under the charter of Hen. 8, had not been administered according to the decree of 13 Car. 1, but had been misapplied, and that the accounts of all the charities had been kept together, and had not been annually or otherwise properly passed. 3. That the money under Sir Thomas White's charity, had been lent to persons who were not the objects of the charity, and for longer periods than nine years, and that the corporation had taken fees for the loans, of all which evidence was adduced.

Mr. Serjt. Parker, Mr. Pauncefort, Mr. Fazakerley, Mr. Noel, and Mr. Taylor, for the corporation, contended that the grants of Henry 8th, and of Philip and Mary,

were made to the corporation for their own benefit, and to preserve government and order in the town, and not for any charitable purposes. That the corporation were not parties in their corporate capacities to the suit in which the decree of 1615 was pronounced, and that they therefore cannot be bound by it. That the decree of 1615 is erroneous in directing the application of the surplus of the fund which ought not [58] to have been considered as a trust. That that decree included the premises granted by the charter of Philip and Mary, although there was nothing in the bill relating to them, and they are not mentioned in the decree of 13 Car. 1. That the Court in that suit delegated its authority to the justices of assize, which it ought not have done. That the petition of the corporation to confirm the Judges' certificate cannot be construed as a consent, because the decree varied from the prayer of the petition; and there being nothing under the common seal, the corporation cannot be bound.

Where a decree cannot be carried into execution by the process of the court, but a new bill and a new decree becomes necessary, the Court will exercise its own judgment, and will not ground its proceedings on a former erroneous decree. *Lawrence v. Berney*, 1 Ch. R. 80, 127; Eq. Ca. Ab. 166. *Johnson v. Northey*, Prec. Ch. 134. *Brockman v. Randall*, Trin. 1734.

But supposing these decrees to stand, that the accounts have been regularly kept and passed as thereby is directed, at any rate the Court will not decree such a retrospective account as is prayed, *Duke of Marlborough v. Strong*, May 1721, in the House of Lords, 2 Bro. P. C. 302 [2nd ed. 1 Bro. P. C. 175]. In the case of *Newark*, Lord Talbot refused to decree an account further back than the filing of the bill.

As to Sir Thomas White's Charity, it is not proved that any of the more immediate objects of the Charity ever applied for, or wanted the loans. The fees taken by the corporation were only for the securities upon which the loans were secured.

Mr. Bootle and Mr. Wilbraham for the defendants in their natural capacities. There is no evidence of any of the defendants having applied any part of the funds to their own private use. It is not shewn who were present at the several assemblies where the acts complained of were done. All those who were present and consenting to those orders, and the representatives of those who are dead, ought to be parties. A trustee for a charity is not to be charged further than a trustee in a private trust, *Man v. Ballet*, 1 Vern. 44.

Mr. Attorney-General in reply:—In whatsoever sense the charter is to be considered, it is clear that the corporation ought to apply the profits to some public use, for the benefit of the inhabitants in general, and cannot apply them to their own private use. There is no other way of calling the defendant to account, and this Court has a right to [59] see the profits applied according to the intention of the Crown.

The decree which the corporation now complain of was not only founded on their own consent, but their defence to part of this information is, that the accounts have been passed in pursuance of the directions of that decree. It is however clear from the evidence that these accounts have not been so passed, and that they cannot stand.

Lord Chancellor (20th May 1737). Information brought in relation to three estates or funds which are called and insisted upon to be Charity Estates.

1st.—The lands and tithes granted to the corporation by the charter of the 15th May, 37 Hen. 8.

2nd.—The tolls and profits of markets, and rents and profits of the Booth-hall, granted by charter 12th Nov. 1 & 2 Ph. and Mary.

3rd.—Sir Thomas White's Charity:—

Information complains of great abuses and misapplication of these estates by the corporation.

That no accounts have been regularly taken.

Prays a general account, with a retrospect for an indefinite space of time. That the corporation may make satisfaction in their corporate capacity in the first place.

That the members of the body who are made defendants in their natural capacity, may make satisfaction for the particular misapplications they have been personally concerned in.

I shall begin with that estate which I mentioned in the second place; The tolls and profits and markets and other premises granted by the charter of Philip and Mary, in order to deliver the cause from it. I am of opinion, that there is no ground to call that a Charity Estate, or to direct it to be accounted for and applied to the uses charged in this information.

The grant is contained in a royal charter of conformation, giving the corporation further franchises, and amongst others two markets, two fairs, a court-house, and a booth-hall, for the sale of merchandises, together with the tolls and profits of the markets, and these are to be held *ad usum et proficuum dicti burghi et burgentium burghi prædicti*. This imports no more than to the use and behoof of the corporation; No particular charity, nor any thing that is commonly understood by the term charitable use is expressed or implied in it.

[60] It must indeed be applied to a public use of the corporation or borough; the members cannot put the profits into their own private pockets, but they are the judges to what public uses it shall be applied; and this Court, according to its present rules, cannot controul it. There is no proof that they have sunk these profits, or put them into their own pockets, but on the contrary, it seems to be agreed on all hands that they have given them as salaries to some of their officers, and it is not improper for them to do so.

To this, however, the directions in Lord *Ellesmere's* decree have been objected; but the answer to that is that no question relative to these profits was in issue in that cause or in any before the court. It is therefore impossible that that decree can be carried into execution as to that part.

It has been insisted upon by Mr. *Attorney-General* in reply, that still this is a proper subject for an information in the name of the *Attorney-General* in this court to have this estate managed, and the profits applied according to the intent of the crown; and this is true in case it had not been applied to public uses or misapplied and converted to the use of private persons; but if that be not the case there is no ground for this court to interpose in estates thus generally granted to corporations. *City of London—Town of Newcastle.*

It follows that as to the premises granted by the charter of Philip and Mary, the information must be dismissed.

The part of the case which comes next to be considered concerns the estates granted to the corporation by the charter of 37 Hen. 8.

This estate is granted in the charter of incorporation; The incorporating clause is *pro universo commodo et communi utilitate inhabitantium burghi prædicti*, and afterwards the lands are said to be granted *pro consideratione prædicta*. It has been much debated at the bar whether these words would operate to make those lands and premises applicable to the charitable uses mentioned in the information, and if this were *res integra* I should have great doubt about it; but I think that point is not now open, but determined and concluded by the decrees that have already passed. As to Lord *Ellesmere's* decree of 14 Jac. 1, the corporation not being before the court in their political corporate capacity, I think they are not bound by it; and therefore no further use can be made of the decree in this cause than as an ancient exposition or construction of the grant of King Henry [61] the Eighth, and of the intention of the donor; and contemporary or even ancient expositions of old grants of the crown, which are frequently expressed in general words, have always great weight. But the main stress of this cause as to this estate rests on my Lord *Coventry's* decree, 13 Car. 1.

That was a proper suit to establish a charity in the name of the *Attorney-General*, the bailiff and burgesses were defendants in their corporate capacity, and therefore they and their successors are as much bound by that decree as private persons in their private capacity, would have been.

By that decree, the rents and profits of the estate granted by king Hen. 8, are directed in the first place to be applied to certain particular uses therein specified, and that the surplus thereof shall be disposed and employed by the corporation for the time being to the uses following, *viz.* "For and towards the repair of the church and school of *St. Mary's*, in *Warwick*, and for and towards the binding of poor children, born or bred in the town to be apprentices, and for and towards the relief of the poor and aged people of the said town, and for and towards the repair of the Great Bridge, there leading over the river *Avon*, and to and for such other religious, good, and charitable uses tending to the general good of the town and ease of the inhabitants thereof, as the bailiff and burgesses for the time being shall think meet and convenient; It being hard now to express and foresee all such particular accidents and occasions as aftertimes may produce or to restrain them from the performance of any good work when they have means to perform the same." Afterwards follow the directions touching the method of accounting.

Against the force of this decree many objections have been made, some of which go to the steps the court took in making the decree, and others to the substance of it.

First, it is said that the court delegated their authority to the justices of assize; but in fact there was no delegation of authority. The reference recites a treaty for an accommodation, and was made to prepare matters, and to put them into this method, in order to bring the parties nearer to an agreement. In those days it was a frequent practice to award commissions and make references which are now disused. If such objections were allowed to old decrees many would be overturned. It is right to allow proceedings [62] their proper force according to the course established at the time they took place.

Secondly as to the substance and justice of the decree.

In those days this court exercised a more large and liberal jurisdiction over charities than it is now in the habit of doing. Many ancient charities where the grants of the lands are in general words, subsist as to the particular applications of them under such decrees. It would be dangerous now to overturn them.

Besides this is an original bill founded on that decree, and intended to carry it on. That decree therefore cannot be varied in this suit, nor in any manner without an appeal or bill of review; for if that were to be done there might be two inconsistent decrees relating to the same estate, and between the same parties, standing on the records of this court at the same time, which cannot be.

It is said that the present not being a bill of review, but an original bill to have the benefit of and to carry on the former decree, the defendants are at liberty to object to the justice of it, and that the court may look into it and depart from it; and upon this head several cases have been cited.

Those cases were very proper to the point to which they were applied; but even on the general doctrine there has been considerable difference of opinion between very great judges who have sat in this court.

In the present case there are two things which entirely deliver this cause from that question. The first of them is that the decree was made with the consent of the corporation, for the certificate of the judges of assize was made a decree on their own petition praying that it might be so; and a corporation may bind their successors as much by consenting to a decree as in any other way. The condition or restriction which the court rejected went only to one particular, which was the increase of the maintenance of the vicar of St. *Mary's*, and did not affect the rest.

But secondly what puts all these objections entirely out of the case is that the defendants have in their plea and answer relied on this decree, and pleaded that they have regularly passed their accounts under it.

Both sides agree that this is to be the rule, and therefore the defendants cannot be at liberty at the bar to take exceptions to it.

The next question is as to what relief the relators are [63] entitled, and how far the stated accounts ought to stand in their way.

As to the stated accounts they are plainly not pursuant to the directions of the decree.

Instead of being passed annually, in some instances, the accounts for fifteen years were passed together. The accounts are not of the rents and profits of the estate granted by Hen. 8 in particular, nor of the particular disposition thereof, but only the receiver's accounts of the whole corporation estates. They do not shew what payments have been made out of this estate; but the whole is mixed and jumbled together. It appears that the justices of the peace were not informed of the rule and measure by which they were to take this account, for they neither saw nor read that part of the decree. The consequence of that is that they could not know what they were about.

If it should be said that this is not very material, provided the application of the trust estate has been right, that draws on another objection, that a plain misapplication appears; for it appears that the particular uses to which the surplus is directed to be applied have not been sufficiently regarded, and great numbers of the items allowed in the accounts are to quite different purposes, and not at all warranted by the decree.

The charity estate has been mortgaged, and the interest of those mortgages and great sums for the principal have been allowed for which there is no colour.

The consequence of which is that an account must be decreed.

The only question that remains is as to how far back and with what particular directions this account is to be decreed.

It is prayed that the account may be carried back for twenty years before the filing of the information ; but I do not think it proper or for the benefit of either side to do that. The misapprehension of or variation from the decree of 13 Car. 1, has subsisted long in the corporation and is not the fault of the present particular members alone. They have followed the steps of their predecessors.

There is no evidence of their having put any part of the money into their own pockets. The vicar of *St. Mary's* was present at passing the accounts, and the inhabitants on whose behalf the present information is brought were no strangers to it.

[64] For these reasons, and to avoid unnecessary expense and vexation, I shall take a shorter period and borrow the rule of the statute of limitations. I would not however be understood to lay it down that the statute of limitations is a bar to a charity or a trust. Certainly not, but in these cases the court must exercise a discretion ; and this is more necessary to be done in regard to these changeable bodies than in any other cases, and I think it right to make the rule of the statute of limitations, the measure of my discretion in this case : with regard to *Sir Thomas White's* charity some enquiries must be made.

Decree. As to the account and relief demanded touching the premises granted by the letters patent of king Philip and queen Mary, let the information be dismissed.

As to the estate granted by the letters patent of king Henry 8, and any houses or lands purchased by the corporation with any part of the rents and profits of that estate, I declare that the rents and profits thereof ought to be disposed of and applied to the charitable and good uses mentioned in the decree of 17 July, 13 Car. 1, and to be accounted for according to the directions of that decree, and that the accounts insisted upon by the defendants in their plea and answer have not been passed pursuant thereto.

But in regard to many circumstances appearing in this cause, and in order to prevent fruitless expense and litigation between the parties, I do not think fit to direct an account so far backwards as is sought by the information ; and therefore decree that the defendants do account before the Master for the rents and profits of the said charity estate since the first day of December 1727, six years before the information filed.

Let the Master enquire what mortgages have been made, or suffered to be subsisting on the charity-estate during that period of time, and what was the consideration of such mortgages, and how the money borrowed was applied, and whether the same or any part thereof hath been paid off, and out of what fund, and what sum of money now remains due and unsatisfied on any such mortgage or mortgages.

Let the Master also enquire whether the salary of the mayor or any other officer of the corporation hath been augmented out of the rents and profits of the charity estate, and state the same to the court.

Let the Master also enquire and certify which of the defendants were mayor or aldermen of the said corporation [65] during any and which of the years, for which the said account is directed, and what other persons have been mayors or aldermen during any and which of the said years.

If any balance of the rents and profits of the charity estate shall be found in the hands of any of the defendants, unapplied to the purposes mentioned in the said decree, let the Master examine and certify in what manner the same may be best applied for the benefit of the charity, and all parties are at liberty to lay proposals before him for that purpose.

As to the management of the said charity for the future, let the Master examine and certify whether any and what augmentations are proper to be made of the particular annual stipends directed to be paid by the said decree, and what surplus will remain of the annual produce of the said charity estate after such augmentations made, and let all parties be at liberty to lay proposals before him for this purpose.

And I do further order that a particular account of the rents and profits of the said charity estates distinct from other revenues of the said corporation be made up and passed annually according to the directions of the said decree, and that at the respective times of passing such annual accounts, a copy of the said decree be laid before and read over to the two justices of the peace who shall respectively pass the same.

As to *Sir Thomas White's* charity—Decree that the same be established according to the intent of the donor declared in the deed of the 6th of July, 5th Edw. 6, and that the Master take an account how much money arising from that charity was on the first day of November 1727, in the hands or custody of, and what sums have been

since received by, the said corporation or of any of the defendants or of any other person for their or any of their use or by their or any of their order or authority and how the same hath been disposed of. And how much money arising from that charity is now standing out on loans and to what persons, and whether such persons are qualified to enjoy the same according to the directions of the deed of the 6th of July, 5th Edw. 6, and the intention of the donor, and let the securities for the same be brought before the said Master; and if any part of such money shall appear to be standing out on loans not pursuant to the directions of the said deed, or is on any other account fit to be called in, let [86] the Master appoint a proper person to call in the same; and to put the securities which have been taken for the same in suit if it shall be necessary; and if any loss shall appear to have happened of any part of the said money arising from this charity, let the Master certify by what means such loss hath been occasioned; and let what is now or shall come into the hands of the defendants or any of them or of any, &c., be placed out, &c.

Reserve all further directions and the costs of this suit till after the Master's report.

All parties to be at liberty to resort to the court as occasion may be. (1)

(The statement of this case, and the arguments of counsel, are taken from Lord Hardwicke's Note-book. The judgment and decree verbatim from a manuscript in his Lordship's handwriting.)

(1) Reg. Lib. A. 1736, fo. 377.

CHARLES HUMPHREYS, Administrator of the goods unadministered of his Sister, MARY SCARLET, Widow of WILLIAM SCARLET, and formerly the Wife of JOHN OSBORNE, Deceased, *Plaintiff*; and THOMAS BULLEN and ANN, his Wife, Administratrix of the said WILLIAM SCARLET, who was Administrator of the said MARY SCARLET, *Defendants*.

[See *In re Lambert's Estate*, 1888, 39 Ch. D. 630.]

S. C. 2 Eq. Ca. Abr. 425, pl. 21; 11 Vin. Abr. 88, pl. 26; 1 Atk. 458.

May 18, 1737.

A. survives her first husband, who left her a legacy; she dies, the legacy being un-received by the second husband during her life, but after her death he administers, and dies before the legacy came to his hands; the administrator gets it in, and the administrator *de bonis non* of the wife brings this bill for the legacy.

Equity considers the administrator *de bonis non* as a trustee for the administrator of the husband, who having an absolute right by surviving his wife, his administrator ought to have the benefit of it. (So *Squib v. Wyn*, 1 P. Wms. 378, and *Cart v. Rees*, cited in 1 P. Wms. 381. *Elliot v. Collier*, 1 Ves. 15, and see Hargrave's and Butler's Co. Litt. 351 a, n. (1).)

During the coverture, husband and wife are but one person; but when she dies he has a right to administer exclusive of all other persons.

A. survives her first husband, who left her a legacy, and intermarries with B. She dies, the legacy being un-received by B. during her life, but after her death he took out admi-[67]-nistration to her, but died himself before the legacy came to his hands, and his administrator gets it in, and the administrator *de bonis non* of the wife brings his bill to have this legacy, received by the administrator of the husband, paid over to him as the legal representative of the wife.

Mr. Attorney-General, for the plaintiff contended, that a husband and wife in law are but one person, and consequently no relation, nor entitled to administer.

Lord Chancellor (May 18, 1737). During the coverture they are but one person; but when that coverture is dissolved by the death of the wife, the husband is certainly the next friend and nearest relation, and has a right to administer exclusive of all other persons. At common law no person at all had a right to administer; but it was in the breast of the ordinary to grant it to whom he pleased, till the statute of the 21st of H. 8, which gave it to the next of kin; and if there were persons of equal kin, which-

ever took out administration was entitled to the surplus; and for this reason the statute of Distribution was made, in order to prevent this injustice, and to oblige the administrator to distribute.

The question here is, whether the administrator *de bonis non* of the wife, or the administrator of the husband, is entitled to this legacy.

I think clearly it was a vested interest in the husband, and therefore his administrator, as his representative, is entitled to it, without being obliged to make distribution, for the husband is not within the equity of the statute, and it is explained besides by the last clause in the statute of Frauds and Perjuries: section 25. "And for the explaining 'an act of this present parliament, intitled, 'An act for the better settling intestate's estates,' be it declared, that neither the said act, nor any thing therein contained, shall be construed to extend to the estates of feme covert that shall die intestate; but that their husbands may demand, and have administration of their rights, credits, and other personal estates, and recover and enjoy the same, as they might have done before the making of the said act."

Notwithstanding, by the rules of the common law, the administrator of the wife is entitled to it, being a chose in action, not received or got in by the husband in his lifetime, yet equity will consider such administrator as a trustee for the administrator of the husband, for the husband having an absolute right to it by surviving his wife, his administrator ought to have the benefit of it. The credits of the wife [68] survive to the husband, and go in equity to his representative, and not to the administrator *de bonis non* of the wife, who is only a trustee for the other; and therefore the plaintiff's bringing this bill is a breach of trust, and I dismiss it with costs, and decree accordingly.

For the plaintiff was cited *Burnet v. Kinnaston* (P. in Chan. 118, and in 2 Vern. 401). And for the defendants, *Huntley v. Griffith* (Mo. 452).

(This case is taken from *Atkyns*, except the sentence beginning at the words "The credits," last line, p. 67, which is taken from Lord *Hardwicke's* Note-book.)

POWELL, senior and junior, *Plaintiffs*; JOHN MONNIER, deceased, the original defendant, ELIZABETH MONNIER, his Widow and Executrix, by bill of revivor, *Defendant*.

[See *Hindhaugh v. Blakey*, 1878, 3 C. P. D. 139.]

May 18, 1737

S. C. 1 Atk. 611.

If a person on whom a bill of exchange is drawn, says in a letter to the drawer, it shall be duly honoured and placed to your debit, this is an acceptance, and will make him liable, for a parol acceptance has been held to be good, and so determined in a case made for the opinion of the Court of King's Bench in the time of Lord *Hardwicke*, Ch. Justice.

The plaintiffs, who were partners, received a bill of exchange from *Charles Newburgh*, dated the 3rd of April 1731, drawn by him on *John Monnier*, in these words, "Thirty days after date, pay to Messrs. *Peter Powell* and Son, or Order, £50, value received." This bill was indorsed by the plaintiffs, and negotiated by several persons; on the 15th of April it came into the custody of *Lavington* and *Paul*, of *Exeter*, merchants, who sent up to *Monnier* the bill of exchange; he received it, he then kept it for ten days before the same became due, without making any objection, and, whilst he had it in his hands, wrote on the left side of the top thereof, No. 84, and at the bottom the 6th of May, which the plaintiffs charged was the private mark or number of bills by him accepted, and intended to be paid. Upon the 6th of May, the day on which the bill was payable, *Monnier* sent it back to *Lavington* and *Paul*, and refused to accept it, or allow it as so much received by him on their account; whereupon *Lavington* and *Paul* demanded [69] and received the £50 of the plaintiffs, who can have no satisfaction against *Newburgh*, he having become a bankrupt and insolvent, before the return of the bill.

The bill is therefore brought for £50, with interest due thereon; *Monnier* died after putting in his answer, and the cause has been revived against his executrix.

It was admitted, that *Newburgh* acquainted *Monnier* by letter, of his having drawn the £50 bill, and desiring him to accept and pay the same; to which *Monnier* on the 12th of April wrote a letter in answer, stating that the £50 bill should be duly honoured, and placed to his debit: but *Monnier* by his answer, stated that he wrote such letter in dependence of *Newburgh's* making due remittances to answer his drafts, and that he returned the £50 bill because *Newburgh* did not remit any effects to answer the same.

The *Attorney-General* insisted for the plaintiffs, that if *Monnier* had not intended to accept and pay the bill, he should, according to the custom of merchants, have returned the same immediately to *Lavington* and *Paul*, whereby the plaintiffs might have got the £50 from *Newburgh*, who was then, and several days after, in good credit, and particularly in such credit with the defendant, that, after the plaintiff's bill came to his hands, *Newburgh* drew another bill of exchange on him for £18 three days after date, which was duly paid. Evidence of merchants was adduced to shew that by the custom of trade, the keeping of a bill by one on whom it is drawn, without refusing to accept it, amounts to an acceptance.

The defendants proved that the marks upon this bill, were made upon all bills remitted to *John Monnier*, whether he intended to accept them or not, and that the mode of acceptance was by writing *J. M.*

Mr. Fazakerley, who was counsel for the defendant, insisted, that the suit here ought not to be proceeded upon any further, but should go off to a trial at law, as it is a mere legal question.

Lord Chancellor. If *Monnier* had been living, I should have been of opinion, that the bill ought to have been dismissed; but now he is dead, and the suit is revived against his executrix, notwithstanding it is a legal question, the plaintiffs may bring their bill, and by praying satisfaction out of assets, and a discovery of assets, it is made a case, of which this Court takes cognizance, and if they retain bills, where it is a legal demand, they must judge upon the [70] facts relating to the legal demand, and, unless those facts are doubtful, will not dismiss the bill, and turn it over to a trial at law.

Mr. Fazakerley then, upon the merits alleged, that *John Monnier* kept the £50 bill till the 6th of May, merely in expectation of receiving money or effects from *Newburgh* to answer it, and that, in receiving it from the indorsees, he entered it in his bill-book, as he constantly did all bills he received, whether good or bad, and that it was then entered at or against No. 84, and therefore wrote that figure at the top of it, and that it did not denote the number of bills accepted or entered to be paid by him, and that writing the 6th of May denoted the day the defendant returned the bill, that *Newburgh* not remitting any effects to answer it, he returned it to *Lavington* and *Paul*; that, at the time of drawing the bill, *Monnier* had not, nor hath since had, any effects of *Newburgh's* in his hands; and that when *Monnier* returned the bill to *Lavington* and *Paul*, he wrote as follows:—"You remitted me *Newburgh's* bill, which I do not pay for reasons, therefore please to credit me, and note £50, the same being due to-day, and let the indorsees reimburse you." And, therefore, upon all other circumstances, this is not such an acceptance as will make *Monnier* liable to pay it.

Lord Chancellor (May 18, 1737). The principal question is, whether this is a sufficient acceptance to charge the defendant, and if there was any doubt of it as to the fact, or whether in law what has been done amounts to an acceptance, it might still be necessary to send the parties to a trial at law, but I think there is no doubt of either.

Monnier, when the bill was sent to him, received it, entered it in his book, as his course of trade is proved to have been, under a particular number, and wrote that number under the bill; now it has been said to be the custom of merchants, that if a man underwrites any thing, let it be what it will, that it amounts to an acceptance; but if there was no more than this in the case, I should think it of little avail to charge the defendant, because that matter has been fully explained; but what determines me are *Monnier's* letters, by which it appears very clearly that he has accepted of it: in one he particularly mentions the £50 bill, and says it shall be duly honoured, and placed to the drawer's debit; nor is there in his letters to *Newburgh*, or the indorsees, one [71] expression that shews the least suspicion of *Newburgh's* credit.

I think there can be no doubt, but an acceptance may be by letter, and has been so determined; there have been questions too, whether a parol acceptance could be good? Lord Chief Justice *Eyre* (1) held it was not, Lord *Raymond* held the contrary; and there was a like point before me at *nisi prius*, in the cause of *Lumley v. Palmer*, and I had a case made of it for the opinion of the Court of King's Bench, where it was

several times argued, and at last solemnly determined, that such acceptance is good, much more than must an acceptance by letter be good.

As to the plaintiff's being entitled to interest, I was at first doubtful whether he could demand any ; but on reading the statute of the 3rd and 4th of Ann. c. 9, s. 4, I think it a clear case that he can, though no protest for that is made necessary by the act, it being requisite only to entitle a payee to damages against a drawer, but does not mention the acceptor of a bill of exchange ; and all the damages, therefore, that can be had in such a case is the interest.

Lord Chancellor decreed the defendant to pay to the plaintiffs the sum of £50, together with interest for the same, from the time of filing the original bill, at the rate of 4 *per cent*. And further ordered, that she should also pay to the plaintiffs their costs of this suit, from the time of filing of the bill of revivor, to be taxed. (Reg. Lib. B. 1736, fol. 332.)

(This case is taken from *Atkyns*, with some additions to the statement of the case and the arguments of counsel from Lord *Hardwicke's* Note-book.)

(1) C. J. *Eyre* waived his opinion, and agreed with the decision of the Court of K. B. The decision in K. B. was referred to, and approved of in *Julian v. Shobrooke*, 2 Wils. 9, and in *Pillans v. Van Mierop*, 3 Bur. Rep. 1662, and was taken for granted by the Court and Bar in *Sproat v. Mathews*, 1 T. R. 182.

[72] CHAMPION v. PICKAX.

May the 28th, 1737

S. C. 1 Atk. 471.

A. devises several leasehold estates to two trustees, in trust, if his grand-daughter married without their consent, to convey the premises to two other trustees, in trust for her separate use during her life, and after her death, for the use and benefit of her issue. Though she has no children by her first husband, she has only a right for her life, for the issue by any husband are provided for by the settlement.

Henry Pierce, by his will, devised several leasehold estates to two trustees, in trust to assign them to his grand-daughter *Mary Pigott*, at her age of twenty-one years, or marriage, if she married with the consent of them, or the survivor of them ; but if she married without such consent, then they were to convey the premises to two other trustees and their heirs, in trust for the sole use and benefit of the said *Mary Pigott*, exclusive of any power and control of her husband, for and during the term of her natural life, and after her decease, for the use and benefit of her issue. She married without the consent of the trustees, and they, in pursuance of the power in the will, conveyed the premises to two other trustees, in trust for her during her natural life, and after her decease, for the use and benefit of all and every her child and children.

Her first husband died, and had no issue by her ; she married the present plaintiff. and they brought their bill against the defendant, who was the surviving executor of the surviving trustee, to have him join in a sale of the trust estate, suggesting that the intent of the will was, for providing for the issue by the first husband only, and he dying without issue, she had now an absolute right and title to the premises.

It was decreed she had only a right for her life, for she might have issue by any husband, who are provided for by the settlement, and would take by purchase.

The bill was dismissed. (This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book.)

[73] EASTER TERM. 1737.

FRY v. WOOD.

S. C. 1 Atk. 445.

Where a person has been examined here, his depositions may be read at law between the same parties.

Agreed in this case where a person has been examined in Chancery, that in a cause at law between the same parties, his depositions may be used in evidence, if it can be proved that the witness is dead (see *Coker v. Farewell*, 2 P. Wms. 563 ; Bull. N. P. 239) ; or by reason of sickness (so *Luttrell v. Reynell*, 1 Mod. 283. *Kersman v. Crooke*, Trial at Bar, 2 Lord Raymond, 1166. *Jones v. Jones*, 1 Cox's Ca. 184), &c., is not able to attend, or that he is out of the kingdom, or otherwise not amenable to the process of the Court. (This case is taken from *Atkyns*. It does not appear in Lord Hardwicke's Note-book.) (*Lord Altham v. Earl of Anglesey*, Trial at Bar, K. B. Gilb. Eq. Ca. 16, 18.)

ANONYMOUS.

S. C. 2 Atk. 2.

An order for a cause to stand over indefinitely, does not imply that it is only put off to the next term.

Lord Hardwicke said, where there has been an order that a cause should stand over indefinitely ; it does not imply that the cause is put off only to the next term. (This case is taken from *Atkyns*. It is not to be found in Lord Hardwicke's Note-book.)

[74] GEORGE MALDEN and MARY his Wife, THOMAS COWPER and SARAH his Wife, and WALTER WARBURTON and ANN his Wife, *Plaintiffs* ; and LITTLETON POINTZ MEYNELL, RICHARD HARPER Executor of SAMUEL ALLEN's Will, ANN BURDET the Representative of a Surviving Trustee, JOHN MINORS and HENRY SCOTT Executors of SAMUEL ALLEN, *Defendants*.

June the 11th, 1737.

S. C. 2 Atk. 8.

Where by marriage settlement it is declared that trustees shall stand possessed of certain terms upon trust, that in case there shall be no issue-male of the marriage at the time of the decease of the husband or wife, which shall first happen, or in *ventre sa mere* born after his death, or in case the issue-male between them shall die without issue-male, and there shall be a failure of issue-male between them, and at the time of such failure there shall be issue-female living at the time of the husband's or wife's decease, which of them shall first happen, or born in due time after the death of the husband, that then the trustees shall by rents and profits raise the portions of such daughter, to be paid at their ages of twenty-one years, with interest for forbearance if not paid at that time, and for maintenance and education, to be paid them at the end of the first half-year after the decease of either the husband or wife ; Held that there being issue-male at the death of the wife who survived her husband, that the contingency had not happened upon which the portions of the daughters were to be raised.

Where a purchaser has given a full value for an estate, a mistake made by some of the parties to a release of their claims under a marriage settlement, shall not turn to the prejudice of a fair purchaser.

By marriage-settlement of the 1st of October 1795, made upon the marriage of John Allen and Esther Stevenson his wife, certain estates are conveyed to " John Allen, " for life, remainder to Esther his wife for life ; remainder to Samuel Stevenson and John " Burdet for two several terms of 600 years, and 590 years ; remainder to the first " and every other son of the marriage in tail-male, with divers remainders over ; and the " trusts of the terms are declared to be, that in case there shall be no issue male of the

"said *John Allen*, on the body of the said *Esther Stevenson*, begotten at the time of the "decease of the said *John Allen*, or of the said *Esther Stevenson*, which shall first happen, "or in *ventre sa mere*, and in due time born after the death of the said *John Allen*; "or in case the issue-male between them lawfully begotten shall all of them die without "issue-male, [75] and that there shall be a failure of issue-male of the body of the said "*John Allen*, on the body of the said *Esther Stevenson* begotten, and that there shall "be at the time of such failure issue-female, one or more daughter or daughters between "them the said *John Allen* and *Esther Stevenson* begotten, *living* at the time of the said "*John Allen's* decease, or of the said *Esther*, which shall first happen, or born alive "in due time after the death of the said *John Allen*; that then the trustees, or the sur- "vivor of them, or the executors, &c., or such survivor, shall, by and out of the rents "and profits so to them as aforesaid limited for the several terms of 600 and 590 years, "raise and levy, receive and pay as to and for the portions of such daughter and daughters "the several sums hereafter mentioned; if one daughter, the sum of £3000, if two or "more £4000 equally to be divided amongst them, to be paid at their several and "respective ages of twenty-one years, if the same can be so soon raised; but if the same "cannot be so soon raised, then to be paid as soon as the same can be raised, with dam- "ages at 5 *per cent.* for forbearance as to such parts as shall be unpaid at their respective "ages of twenty-one; and in the mean time raise and pay for the maintenance and "education of such daughter or daughters, the said yearly sum or damages out of the "said premises, such yearly sum or sums of maintenance to be paid at the end of "the first half-year after the decease of either *John Allen* and *Esther Stevenson*, "which should first happen, without such issue-male as aforesaid."

In the settlement, there is a power of revocation of all the uses of the marriage-settlement except as to the lands in jointure, and which revocation was by a deed of 4th June 1700, executed as to the uses upon all the lands except the lands in jointure, and were by a conveyance of the 7th June 1700, sold and conveyed to *Samuel Stevenson* the father-in-law of *John Allen*. *Samuel Stevenson* by his will of the 29th October 1707, devises these estates to his daughter for her life, remainder to trustees for 500 years, upon trust to raise £450 a-piece for his three grand-daughters, and subject thereto, to his grandson *Samuel Allen* in tail-male.

John Allen dies, leaving his widow and four children, his son *Samuel Allen* and three daughters.

By articles of the 24th March 1730, and made between *Samuel Allen*, his mother and three sisters, *Samuel Allen* agrees to convey the *Shewell* estate to his mother, and after reciting that he had agreed with Mr. *Meynell* for the sale of [76] that part of the estate wherein his mother's jointure was, as well as the rest of the estates, and that she had agreed to join in a recovery and conveyance without prejudice to her life-estate, in consideration of 200 guineas to *Esther Allen*, £100 to *Mary Allen*, £590 to *Esther Allen*, and which sums were to be paid by Mr. *Meynell* on having a conveyance, but which sum of £590 was to be paid by the mother to her three daughters, share and share alike, she agreed to join with *Samuel Allen* in such conveyances as were necessary to make a good title to Mr. *Meynell*: and at the end of the said articles, it is expressed, that immediately from and after the performance of the several agreements, the said *Samuel Allen*, his mother and three sisters shall execute general releases to each other in as full, ample, and general words as can be devised to prevent all possible ground of dispute between them for the future, so as not to extinguish any agreement in these articles, or the right, title, or interest of any of the parties to any lands, tenements or hereditaments whatsoever, in reversion, remainder or expectancy, or otherwise howsoever. and *Esther* agrees, upon *Samuel Allen's* performance of these articles, to deliver up all deeds whatsoever, the marriage articles and her jointure deed excepted.

By articles of the 8th July 1731, and made between *Samuel Allen* and Mr. *Meynell*, *Samuel Allen* consents to convey the reversion in fee, expectant on the life-estate of his mother, and in consideration thereof, Mr. *Meynell* covenants on having a good title made to him and his heirs to pay to *Samuel Allen* £14,900, and to Mrs. *Allen* his mother, in consideration of her joining in the conveyance, £982, 16s. 4d. By bargain and sale dated the 22nd October 1731, intended to be inrolled, but which never was inrolled, *Samuel Allen* and his mother join in making a tenant to the præcipe, and by a conveyance of the same date, after reciting that £450 given by the will of the grandfather to his three grand-daughters had been raised and paid, *Samuel Allen* and his mother *Esther Allen*, in consideration of £982, 16s. 4d. in hand paid to *Esther Allen*, and £13,918

in hand paid to *Samuel Allen*, convey to Mr. *Meynell* and his heirs ; and *Samuel Allen* covenants against all incumbrances done by him and his ancestors, except his mother's life-estate and certain incumbrances in a schedule annexed to the conveyance, wherein the first mentioned are the said two terms of 600 and 590 years limited by the settlement of the 1st of October 1695. On 19th of February 1732, *Samuel Allen* obtained a decree against Mr. *Meynell*, specifically to per-[77]-form the articles, and to pay the residue of the purchase-money ; whereupon *Samuel Allen*, the plaintiff, was to deliver to *Meynell* the conveyances which had been already executed. In May 1733, *Esther Allen* died, and after her death it was discovered that the bargain and sale by *Esther* for making a tenant to the præcipe had never been inrolled, and the time having elapsed for inrolment, the recovery was considered void. Whereupon *Samuel Allen* joined with *Gisborne*, a mortgagee on the premises, in making a new tenant to the præcipe, and in a conveyance to Mr. *Meynell*. In Trinity Term 1733, a new recovery is suffered by *Samuel Allen* ; and 10th July 1733, Mr. *Meynell* had paid the sum of £13,548, 6s. 6d. in part payment of the purchase-money ; in June 1734, *Samuel Allen* dies.

Upon the death of their brother, *Samuel Allen*, an estate of £1000 *per annum* comes to his sisters under their father's will.

The original bill is brought by the sisters of *Samuel Allen* and their husbands, to have their portions of £4000 raised, and for payment of the sum of £982, and the cross bill is brought by Mr. *Meynell* for establishing the purchase, and to have an assignment of the two terms of 600 and 590 years.

Mr. *Meynell*, by his answer, stated that at the time of entering into the articles of purchase, he did not know that the premises were subject to the terms for raising £4000 for the plaintiffs, nor did he contract for the same, subject to the terms for raising £4000.

The *Attorney-General*, Mr. *Wilbraham*, and Mr. *Hawkins Browne*, for the plaintiffs.

At the time of the failure of issue-male by the death of *Samuel Allen*, three daughters were living, and were living at the time of the death of the survivor of the father and mother. The defendant's construction of the trusts of the terms will make the two contingencies the same. The obscurity arises from placing the words relating to the daughters in one branch of the sentence after both the contingencies without repeating them. Supposing the daughters are entitled to have the £4000 raised, then the question arises whether they have barred themselves by the release. The £590 was intended as a consideration for their contingency in case their brother had died without issue-male in the lifetime of the mother, for he could not suffer a recovery without her [78] joining. And they cited *Moor v. Mayhew*, 1 Ch. Ca. 34. *Bovy v. Smith*, 2 Ch. Ca. 124.

Mr. *Brown*, Mr. *Fazakerley*, Mr. *Weldon*, and Mr. *Noel*, counsel for Mr. *Meynell*. Our cross bill is to establish our purchase, and to have an assignment of the two terms of 600 and 590 years. On their bill there are two demands, as to the first of £4000 ; the daughters are parties to the articles, and are to have part of the money paid to the mother, *viz.* £590, which is computed as part of the £982. The estate is recited to be but £600 *per annum*, subject to the mother's jointure, and Mr. *Meynell* was to give for it £14,900, and the daughters would have it also, subject to a contingent charge of £4000, which is impossible. It was plainly intended that the family should part with their whole interest in the estate (except the mother's jointure), be their respective shares more or less. But it is objected that Mr. *Meynell* had notice of the terms, but no objection of this kind was made, till after he had paid the whole purchase-money, except about £2000. The deed of the 22nd of October 1731, is produced by them, and in their custody : but the question is, whether the trusts for raising £4000 have ever arisen ;—two contingencies upon which the portions are to arise,—1st, In case there shall be no issue-male at all at the decease of either the husband or wife, or born after the decease of the father : *i.e.* in case there never was any son at all. 2ndly, The subsequent clause relates to the issue-male of such son. The word living is not meant as a description of the daughters, but refers to the second issue-male : if there should be a son, and he should die without issue-male living at the time of the decease of the father or mother. These provisions, therefore, have never arisen, but supposing they have arisen, what relief are they entitled to in a court of equity. They claim both the £4000 and the £590, these are inconsistent ; the £590 is upon the foot of the purchase ; the £4000 is inconsistent with it. The daughters are to release generally, so as such releases do not extend to release or discharge any of the articles or agreements

hereinbefore expressed, or any of the conveyances to be executed in pursuance thereof, or any of the covenants to be contained, or any right or title of any of the parties to any lands, tenements, or hereditaments in possession, reversion, remainder, or expectancy; this relates to an estate of £1000 *per annum*, which they were to have on their [79] brother's death. These trust terms were only a security, not considered as real estate. But it is objected, that here was an ignorance of their right. The answer is, that they knew the deeds, and the terms, and they must take notice of their rights. Suppose both parties are under a mistake, to whose prejudice ought it to turn. At the time they pretended to make the discovery, we had not more than £2000 in our hands. And they cited *King v. Withers*, *coram* Lord Talbot.

Mr. Attorney-General in reply. The construction we make, is according to the common provision made in marriage-settlements. The latter end of the clause as to the half-yearly payment of the interest, is to answer the purpose of both contingencies; if upon the execution of the articles the £4000 had been in contemplation, there ought to have been an express covenant from the daughters to renounce the benefit of this provision, and as there is no such covenant, he submitted it to the Court that the plaintiffs are still entitled to the £4000. The whole £982 was to be a consideration only for what the mother agreed to do.

Lord Chancellor (June 14, 1737). This settlement is very inaccurately penned; it has been insisted that the meaning of it is, that if there should be a failure of issue-male, in the lifetime of *John Allen*, and *Esther* his wife, then the £4000 should not be raised, and therefore, as there was issue-male in the lifetime of *John* and *Esther*, the contingency has never happened.

But this is an absurd construction, to confine it to issue-male in the lifetime of *John* and *Esther*, because it is expressly extended to issue-male born in due time after the death of *John*, therefore this can never be the meaning of the words.

I do not think that the release under the articles is material on one side or the other, and therefore it may be thrown out of the case.

There are three considerations.

First, Whether the contingency has taken place upon which the trust of these terms was to arise, or not? And if it is still to be regarded as a beneficial interest, or whether they are attendant upon the inheritance?

Secondly, Whether the plaintiffs have barred themselves of their right to the £4000?

Thirdly, Whether the defendant, Mr. *Meynell*, is entitled to have an assignment of these terms?

[80] As to the first question; upon taking all the circumstances of this case together, I am of opinion the contingency has not happened:—

“That in case there should be no issue-male of the said *John Allen*, on the body “of the said *Esther Stevenson* begotten, at the time of the decease of the said *John Allen*, or of the said *Esther Stevenson*, which shall first happen, or in *ventre sa mere*,” &c.—*vide* the settlement.

“Or in case the issue-male between them, shall all of them die without issue-male, “and that there shall be a failure of issue-male of the body, &c., and that there be, at “the time of such failure, issue-female, one, or more daughters between them the said “*John* and *Esther* begotten, living at the time of the said *John Allen*'s decease, or of “the said *Esther*, &c., then the trustees, &c., shall raise and pay, if one daughter £3000, “if two or more £4000 equally to be divided,” &c.

The ambiguity of this clause arises from the word *living*.

The counsel for the plaintiffs have construed *living* to refer to daughters living at the time of the failure of issue-male, and that the meaning of the words *living* at the time, &c., are to be taken as a further description in regard to the failure of issue-male.

The counsel for the defendants have construed the word *living* to refer to the issue-male living at the time of the said *John Allen*'s decease, or of the said *Esther*, which shall first happen.

The clause relating to the payment explains it still further, and shews the parents could not mean to extend the payment of these portions to a son's dying without issue-male at any time, whatsoever, for the brother might have lived to fourscore years, which is too remote for them to have in their contemplation, and therefore they have fixed the payment at twenty-one.

The interest also was to commence upon the dying of *John Allen*, &c.

This refers to either dying without issue-male, and in this case both died leaving issue-male.

The meaning then is plain, that this was intended as a provision for daughters, if there should be only daughters at the time of the death of *John Allen*, or of the said *Esther*.

The common and ordinary provision in marriage-settlements is, that if the sons die before twenty-one, then the [81] trustees, &c., shall by sale, &c., levy and raise, &c., and not that it should be stretched to a dying at any time.

The second question is, whether the plaintiffs have barred themselves of their right.

To my apprehension, it was intended by the mother, daughters, and sons, that all the estates in the family should be parted with upon the consideration expressed in the articles.

It appears plainly too, that the son was to convey this estate to Mr. *Meynell*, clear of every thing but the estate for life, which the mother had by virtue of her jointure, without any reservation besides for any other part of the family.

Great part of the estate of *John Allen* was settled on the mother, with remainder to the son in tail, remainder to him in fee, and therefore the son by fine could have barred the remainder on all the estates, except the estate left by the grandfather.

The proviso was not intended to save any right the daughters might have upon any lands, and after having a sum of money in consideration of these articles, it would be too much for them to contend that they have a right to set up this demand.

It seems to me, that Mr. *Meynell* has given very amply for this estate, and-shall a mistake of the parties, who knew nothing of the £4000 at the time, turn to the prejudice of a fair purchaser.

It is rightly observed, that the bill is inconsistent; for would they have the consideration of these articles and the £4000 too, when their releasing all demands was the only pretence for the sum of £982, the consideration money in the articles.

It is said, that the whole articles must be performed; but *Samuel Allen* has not performed his part, for he has not conveyed the *Shewell* estate, and therefore the articles are void. But still the defendant Mr. *Meynell*, is intitled to his equity, for the heirs of *Samuel* ought to perform it.

And if the plaintiffs insist upon the £982 they must convey to Mr. *Meynell*, or else they are not entitled to it; which they agreeing to accept, Lord *Hardwicke* dismissed the bill as to the trusts of the term set up by the plaintiffs, and they were decreed to convey by an assignment of the terms to Mr. *Meynell* upon payment of £590, part of the £982, which sum was directed to be paid in thirds to the plaintiffs from the time of the conveyances executed, the [82] residue of the £982 was directed to be paid to the executors of the mother, the plaintiffs *Malden* and his wife. (Reg. Lib. B. 1736, fol. 477.) (1)

(The statement of this case, and arguments of counsel are taken from Lord *Hardwicke's* Note-book; the judgment from *Atkyns*.)

(1) In the *Lord Chancellor's* Note-book the following decree appears: 1st. Account of what is due for £982 and interest at £4 per cent. from 25th December 1731, on possession. 2nd. That £590 part of the principal, together with the interest for that sum be paid by defendant Mr. *Meynell* in manner following (that is to say), one third to plaintiff *Malden* and his wife, one third to plaintiff *Warburton* and his wife, and one third to plaintiff *Esther Cooper*—it being admitted that her husband is dead. 3d. Residue of £982 and interest to be paid to the executors of *Esther Allen*. 4th. On the cross bill upon such payment made, and payment of the residue to the executors of *Samuel Allen*, defendant *Ann Burdet*, representative of surviving trustee, assign the two terms to such person or persons as defendant *Meynell* shall appoint to attend the inheritance, at his expense. Master to settle it. No costs on either side.

MARY METCALF, Widow, *Plaintiff*; and IVES and his Wife, and JOHNSON and his Wife, *Defendants*: and IVES and his Wife, *Plaintiffs*; and MARY METCALF, and JOHNSON and his Wife, *Defendants*.

June 18th, 1737.

S. C. 1 Atk. 63.

By articles before marriage, husband and wife agree in consideration of £2000 the wife's portion to release all right which they might be entitled to in respect of her father's personal estate by the custom of London; this agreement though never carried into execution by the husband and entered into when his wife was an infant shall bind and prevent her claiming any further part of her father's personal estate; and the wife's right to the orphanage part shall go to increase the whole general estate, of the father; and the rather as the release is to be made to the executors who represent the whole estate; (1) and an award between some of the parties in respect of the father's personal estate was set aside on the ground that the marriage articles had been concealed from one of the arbitrators.

Upon the marriage of *Mary Metcalf* with her late husband, her father, *William Russell*, a freeman of *London* settled some houses in *London*, of the value of £1000, upon her [83] and her husband and the issue of the marriage, which was all the advancement she had from her father during her life, and upon the marriage of his two other daughters, *Mrs. Ives* and *Mrs. Johnson* he gave them each £2000. Previous to the marriage of *Mr. and Mrs. Johnson*, an agreement, dated 4th of February 1703, was entered into by which in consideration of £2000, the marriage portion of *Mrs. Johnson*, *Richard Johnson* and *Sarah* declared and agreed that the said sum of £2000 was to be the marriage portion of *Sarah*, and should be in full satisfaction, lieu, and bar of all such part and share of the personal estate of *William Russell* which *Sarah* or her husband or he in her right might claim or be entitled unto by common law or by virtue of any custom of the city of *London*, and they both covenanted not to prosecute any suit or action for any part or share which *Sarah* might be entitled unto out of her father's personal estate, and to execute releases to the executors or administrators of the father. At the time of executing this agreement and of the marriage *Mrs. Johnson* was an infant, *Russell* by the sale of his real increased his personal estate to near £30,000, and died leaving *Mrs. Metcalf*, *Mrs. Ives*, and *Mrs. Johnson* his only children, having first made his will, whereby he left *Mrs. Metcalf* £2000, and an annuity of £40 *per annum* to *Mrs. Johnson* for life, and after some other legacies made *Ives* and his wife residuary legatees.

Mrs. Metcalf being willing to waive her legacy and take to her orphanage share, some differences arose thereon between her and *Ives* and his wife, which were referred to arbitration. The arbitrators by their award dated in April 1727, taking notice that *Ives* had made oath that the testator's estate amounted to £26,000, whereout he owed £1200, and considering *Mrs. Ives* as not advanced at all, and *Mrs. Johnson* as advanced only by the £2000 given to her upon her marriage, and consequently entitled to a further orphanage share of the estate, awarded *Mrs. Metcalf* the sum of £4450 in full of her orphanage share, and mutual releases to be given, which was accordingly done. In 1726, *Johnson* and his wife, filed a bill in the Exchequer against *Ives* and his wife in respect of the orphanage part of *Russell's* estate, which terminated in an agreement between *Johnson* and *Ives*, by which *Johnson* agreed to take £2143 in full of all demands on the estate of *Russell*. The marriage articles between *Johnson* and his wife were not produced before the arbitrators; one of them indeed stated that he had seen them, but the other swore that he had not, and that if he had known their contents he would not have consented to the award. *Mrs. Metcalf* now brought her bill to be relieved and to set aside the award, and releases, and to be let into her full orphanage share, regard being had to *Ives's* advancement and to *Johnson's* being barred from any share by her marriage articles; a cross bill was exhibited by *Ives* and his wife against *Mrs. Metcalf* and against *Johnson* and his wife, praying relief against the award, for that no allowance was made thereby of the £1000 which *Mrs. Metcalf* had received upon her marriage, and which was concealed by her from the arbitrators, and that she might be decreed to give up her

securities for the £4450 awarded to her, and account for the interest received ; and praying against *Johnson* that he might be decreed to return the money he received for the purchase of his claim, he being barred by the articles.

Both causes were heard at the Rolls and both bills dismissed.

The questions now were, whether these articles were a [85] bar being but a bare agreement not carried into execution, and if so whether the benefit arising from the composition with *Johnson* should accrue to the estate of the freeman, or only to his legatary share ; and lastly, whether the court would relieve against the award.

Mr. Attorney-General (*Ryder*), Mr. *Chute*, and Mr. *Stracey*, for the plaintiff *Metcalf*, insisted that the marriage articles of Mr. and Mrs. *Johnson* were binding as to her interest in the customary share ; that there could be no doubt that a child of full age might agree to do such an act for a valuable consideration, and that if so then a husband who marries a woman under age might covenant to do it, and to release the customary share ; and to this point they cited *Hobson v. Trevor*, 2 P. Wms. 191. *Beckley v. Newland*, 2 P. Wms. 182. *Taylor v. Taylor*, in Scacc. *Lockyer v. Savage*, in Scacc ; 2 Stra. 947. *Kemp v. Kelsey*, Prec. in Chan. 544, 594, and it was also argued that *Ives* and his wife could not insist that the award should not be set aside since it was the prayer of their own bill that it should ; and further that having purchased of *Johnson* at an under-rate they ought to be accountable.

Mr. *Fazakerley*, for *Ives* and his wife, contended that Mrs. *Metcalf* was bound by the award ; that she acquiesced in it till 1732, and received the money awarded. That the award was right in itself ; but supposing in strictness there was a mistake, mistakes in judgment afford no ground to set aside an award, the parties have had an opportunity of being heard ; and it is not pretended that they were ignorant of the fact of the articles : if they were aware of them it was their business to have laid them before the arbitrators, indeed one of these at least, swears that he had heard of them. It these cases the court will not examine whether they judged rightly or not, unless there be fraud. That it was true that Mr. *Ives's* bill sought to set aside the award upon certain terms, but yet by his answer he insisted upon the award as against Mr. *Metcalf* that one thing made this an unconscionable demand. The will of the father has given £2000 to Mrs. *Metcalf*, and £3000 to her children, which must come out of the deadman's part.

Mr. *Browne*, for *Johnson* and his wife, contended that the agreement on the marriage of *Johnson* did not bind the wife who was then an infant, and could have no more force than if she had not been a party. That there is no lien on the orphanage part, it being only a possibility, and that the [86] husband had no interest at the time of making the articles which was before marriage. In *Lockyer v. Savage* the wife was of full age and could bind herself. In the case of *Kemp* there was a marriage without the father's consent, and that forfeits the orphanage part ; this is not a case within the custom, for by that it must be—1st, either a bar by advancement which this cannot be said to be, or 2nd, a composition, this is not so because Mrs. *Johnson* was an infant and incapable of contracting. This then is only the case of a personal agreement between the husband and the father ; if the wife should survive, this right would survive to her ; it is only a personal obligation on the husband, and cannot bind the wife.

Lord Chancellor. I cannot enter into any of the hardships which may fall upon any of the parties, but must decree according to the merits of the case. The first question is whether these articles being but a bare agreement not carried into execution shall bar the defendants *Johnson* and his wife, from claiming any further share of her father's personal estate. And as to that I am of opinion that the articles are a bar, they being entered into as a consideration for the marriage and portion, long before the defendant, *Johnson*, was entitled to any thing from her father, and no hardship is thereby imposed by him either upon the husband or wife ; and there is no difference in a court of equity whether it be but a bare agreement or whether it be actually executed ; but both must operate as well against customary as other rights, there being no difference between common law, and customary rights, nor between vested and contingent ones. As appears from the case of dower which is both a common law and a contingent right, and yet of which a woman may bar herself ; so that contingent and vested rights stand as to the present purpose upon the same footing, it being in a person's power to bar him or herself of both. (See *Blunden v. Barker*, 1 P. Wms. 639. *Cox v. Belitha*, 2 P. Wms. 273. *Lockyer v. Savage*, 2 Strange, 947.) It has been objected that the wife was an infant at the time of these articles ; but

the husband was of full age and hath thereby contracted to accept of this sum as a full bar, and to give a release to the father's executors; and this same husband being living at the father's death must execute this agreement; besides this was such an interest as he might have released, and his release would [87] have been good against the wife. It is plain that had she been of age these articles would have bound her; but in the present case though she was not of age, it is not herself but her husband that is before the court, and he can take no advantage of his wife's infancy; and if agreements of this kind were not held good and binding it might occasion great prejudice to the citizens of *London*, who may desire to marry their children in their own lifetime, and to settle the rate of each child's portion. The next question is, whether the plaintiff can claim the benefit of this agreement; in other words, whether the surplus arising from this composition shall go to the freeman's whole estate, or whether only to his legatary share; and this I think must come within the constant rule, that in cases of composition what accrues thereby goes to and is considered as part of the freeman's estate, and as if the person compounded with had been entirely out of the question. Agreements to do a thing whether relating to customary or common law rights are considered in equity as if the thing was actually done; so this agreement being to release to the executors of the father must be so construed as to have the same effect as if the release had actually been made, which would have operated as an extinguishment of the wife's right to the orphanage part, and the benefit would have accrued to the whole estate, the executors being the freeman's representatives as to the whole estate, and therefore the release must be according to the agreement.

The last point is, whether there ought to be any relief against the award; and I think the plaintiff well entitled to relief upon account of the concealment of the articles from one (at least) of the arbitrators, who deposes that had he known of them, he would not have made such an award. Now though awards (2) are not to be set aside for an error in [88] judgment in point of law, yet if any act or industry be used by either of the parties to prevent the arbitrators coming at the knowledge of the fact, it will be a good ground to relieve against and set aside such an award; as was done by Lord *Cowper*, who set aside an award for the arbitrators having proceeded upon a mistake. Upon these grounds the decree at the Rolls was reversed; and the articles were decreed to be a bar; and the award to be set aside. (Reg. Lib. B. 1736, fo. 447.)

(This case is taken from a manuscript found amongst the papers belonging to Lord Chancellor *Hardwicke*.)

(1) See *Pusey v. Desbouverie*, 3 P. Wms. 315. *Read v. Snell*, 2 Atk. 644. The cases cited in *Tomkyns v. Ladbroke*, 2 Ves. 592. The present case and the other cases appear to have been decided with reference to the particular customs of the city of *London*.

In *Pitt v. Jackson*, 2 Bro. Ch. Ca. 51, by marriage-settlement £1500 was vested in trustees, and £5000, covenanted to be paid to them by the husband to be laid out in land to be settled to the husband and wife for their lives, with remainder to the children of the marriage as the father should appoint, and in default of such appointment, as the mother should appoint, and in default of her appointment to the children in tail; the father by his will stating that the money had not been laid out in land, gave to *Ann* more than half of the money, and the residue to *Mary*; but afterwards having advanced to *Ann* upon her marriage more than she could have been entitled to under the settlement, he by a codicil revoked what he had given to *Ann* by his will. It was held that the father became a purchaser of *Ann*'s share under the settlement by the fortune given to her on her marriage; and see *Smith v. Lord Camelford*, 2 Ves. jun. 698.

But in *Folkes v. Western*, 9 Ves. 456, where under marriage articles certain sums were agreed to be settled upon younger children as the father and mother or the survivor should appoint, and in default of appointment equally amongst their children, and the father having two younger children advances upon the marriage of one child a sum of money in satisfaction of her portion: It was held, that the effect of the advancement was not to make the father a purchaser of that child's portion, but that her portion went to the other child who had not received any advancement. It is to be observed, that in this case *Pitt v. Jackson* was not brought under the consideration of the court, and that it was decided in analogy to the particular customs of *York* and *London*. In speaking of this case, the Vice-Chancellor (Sir J. Leach) says, "that

"having carefully considered the case of *Folkes v. Western*, I do not concur in the "observation made at the bar, that there is error in that decree, inasmuch as it was not "declared that the father was a purchaser of Mrs. *Lloyd's* share; there was in that "case no expressed intention on the part of the father to that effect." *Noel v. Lord Walsingham*, 2 Simon's & Stuart's Reports, page 111. But in *Dawson v. Duke of Cleveland*, post, 106, where the father having appointed under letters patent £8000 to one daughter for her marriage portion and the residue amongst his other younger children, and afterwards gives to that daughter a marriage portion of £20,000, Lord *Hardwicke* held that the £8000 accrued to the personal estate of the father.

(2) Awards cannot be set aside upon errors in law if the parties refer a question of law to an arbitrator meaning to have his decision upon the law, *Knox v. Symonds*, 1 Ves. jun. 369. *Ching v. Ching*, 6 Ves. 282. *Young v. Walter*, 9 Ves. 364. But if they refer to a person to decide all matters in difference according to law, and he means to decide according to law, and mistakes, the Court will set that right, *Kent v. Elstob*, 3 East, 13. *Young v. Walter*, 9 Ves. 364. Awards may be impeached for misbehaviour, corruption, excess of power, and mistake of arbitrators, *Burton v. Knight*, 2 Vern. 514. *Chicot v. Lequesne*, 2 Ves. 315. *Morgan v. Mather*, 2 Ves. jun. 15. *Walker v. Frobisher*, 6 Ves. 70. But the evidence of mistake must be clear and distinct, *Anderson v. Darcy*, 18 Ves. 448.

JAMES BUSH and Another, Executors of JOHN WOODWARD, *Plaintiffs*; and ELIZABETH WOODWARD and Others, Executors of FRANCIS WOODWARD, *Defendants*.

June 24th, 1737.

Where a settlement was prepared whereby the father agreed to settle upon his son who was unprovided for, and his wife and the issue of the marriage certain lands; but previous to its execution refused to execute it unless the son gave him a bond, to which the son having objected at last consented and privately executed the bond; The court relieved against the bond.(1)

Mr. *Attorney-General* for the plaintiff stated, the bill was for relief against a bond privately obtained by *Francis* [89] *Woodward* from his son *John Woodward*, in fraud and prejudice of the marriage agreement of the latter.

In 1728 *John Woodward*, being about to be married to a lady whose portion was £3000, a settlement was prepared whereby the father agreed to settle certain lands upon his son and his intended wife and the issue of the marriage. Previous to the execution of it, *John Woodward* was for the first time informed that his father, *Francis Woodward*, would not execute it unless he gave him a bond for £500. To this *John Woodward* strongly objected; but at last consented, and the bond in question was accordingly privately executed by him, by which he bound himself in a penalty of £1000 to pay £500 within one month after his father's death.

Mr. *Browne* for the defendants. *John Woodward* was a younger son wholly unprovided for, there being no provision secured to him in his father's settlement. The person who informed him of the necessity of executing the bond was the solicitor employed by the wife's family.

The *Lord Chancellor* decreed that the plaintiff should be relieved against the £500 bond; and that the same should be delivered up to be cancelled; and that a perpetual injunction should be awarded to stay proceedings on the said bond. (Reg. Lib. A. 1736. fo. 596.)

(This case is taken from Lord *Hardwicke's* Note-book.)

(1) So *Arundel v. Trevilian*, 1 Ch. Rep. 87. *Drury v. Hooke*, 1 Vern. 412. *Smith v. Bruning*, 2 Vern. 392. *Stribblehill v. Brett*, 2 Vern. 446. *Smith v. Aykwell*, 3 Atk. 566. *Cole v. Gibson*, 1 Ves. 503. And in *Shirley v. Master*, 1779, the court of Exchequer was of opinion that such contracts being avoided on reasons of public inconvenience, will not admit of subsequent confirmation; but a court of equity will not set aside a marriage brokerage bond; which when done would be injurious to a former agreement made upon a valuable consideration, *Roberts v. Roberts*, 3 P. Wms. 74. So underhand agreements made to defeat marriage agreements are set aside as fraudulent, *Redman v. Redman*, 1 Vern. 348. *Gale v. Lindo*, 1 Vern. 475. *Lumlee*

v. *Hanman*, 2 Vern. 499. *Keat v. Allen*, 2 Vern. 588. *Webber v. Farmer*, 2 Bro. P. C. 88. Relief seems to have been given in the preceding cases upon the ground of vice in the original contract; but in *Neville v. Wilkinson*, 1 Brown Ch. Ca. 53, where the original contract was good, yet where the defendant upon a treaty of marriage represented that a debt did not exist, Lord *Thurlow* relieved against it, and said he would not lay it down as a rule that fraud, in cases of this nature, must be upon an article expressly contracted for; if any man upon a treaty for any contract will make a false representation, by means of which he puts the person bargaining under a mistake upon the terms of the bargain, it is a fraud—it misleads the parties contracting on the subject of the contract. See likewise *Scott v. Scott*, 1 Cox's cases, p. 367, where *Eyre, C. B.*, says, that in *Neville v. Wilkinson*, the concealment of the debt directly affected the trusts of the marriage agreement; but *quære* whether the court would relieve against the wilful concealment of a debt originally good, but which did not impugn some part of the marriage agreement, or infringe some interest derived under it, *ib.* A bond given as a remuneration for assistance in effecting an elopement and marriage, though given by the husband subsequent to the marriage, is void, *Williamson v. Gihon*, 2 Sch. & Lef. 364.

[30] NANCY SMITH, *Plaintiff*; and JAMES DOWNING, *Defendant*.

June 25th, 1737.

Particular acts of excessive drinking by a party executing a conveyance (1) not a sufficient ground to set aside a conveyance; nor inadequacy of price alone, (2) where there is no fraud, especially where the person claiming against the conveyance has allowed fifteen years to elapse without taking any step.

This case came on by Appeal from a Decree of the *Master of the Rolls*.

The plaintiff claimed the property in question as heir at law to her mother.

[91] The defendant by way of defence insisted:—

1st. That the plaintiff was illegitimate.

2ndly. That the premises were conveyed to the defendant by way of mortgage in 1713, and that in 1714, the equity of redemption was absolutely released to him subject to an annuity of £10 *per annum* to the plaintiff.

The supposed marriage between the plaintiff's father and mother was said to have taken place in 1697.

By deed of 20th March 1703, the premises in question were vested in trustees, in trust for the separate use of *Mary Pearson* the plaintiff's mother for her life remainder to such uses as she should by deed or will appoint.

Mary Pearson, upon the death of *Henry Pearson* married *Lewis Rice*, and by deed of 13 January 1713, mortgaged the premises to the defendant for 1000 years to secure £300 which he had lent to her, and the receipt of which was thereby acknowledged.

Mary Pearson otherwise *Rice*, by will of 20 March 1713, gives the premises to the defendant and his heirs, and declares her will to be that he should pay to the plaintiff by the appellation of "her god-daughter" £10 *per annum*, during her life, and directs her trustees to convey the premises to the defendant and his heirs.

By deed of 14th August 1714, *Mary Pearson* otherwise *Rice*, after reciting that the mortgage term was forfeited to the defendant, and that a further sum of £300 had been advanced, the receipt of which was thereby acknowledged, she and her trustees grant and confirm the premises to new trustees for 100 years, remainder to the defendant and his heirs. The trust of the term of 100 years, was declared to be to secure £60 *per annum* to *Mary Pearson* for her life, and the residue to the defendant, and after her death to secure the annuity of £10 *per annum* to the plaintiff.

Mary Pearson died on the 28th of November 1714.

By deed of 20 January 1714, reciting *Mary Pearson's* will, her trustees in pursuance of the trusts thereof convey the premises in trust for the defendant, subject to the annuity of £10 *per annum*.

On behalf of the plaintiff, evidence of her legitimacy was adduced, but it appeared upon examination in the parish where the marriage between her father and mother was stated to have taken place, that the register for that year was not to be found. In order to invalidate the conveyances under which the defendant held, evidence was

ad-[92]-vanced to shew that the estate at the time *Mary Pearson* came into possession of it was worth £200 *per annum*, and that she by immoderate drinking had so much impaired and weakened her understanding, as to become incapable of managing her affairs, and that about six weeks before her death, she went and lived with the defendant.

Mr. *Fazakerley* and Mr. *Yate*, for the plaintiff, contended that the plaintiff's legitimacy was established by the evidence, and that the conveyances to the defendant was void for fraud and imposition. That by the deed of January 1714, he took a conveyance from the trustees in pursuance of the will, without relying upon his title as a purchaser.

Mr. *Attorney-General* and Mr. *Browne*, for the defendant, contended that the plaintiff's legitimacy was not established. That the defendant's title was secured by a fine levied in Trinity Term 1714, by *Mary Pearson*, of which the deed of 14 August 1714, was a declaration of uses. That where a feme covert levies a fine without her husband, no one but her husband can ever avoid it. That there is no proof of *Mary Pearson's* incompetency, or of any fraud. That a valuable consideration was given for the conveyances, which is acknowledged by the deeds themselves. That *Mary Pearson* did not come to live with the defendant until after the deeds were executed, and that the plaintiff had continued to receive her annuity until the year 1733, when the bill was filed.

Lord Chancellor (June 24, 1737). There are two questions in this case ; 1st, Whether the plaintiff has made out her legal title as heir at law ; and, 2dly, If she has, whether there are equitable grounds to set aside the conveyances under which the defendant claims.

The first question depends upon the plaintiff's legitimacy ; but it is unnecessary to examine the evidence upon that point, because the legal title has been shewn to be in the defendant, and I do not find any grounds of equity to set aside those conveyances, and to take that legal title from him.

It is said that these conveyances were fraudulently obtained, but there is no proof of actual fraud or imposition. It is, however, contended that sufficient grounds for relief exist in the circumstances arising out of the condition of the parties, and of the deeds executed between them ; and, first, the evidence of *Mary Pearson* having been addicted to drinking is relied upon, but particular acts of excessive [93] drinking are not sufficient ; and if the excess was so great as to produce actual imbecility, the case is open at law.

2dly, It is said that *Mary Pearson* was actually in the power of the defendant, and that this is to be inferred from her residing in his house ; but by the plaintiff's own evidence, she did not go to reside with the defendant until after all the conveyances were executed. The defendant's answer says, that it was about August, which might indeed be before the conveyance of the 12th of August, but must have been subsequent to the mortgage, and the will, the first of which is dated on the 12th of January 1713, and the latter on the 20th of March 1713, at which times it is not pretended that she resided with the defendant, and the will shews her intention, that he should have the estate. The last point insisted upon is, that the consideration is inadequate. That alone would not be a sufficient reason for me to decree in favour of the heir at law where no fraud appears : but consider what the consideration is ; the property consists of houses, the consideration was £600 in money, £60 *per annum*, reserved to herself for life, and £10 *per annum* to the plaintiff ; besides which it is clear that she intended some advantage to the defendant.

Added to these considerations, is the great length of time which the plaintiff has permitted to elapse. The bill was not filed until fifteen years after the plaintiff came of age, during the whole of which time she accepted her annuity of £10 *per annum*, although she must have known in what right she received it. I am therefore of opinion, that the decree must be affirmed. (Reg. Lib. B. 1736, fol. 403.)

(This case is taken from Lord *Hardwicke's* Note-book.)

(1) Intoxication alone is not a sufficient ground for setting aside a deed or agreement, *Cory v. Cory*, 1 Ves. 19. *Cooke v. Clayworth*, 18 Ves. 15. *Secus* if through the management or contrivance of him who gained the deed, the party from whom such deed has been gained, was drawn in to drink ; *Johnson v. Medlicott*, by Sir J. *Jekyll*, May 29, 1734, 3 P. Wms. 130 ; or where there is that extreme intoxication

which deprives a man of his reason, *dictum* by Sir William Grant, in *Cooke v. Clayworth*, 18 Ves. 12.

(2) Mere inadequacy of price is not a ground for setting aside an agreement, see *Mortimer v. Capper*, 1 Brown's Rep. 157. *Griffith v. Spratley*, 1 Chan. Rep. 382. *Moth v. Attwood*, 5 Ves. 845. *Low v. Barchard*, 8 Ves. 133. *Burrows v. Lock*, 10 Ves. 474, unless the inaccuracy is so gross as to shock the conscience of any man who heard the terms, *Heathcote v. Paignon*, 2 Bro. Ch. Ca. 167, and *Gibson v. Jeyes*, 6 Ves. 272; or where it is so gross, as to be conclusive evidence of fraud, *Coles v. Trecothick*, 9 Ves. 246. *Lowther v. Lowther*, 13 Ves. 103; or where it is such as to satisfy the conscience of the court by the amount of the inadequacy that there must have been imposition or that species of pressure upon distress which in the view of the court amounts to oppression, *dict. per Lord Eldon*, *Underhill v. Horwood*, 10 Ves. 209. What is to constitute that inadequacy from which fraud, imposition, or oppression is to be inferred has never been defined. In *Heathcote v. Paignon*, 2 Brown's Rep. 166, an annuity purchased on a life of 30 for four years purchase, was considered to afford evidence of fraud. But this decision has been disapproved of by Lord Eldon, Lord Redesdale, and by Lord Thurlow himself, and is not considered as an authority. See the note to *Verner v. Winstanley*, 2 Sch. & Lef. Rep. 395. *Gibson v. Jeyes*, 6 Ves. 274. *Low v. Barchard*, 8 Ves. 137. In *Mortimer v. Capper*, 1 Brown's Rep. 156, Lord Thurlow mentions a case where the consideration was only one tenth of the value, and yet a specific performance was decreed.

[94] JOHN SIMANCE and ELIZABETH his Wife, *Plaintiffs*; and JAMES TATAM, ROBERT HITCHCOCK, and RICHARD WEBB, *Defendants*.

June 28th, 1737.

S. C. 1 Atk. 613.

Where by a marriage-settlement the husband conveys his estate to trustees to the use of himself for ninety-nine years, if he should so long live, with remainder to trustees to preserve contingent remainders, remainder to the wife for life, remainder to the heirs of her body by the husband, with a covenant on the part of the husband not to bar or destroy the estates intended to be settled, this Court will not compel the trustees to destroy the contingent remainders by joining in a sale.

The bill as against *James Tatam*, was for a specific performance of an agreement for the purchase of an estate, and as against *Hitchcock* and *Webb*, that they might be decreed to join in the conveyance.

By an indenture of purchase of June 3, 1729, between *John Simance* of the first part, *Elizabeth Hitchcock* of the second part, *Robert Hitchcock* and *Richard Webb* of the third part, being the settlement previous to and in consideration of the marriage between the plaintiffs, the estate in question was conveyed to *Hitchcock* and *Webb*, and their heirs, to the uses after the marriage of *John Simance* and his assigns, for ninety-nine years, if he should so long live, and from and after the determination of that estate, to *Hitchcock* and *Webb*, and their heirs, in trust to preserve the remainder to the wife for her life by way of jointure, remainder to the heirs of the body of the wife begotten by the husband, remainder to the right heirs of the husband. This indenture of settlement also contained a covenant on the part of the husband, not to bar or destroy the estates intended to be settled.

Mr. *Attorney-General* for the plaintiffs, cited the following cases, *Tipping v. Pigot*. Mich. 1713. *Elie v. Osborne*, 2 Vern. 754. *Treven v. Charlton*, and contended that if the trustees should join in the conveyance, a court of equity would not compel them afterwards to make satisfaction; and that [95] courts of equity consider the tenancy in tail as including the whole interest in the estate, and that no remainder over is of any value.

Mr. *Pitworth* for the defendant *Tatam*, argued that this settlement ought to be considered as articles in respect of the covenant by the husband not to bar or destroy the estates intended to be settled.

Lord Chancellor (June 28, 1737). There are many cases in which the Court will compel the trustees to join in such a conveyance as will destroy contingent remainders, but then it must be in some measure to answer the uses originally intended by the

settlement ; and has been usually done in the case of old settlements only, as in *Winnington v. Foley* ; (1) but I believe no instance, where they have compelled such trustees to join with the father termor for ninety-nine years, and the son to sell the estate.

The old notion was, that these trustees were only honorary ; but this has been waived since, for in the case of "*Pigot v. Pigot*, Lord *Harcourt* was of a different opinion, and in *Mansell v. Mansell*, 2 P. Wms. 678, Lord Chancellor *King*, assisted by Lord Chief Justice *Raymond*, and Lord Chief Baron *Reynolds*, was of opinion, that trustees for supporting contingent remainders, joining to destroy them, were guilty of a breach of trust, and that there was no diversity, whether the settlement be voluntary, or for a valuable consideration, or by will only." But the reason of those cases turned upon what the Court should do, after trustees had actually destroyed the remainders ; here the case is different, for the application to the Court is to compel the trustees to do an act which would destroy the remainders.

There is another difficulty besides, which is, the husband's actually covenanting in the settlement, that he will not bar the estate tail to the wife, but preserve the uses before limited ; and even though the husband were dead, the wife could not do any act by which she could bar the estate tail, notwithstanding the trustees should consent to join with [96] her, for she is absolutely restrained from barring it by the 11 Hen. 7, c. 20.(2)

If it had been an application only to destroy the contingent remainders, I should have taken more time to consider ; but here it would overturn all the uses of a marriage settlement, which would be assuming too much power, and would be making a decree to compel a breach of the husband's own covenant.

The bill was dismissed.

(The statement of the case, and the arguments of counsel, are taken from Lord *Hardwicke's* Note-book. The judgment from *Atkyns*.)

(1) 1 P. Wms. 536. There, in a marriage-settlement, the husband was made tenant for ninety-nine years, if he so long lived, remainder to trustees during the life of the husband to preserve contingent remainders, &c., remainder to the first, &c., sons of that marriage in tail male successively ; a son was born, and of age, the wife dead ; the son being in treaty for a marriage, which appeared to be a beneficial one for the family, Lord Chancellor *Parker* decreed the trustees should join with the father and son in barring this, and making a new settlement.

(2) " If any woman which shall hereafter have any estate in dower, or for term of life or in tail, jointly with her husband, or only in herself, or to her use, in any manors, lands, &c., of the inheritance, &c., of her husband, and shall hereafter being sole, or with any other after-taken husband, discontinue, alien, &c., or suffer a recovery of the same, such recovery, discontinuance, alienation, &c., shall be utterly void and of no effect."

MICHAEL ROBINSON and THOMAS HUNTER, Executors of Doctor JOHN MORLEY, *Plaintiffs* ; and JONATHAN BACON and ELIZABETH his Wife, RICHARD TAYLOR and MARY his Wife, AARON COOPER and JANE his Wife, and Others, *Defendants*.

Between June 28th, and July 6th, 1737.

Where a testator by his will, gave his personal estate to his executors in trust for the use of his niece *Elizabeth* ; but in case she married before she attained twenty-four, without their consent, then he gave his personal estate to his executors in trust to be disposed of and given to any child or children which then should be lawfully born of his niece *Jane*, or her eldest sister *Mary*, at the discretion of his executors or major part of them. Held, upon the marriage of *Elizabeth* before she attained twenty-four, without the consent of the executors, that she had forfeited her right to the testator's personal estate.

This bill was filed by the executors of doctor *Morley*, to obtain the directions of the Court in the execution of the trusts of his will.

Doctor *Morley*, by his will bearing date the 23rd of September 1730, after giving his real estate to his niece *Elizabeth*, and her issue male and female, in strict settlement, [97] appointed his wife *Ann* (since deceased), and the plaintiffs, guardians of his niece *Elizabeth*, and executors in trust to the use of her, " To whom I give and bequeath

all my goods and chattels, not otherwise disposed of by this my will, or any codicil hereto." He then gave to his wife one half of the table and bed linen, and the other half to his niece *Elizabeth*, and the half he gave to his wife was declared to be in confidence that she would give what remained of it at her death to his niece *Elizabeth*, and he gave two pictures of himself and his wife, to his niece *Elizabeth*, after his wife's death, and then proceeded in these words, and if my said niece shall prefer to marry before she attains twenty-four, without the advice and express consent of her guardians, or the major part of them, I then give all my personal estate and every part of it which is before given in this will, to my said niece *Elizabeth*, except as hereinafter excepted, to the executors in trust before named, to be disposed of and given to any child or children which shall then be lawfully begotten of the body of my niece *Jane Robinson*, or of her eldest sister *Mary*, at the discretion of the executors before named, or the major part of them; and if my said niece *Elizabeth* shall prefer to marry without the express consent of her guardians, in such manner as is before mentioned, or if [she shall die without issue before she shall come to the age of twenty-four years, I give out of my personal estate £400 to the Fellows of Lincoln College, upon certain trusts.

The testator's niece *Elizabeth* married before she attained twenty-four, without the consent of her guardians, and the question was, whether she had by such marriage forfeited her interest in the testator's personal estate.

Mr. Attorney-General and Mr. Noel for Mr. and Mrs. *Bacon*.

These conditions are never favoured, and in the present case the restriction is continued even after the legatee shall have attained her age of twenty-one years. This is not properly a devise over of the personal estate, but there is only a power given to the trustees to dispose of it amongst the children of the testator's other nieces. If they do not dispose of it nothing vests. The testator has left it to the discretion of the trustees whether they will take away the personal estate or not. *Sir H. Bellasis v. Ermine*, 1 Ch. Ca. 22. *Fleming v. Waldgrave*, 1 Ch. Ca. 58. *Paget v. Haywood*, 12th Nov. 1733, at the Rolls.

[98] Mr. *Browne* and Mr. *Fenwick* for the defendants, *Taylor* and *Cooper*, argued, that the Court always supports the forfeiture where there is a limitation over. That in the present case there is a plain trust. The discretionary power given to the trustees extends only to the proportions in which the fund is to be divided. In *Fleming v. Waldgrave*, the person whose consent was necessary, was to be benefited by the forfeiture. In *Paget v. Haywood*, there was only a direction that the money should fall into the residue.

The Lord Chancellor declared, that the interest of the defendant *Elizabeth* was forfeited by her marriage without consent.

(This case is taken from Lord *Hardwicke's* Note-book.)

JOHN SMITH and JOANE his Wife, *Plaintiffs*; and WILLIAM BAKER, *Defendant*,
et c contra.

July 12th, 1737.

S. C. 1 Atk. 385.

Where a person having purchased a copyhold in his own name and in the names of two other persons, devises it to his wife without having made a surrender, the court will supply a surrender in favour of the wife, though she is not unprovided for, as against a person who stands in the situation of a *heres factus*; and though by the custom of the manor unless a disposition is made of the copyhold in pursuance of a surrender, the beneficial interest therein goes to the next in remainder named in the grant.

The original bill was for the surrender of a copyhold estate, and an account of the profits. The Cross-bill prayed, that the defendant might be quieted in the possession of the copyhold.

Gabriel Baker, on the 1st of October 1713, in consideration of £118, 15s. by him paid, obtained a grant of the copyhold estate in question, to be made to himself, *John Broome*, and *William Baker*, during their lives in succession, subject to a life-estate in *Mary Palmer*.

By the custom of the manor, the purchaser of a copyhold being the first person named in the grant, has the power of disposing of the estate by deed or will made in

pursuance of a surrender, but if no such disposition is made by him, the beneficial interest in the estate goes to the next person in succession.

Gabriel Baker being entitled to the copyhold in question, [99] and to the reversionary interest in a leasehold estate for years, and to no other real estate, by his will dated the 1st of June 1720, gave all the rest and residue of his real and personal estate and all his possessions and reversions to his wife, the plaintiff *Joane*, and appointed her executrix. Mrs. *Palmer* died in 1733, and upon *Gabriel Baker's* death, the copyhold estate not having been surrendered to the use of the will, the defendant, as the next person named in the grant, took possession of the estate, and procured himself to be admitted, and insisted that by the custom of the manor, he was entitled to hold the same.

Mr. *Attorney-General* and Mr. *Murray* for the plaintiff contended, that as *Gabriel Baker* had paid the purchase money for the estate, the defendant, notwithstanding the custom, was only a trustee for him, and that therefore if no devise had been made of this estate, and the plaintiff had claimed it as executrix, she would have been entitled to the relief prayed against the defendant. *Clark v. Danvers*, 1 Ch. Ca. 310. *Rundle v. Rundle*, 2 Vern. 264. *Howe v. Howe*, 1 Vern. 415. But that in the present case the copyhold was clearly intended to be devised by the will, there being no other real estate or reversions to which the words in the will could be referred, particularly as the latter word was in the plural number, and that this being the case of a wife unprovided for, the surrender ought to be supplied.

Mr. *Browne* and Mr. *Fazakerley* for the defendant, contended, that this was not the common case of a resulting trust, that the purchaser knew the custom of the manor, and purchased subject to it, and intended that the estate should go according to such custom: that if the defendant is to be considered as a trustee, the custom will be defeated in every instance.

That as to the plaintiff's claim as executrix, copyholds are not within the statute of Frauds and Perjuries, and are not subject to debts. That the defendant being named in the grant ought to be considered as a special occupant. That as to the plaintiff's claim under the will, the copyhold is not mentioned in it, nor necessarily implied, for the words "real estate, and reversions," may be referred to the leasehold for years which is a chattel real, and that the argument arising from the word reversions being in the plural number, is too minute. That though the copyhold had been mentioned in the will, yet the surrender ought not to have been supplied, for the plaintiff is not unprovided for, the personal estate [100] being bequeathed to her; the defendant is the *hæres factus* and wholly unprovided for, and stands in the place of an heir at law or remainder-man.

Evidence was offered on the part of the defendant to prove that applications had been made to *Gabriel Baker* to surrender the copyhold to the uses of his will, and that he had refused, and said that he intended the estate for the defendant.

The *Lord Chancellor* refused to admit this evidence, saying that supposing this to be only a resulting trust by law, it would be dangerous to admit parol evidence against the operation of law; but that the question here was, whether these lands were intended to pass by the will, and this evidence was to explain the testator's intention in his will, contrary to the case of *Browne v. Selwyn* in the House of Lords, which is against all parol evidence to explain a will, although the will was there of personal estate, and contrary to the former authority of *Littlebury v. Buckley*, and several former cases.

Upon the principal point his Lordship delivered the following opinion:

Lord Chancellor. This appears to me to be a plain case for the plaintiff upon the first point, for though the legal estate is by the custom in the next life, yet I think that in equity there is a resulting trust for the representative of the plaintiff's husband who purchased this estate.

I do not however think it necessary for me absolutely to determine this point, although the cases upon it are very strong, particularly that of *Benger v. Drew*, 1 P. Wms. 781.

He who pays the price has a resulting trust at law excepted out of the statute of Frauds, though the conveyance is taken in another name, and this will not defeat the custom where the three are joint purchasers.

But I do not determine this point because the present case rests upon the second.

The first consideration upon the second point is, whether these lands are comprised in the will.

C. v.—27*

I think they plainly are.

Where a man devises all his real and personal estate in possession and reversion to a wife or child,⁽¹⁾ and has no other [101] real estate but the copyhold, it will pass by the general words ; but this depends upon the circumstances of the case.

There are words at the outset of the will which have not been taken notice of, As to all my temporal estate, which it has pleased God Almighty to bless me with, I dispose of as follows.

Here is a plain intention to dispose of his whole estate, and the subsequent words are general enough to carry it ; his leasehold estates for years can never satisfy the word real in the will, for it is called a chattel real only, as it is derived out of the real estate, and the word reversions will be inoperative, unless construed to refer to the copyhold estate.

The next consideration upon the second point is, whether she is entitled to have the want of a surrender supplied.

As to the objection, that she is not a wife unprovided for, it has not appeared to me that the wife is provided for, the *quantum* of the other estates not having been proved : but even allowing she has another provision, yet the husband might not think it sufficient, and therefore I do not look upon this case to be out of the common one, where the court will supply the surrender if he devises the copyhold to her.

It has likewise been objected, that the court will not supply the surrender against an heir, but this rule must be applied solely to an heir in blood, who is of kin to, and represents the testator, and not to a *hæres factus*, for the defendant here is merely nominal, and not even the least relation, but barely of the same name.

His lordship decreed that the plaintiff was entitled to the equitable interest in the estate, and that the defendant should deliver up the possession to her, and that she should enjoy against him, and all claiming under him, and that he should answer for the profits. (Reg. Lib. B. 1736, fo. 476.)

This case appears in Lord *Hardwicke's* Note-book, from which the statement of the case, and the arguments of counsel are taken. The judgment in *Atkyns* is corrected by a Manuscript Report of Mr. *Forrester's*.)

(1) Where copyhold lands are surrendered to the use of the will, by a devise of lands generally, they will pass, notwithstanding there are freeholds to answer such devise. *Tendril v. Smith*, 2 Atk. 85. So where the devisee has only an equitable interest in the copyholds, though there has been no surrender. *Tuffnell v. Page*, 2 Atk. 37. *Carr v. Ellison*, 3 Atk. 73. But it is otherwise where the legal estate is in the devisor, and no surrender has been made. *Hawkins v. Leigh*, 1 Atk. 387. But now by 55th G. 3, c. 192, where the custom of the manor warrants a disposition by will, such disposition shall be valid, though no surrender shall have been made to the use of the will. This statute only applies to a mere formal surrender, and does not apply to a case, where by the custom of the manor, there must be a separate examination of the feme-covert, previous to a surrender being made. *Doe dem. of Nethercote v. Bartle*, 5 Barn. & Ald. 492.

[102] The ATTORNEY-GENERAL at the RELATION of the CHURCHWARDENS and OVERSEERS of the POOR of the Parish of KNOWLE, in the County of WARWICK, *Plaintiffs* ; and EDWARD MOOR, THOMAS TOWLING, WILLIAM BRADLEY, JOHN WHEELER, SARAH LOGGEN, JOSIAH OSBORNE, and REBECCA his Wife, *Defendants*.

July 13th, 1737.

Thomas Harborne, by his will, directs that his debts should be paid by his executrix, and after charging his real estate with £4 *per annum*, for providing coats for poor persons, he gives, in case his daughter shall have no issue, £2000 to trustees, for charitable purposes, and all the residue of his estate, real and personal, he gives to his daughter, and appoints her sole executrix. His daughter having died, without having had issue, it was held, that the £2000 was not, but that the debts were, a charge upon the real estate.⁽¹⁾

By marriage articles it was agreed, that £600 should be laid out in land, and that the land should be settled to the use of the husband for life, remainder to the wife for life, remainder to the heirs of the body of the wife by the husband, remainder to the

right heirs of the husband. The £600 was received by the husband, and never invested in land. The husband having survived his wife, and left a daughter, who died without issue, it was held, that the £600 must be considered as real estate.(2)

The object of this information was to obtain the benefit of certain charitable bequests, given by the will of *Thomas Harborne*.

[103] By the marriage articles between the testator and his late wife, dated the 28th of January 1722, it was agreed that £600, part of the wife's portion, should be laid out in land; and that the land should be settled to the use of, the testator for life, remainder to the wife for life, remainder to trustees for 500 years, remainder to the heirs of the body of the wife by the testator to be begotten, remainder to the right heirs of the husband. On the 29th of December 1726, the testator surrendered all and every part and parcel of his copyhold lands within the manor of *Knowle*, and the reversion and reversions thereof, to such uses as he should appoint by his last will, to be executed in the presence of three witnesses.

On the 21st of August 1728, the testator made his will, in the following words: "I will that my debts, funeral expenses, and the sum of £5 to *Joseph Boston*, of *Balsall Street*, be paid by my executrix, and within one month after my decease. *Item*, I will that my executrix, and her heirs, shall yearly and every year for ever, upon the 2d of September, give to six of the poorest and most proper objects of charity, within the manor of *Knowle*, that duly attend the service of the church, a dark gray cloth coat or gown, of ten shillings price; and I will that £4 *per annum* be charged on the tenement at *Knowle* for that purpose; And if my daughter should not have any issue, then I give to my brother, and the minister of *Knowle*, for the time being, £2000 in trust, for ever, that they or their heirs, for ever, see that the interest of the said £2000 be applied to the best charity they can think upon. All the residue of my estate, real and personal, goods and chattels, whatsoever, I give to my daughter, *M. Harborne*, whom I make sole executrix of my will."

The testator received the £600 agreed by the marriage [104] articles of 28 January 1722, to be laid out in land, and it was never so invested.

The testator survived his wife, and the daughter survived him, and died without issue.

The questions were, whether the legacy of £2000 was good at all; and if good, whether it was intended to be a charge upon the copyhold estates; and, lastly, whether the £600 was to be considered as money or land.

The Attorney-General and Mr. *Fazakerley*, for the plaintiff, argued that the testator intended to make the £2000 a charge upon the copyhold estate. He had no other real estate, and after giving this legacy of £2000 gives all the residue of his real estate to his daughter, meaning so much as should remain after his prior gifts were satisfied. *Trott v. Vernon*, Pre. in Ch. 430; 2 Vern. 708. In *Weal v. Morris*, 23 July 1734, at the Rolls, the words were, "My will is, that all my debts be in the first place paid." The testator then gave several legacies, and then gave all the residue of his real and personal estate. In the *Earl of Warrington v. Leigh*, 1 Bro. P. C. 94, the words were, "As to the worldly estate which God has blessed me with, I give and dispose thereof as follows. *Imprimis*, I will that all my debts be paid." In *Bamfield v. Bamfield*, 31 July 1734, before Lord *Talbot*, the words were, "As to my worldly estate, I give and dispose thereof as follows." He then gave £2500 to his wife, and £20,000 to his daughter. "All the rest and residue of my real and personal estate I give to my two brothers." And Lord *Talbot* said, that as to the distinction between debts and legacies, a wife and daughter were a kind of creditors. So *Robinson v. Robinson*, 20 May 1736, before the Master of the Rolls.

As to the £600 it must be considered as personal estate. The testator has his election to take it as personal estate or as money, and he has made his election by keeping it in his hands as money. His heir cannot insist against him, that he was guilty of a breach of trust.

Mr. *Noel* and Mr. *Murray* for the defendant *Bradley*, who was the customary heir, contended, that the heir at law ought not to be prejudiced by any but necessary implication, and that the present case was very distinguishable from those cited; for here the testator does not begin by making his real and personal estate as one fund for the payment of his debts. The surrender to the uses of his will is not with-[105]-out effect, for the £4 *per annum* is charged upon the copyholds.

Mr. *Floyer* and Mr. *Wilbraham* for the defendants, *Wheeler* and *Loggen*, and

Osborne and his wife, the heirs at common law, contended that the £600 was to be considered as land, and was not charged with the legacy. If the money had been laid out according to the agreement, the testator would have had only an estate subject to the tenancy in tail of his daughter, which is not respected in law, and after his death the daughter might have insisted upon the money being invested in land. In *Lechmere v. Lechmere*, Ca. Temp. Talbot, 92, and 3 P. Wms. 211, 228, it was held, that an heir at law was entitled to the benefit of his ancestor's covenant.

His Lordship, as to the charity of £4 a-year, charged by the testator *Thomas Harborne's* will on his copyhold tenement in *Knowle*, declared that the same ought to be established and paid out of the said copyhold tenement, and decreed an account of the £4 *per annum*; and as to the £2000 so far as to charge the real estate therewith, dismissed the bill. And his Lordship directed that the debts, funeral expenses, and legacies should be paid out of the personal estate of the testator; and his Lordship declared that the sum of £600, part of the testator's wife's portion covenanted to be laid out in land, was to be considered as a debt of the testator, to be satisfied out of his personal estate; and if the said testator's personal estate should fall short to pay his debts, funeral expenses and legacies, then it was ordered that as to so much of his personal estate as should be exhausted by the payment of his debts and funeral expenses, the relators should stand in the place of the creditors, and to have satisfaction of the said £2000 and interest *pro tanto* out of the said testator's real (3) estate, and it was ordered that the same be borne and paid rateably and proportionably between the sum of £600, which was to be considered as part of the real estate of the said testator, and the copyhold land. (Reg. Lib. A. 1736, fo. 653.)

(This case is taken from Lord *Hardwicke's* Note-book.)

(1) Plain words are necessary, as well to disinherit an heir as to create a charge upon real estate. *Per* Lord *Macclesfield*, *Davis v. Gardiner*, 2 P. Wms. 188. But introductory words in a will have been held to charge an estate; as where a testator devises that all his debts shall be paid in the *first place*, and devises his estates to his sister, whom he makes executrix. *Trott v. Vernon*, Pre. Ch. 430; 2 Vern. 708. *Beachcroft v. Beachcroft*, 2 Vern. 690. *King v. King*, 3 P. Wms. 358. *Hutton v. Nicholl*, Ca. Temp. Talbot, 110. *Aubrey v. Middleton*, 4 Vin. 460, pl. 15. *Bench and Others v. Biles*, 4 Mad. Rep. 187. *Leigh v. Earl of Warrington*, 4 Bro. P. C. 91. *Lord Godolphin v. Pinnock*, 2 Ves. 272—569. So, where a testator says, "As to all my worldly estate, my debts being first satisfied," and then proceeds to devise his real estate. *Harris v. Ingledew*, 3 P. Wms. 91. *Newman v. Johnson*, 1 Vern. 45. *Shallcross v. Finden*, 3 Ves. 738. So, where a testator directs his debts to be *first* paid, and afterwards devises real estates to trustees for the use of his children, with power for the trustees to let and repair, and makes them executors. *Williams v. Chitty*, 3 Ves. 545. So, where a testator, in the introductory part of his will, wills and directs that his debts shall be paid and satisfied, and afterwards devises real estate to trustees for a limited purpose of raising portions for younger children, by sale, and appoints them the executors of his will. *Clifford and Others v. Lewis and Others*, 6 Mad. Rep. 33. But where a testator devises, that all his debts shall be paid by his *executors*, and the real estate is specifically devised to his son, who is not an executor, the real estates will not be charged with the payment of debts. *Powell v. Robins*, 7 Ves. 209.

Whether it requires a stronger inference of intention to charge real estates with legacies than debts seems doubtful.

Lord *Alvanley* was of opinion, that it required stronger words to charge lands with legacies than debts. *Rightly v. Rightly*, 2 Ves. jun. 329.

Lord *Loughborough* did not know how to state a difference between debts and legacies. *Williams v. Chitty*, 3 Ves. 551. But Lord *Alvanley*, after adverting to Lord *Loughborough's* opinion, upon reflection, remained of the same opinion. *Keeling v. Brown*, 5 Ves. 362.

In *Bamfield v. Bamfield*, cited in argument, Lord *Talbot* seems to think that there is a difference between debts and legacies.

(2) So *Lingen v. Sowray*, 1 P. Wms. 172. *Disher v. Disher*, 1 P. Wms. 204, and see *Pulteney v. Lord Darlington*, 1 Brown's Ch. Ca. 223. *Wheldale v. Partridge*, 5 Ves. 397; 8 Ves. 227. *Biddulph v. Biddulph*, 12 Ves. 161. *Kirkman v. Miles*, 13 Ves. 338. *Stead v. Newdigate*, 2 Merivale's Rep. 521.

(3) This charitable bequest was not affected by the statute of mortmain. The

Court does not now marshal assets to pay charity legacies. *Attorney-General v. Tyndall*, Ambler's Rep. 615. *Makeham v Hooper*, 4 Brown's Rep. 155.

[106] WILLIAM DAWSON, Executor and Residuary Legatee of Lady BARBARA FITZROY, Plaintiff; and The Duke of CLEVELAND, ANN Duchess of CLEVELAND, Executrix to the late Duke, HENRY VANE and Lady GRACE his Wife, JOHN PADDY and Lady ANN his Wife, two of the Daughters of the late Duke, and THOMAS PULTENEY, a Trustee, Defendants.

July 15th, 1737.

Where under letters patent £3000 *per ann.*] was granted out of the hereditary excise, with a power for the grantee, after the commencement of the estate *in possession*, and during the continuance of his estate and interest therein, to appoint part of the premises, so being in his possession, for raising portions for younger children. An appointment made by the grantee, to commence after his death, was declared void. And where the father made an appointment of part of the premises, for raising £8000 for the marriage portion of one of his daughters, and as to the residue amongst his other younger children, and afterwards gives that daughter a marriage portion of £20,000. It was held, that the other younger children were not entitled to the £8000, but that the father became a purchaser of, and was entitled to the £8000 (1) and interest, from the time of the marriage of his daughter.

King Charles the 2d, by letters patent, dated the 22d of October, in the 26th year of his reign, granted to the Dukes of *Cleveland*, *Northumberland*, and *Grafton*, £3000 *per annum* each, out of the hereditary excise, and to the heirs of their respective bodies, with cross remainders to them and their heirs male, with power for every of them to make a jointure of one third part; and it was further granted to them respectively that they might, after the commencement of the estate in possession, and during the continuance of their respective estates and interests, by writing under their hand and seal, appoint any other part of the premises, so being in his or their respective possession, not exceeding one other third part of the whole, for any number of years not exceeding twenty-one years, in order to and for the purpose of raising portions for his or their daughter or daughters, younger son or sons, respectively, which said limitations and appointments were to be as good and effectual as if the persons were actually named.

[107] The late Duke having become entitled to an additional £1000 *per annum*, upon the death of the Duke of *Northumberland*, on the 20th of July 1722, appointed £1000 and £336, 6s. 8d. *per annum*, to trustees, to hold for twenty-one years, *to commence from and after his death*, in trust for his younger children, in such proportions as he should appoint, and in default of appointment, in equal proportions between them, reserving a power of revocation to himself.

On the 22d of July 1724, the late Duke made a second appointment of the same sums of £1000 and £336, 6s. 8d. *per annum*, to the defendant *Pulteney* and another, to hold from the day next before the day of the date of the appointment for twenty-one years, upon trust, by sale or mortgage of both or any part thereof, to raise £8000 for the marriage portion of Lady *Grace*, provided she married with consent, &c.; as to the residue remaining unsold, or subject thereto, upon trust, yearly to receive the same during the term, or to sell the same and apply the money amongst the Duke's other younger children as he should appoint, or in default of appointment, equally amongst them, provided that until any of the daughters attained twenty-one, the trustees should place out the money at interest, except so much as should be applied for their maintenance.

Afterwards, upon the marriage of Lady *Grace* with the defendant, Mr. *Vane*, the late Duke gave her a marriage portion of £20,000.

Lady *Ann*, another daughter, married the defendant, Mr. *Paddy*. The Duke died in 1730, and Lady *Barbara Fitzroy*, the only remaining younger child died, having by her will, bearing date the 20th of March 1733, made the plaintiff her executor and residuary legatee.

The object of the bill was to have Lady *Barbara's* share of these two annuities of £1000 and £336, 6s. 8d. raised and paid to the plaintiff as her executor.

The questions which arose were, 1st, Whether the first or second appointment

should take effect. If the second, then 2dly, Whether Lady *Grace* was, notwithstanding her marriage portion of £20,000, entitled to the £8000. If not, 3dly, Whether the other younger children were entitled to have it divided between them. If not, 4thly, Whether it belonged to the personal representative, or to the heir of the late Duke.

Mr. *Floyer* and Mr. *Wilbraham* for the plaintiffs, contended, that the first appointment was good, and that Lady [108] *Grace* could not be entitled to a double portion; that the £8000 would fall into the whole fund, for the benefit of the other younger children; and likened it to a cause of the custom of *London*, where a child is advanced.

The *Attorney-General* and Mr. *Brown* for the defendant, *Southcole* and the Duchess of *Cleveland*, contended, that there were no words in the proviso to restrain the Duke from making an appointment to take effect after his death; that the Duke had become the purchaser of the £8000; that it was not like the case of the custom of *London*.

The *Lord Chancellor* decreed that the appointment of 1724 was to take effect, the former one not being in pursuance of the power, inasmuch as the term was to commence *in futuro*; and he compared it to the common case of a power in a tenant in tail to make leases, which must be executed *in presenti*. As to the £8000 his Lordship said, that where a marriage settlement provides portions to be raised for children, if the father, without taking notice of it, gives the child an equal or greater portion, the portion so provided for shall go to the father or his representative, or sink into the inheritance, according to the circumstances of the case. That where the father, in such case, dies without doing any act affecting a term to raise portions, such term has been construed to be extinguished for the benefit of the heir. But if the father does any act to shew an intention of considering himself as the purchaser of the term, by the portion given, as by assigning it, &c., it has been decreed to be raised for the benefit of the father's representatives, but that in the present case the plaintiffs had clearly no title to any share of the £8000.

His Lordship decreed that the appointment of 1724 was to take effect, and that the executrix of the late Duke was entitled to the £8000 and interest, from the time of the marriage. (2)

(The statement of this case, and the substance of the decree, are taken from the *Lord Chancellor's* Note-book. The language of the judgment from Mr. *Forrester's* manuscript report.)

(1) See *Pitt v. Jackson*, 2 Bro. Ch. Ca. 55. *Smith v. Lord Camelford*, 2 Ves. jun. 698. *Folkes v. Western*, 9 Ves. 456. *Noel v. Lord Walsingham*, 2 Sim. & Stuart's Rep. p. 111, and see *Metcalf v. Ives*, ante, p. 82, and the notes to that case.

(2) By the decree in the Register's Book, it is stated, that the late Duke of *Cleveland* having paid a portion on the marriage of the Lady *Grace Vane*, greater than the sum of £8000 provided by that deed that the sum of £8000 and such interest as ought to be paid for the same, ought to accrue to his personal estate. Reg. Lib. A. 1736, fo. 560.

[109] SEYMOUR v. TREVILYAN and Others.

July 16th, 1737.

S. C. 3 Atk. 358.

A husband cannot devise away a wife's paraphernalia, he can only bar her by acts done in his life-time. (See *Northey v. Northey*, post. *Marshall v. Blew*, 2 Atk. 217. *Hastings v. Douglas*, Cro. Car. 343.)

This was a bill brought by the trustees of Mr. *Portman's* will, for carrying into execution the trusts of his will.

Mr. *Portman* by his will of the 31st of January 1723, gives his wife £10,000 in full of all her dower and thirds, and in full satisfaction of any lands he had settled on her for life; and he gives her all her wearing apparel, and ornaments of her person, the gold watch and great pearl necklace which she usually wore, his snuff-box which came from *France*, and all his jewels, except those set about Sir *William Portman's* picture, which he gave to his niece, wife of the defendant *Berkeley*; and all the residue of his personal estate he gives to his executors, for the purposes mentioned in his will.

By a codicil of the 13th of March 1723, he revoked the legacy of his great pearl

necklace and jewels devised to his wife by the will, and ratifies his will in all other respects.

By another codicil of the 16th of April 1726, he gives to his wife his diamond earrings, which cost near £1200; to the Earl of *Pawlett* his snuff-box, that had a cornelian stone thereon; and to his godson *Courtenay*, son of Sir *William Courtenay*, his snuff-box set with diamonds, and ratifies his will in all other respects.

The testator's widow afterwards intermarried with the defendant *Fownes*.

Mr. *Fazakerley* for the plaintiff.

The Attorney-General for the defendants *Fownes* and his wife.

Lord Chancellor. That it is a general rule of equity where the demands are of the same kind of estate, that you cannot claim under and yet controvert the testator's intention.

[110] But I give no opinion where they are different.

It is plain the paraphernalia are included in the devise in the will; but a husband cannot devise away a wife's paraphernalia, he can bar her only by act done in his life-time.

Tipping v. Tipping, 1 P. Wms. 730.

The revocation is of the devise of his jewels, which seem to be contradistinguished even in the will from hers, which are there called the ornaments of her person, and the diamond ear-rings do not appear ever to have been worn by her, and therefore might be no part of her paraphernalia.

But suppose the testator had completely revoked the devise, it was only a revocation of a devise, void in itself, and it is therefore too remote to infer from thence an intention that her rights should pass by the devise of the residue of his estate.

The law in the latter cases, has gone strongly in favour of paraphernalia, I remember this case in Lord *Macclesfield's* time; *Tipping v. Tipping*, 1 P. Wms. 729; Husband had devised his lands for payment of his debts; The creditors had exhausted the personal estate, and amongst the rest the wife's paraphernalia; and on a bill brought by her, my Lord decreed that she should stand as a creditor for them on the real estate.

And his Lordship declared that the defendant *Meliora*, the wife of the defendant *Fownes*, is entitled to her paraphernalia, except the great pearl necklace; and the Master is to enquire of what particulars such her paraphernalia consisted, and what jewels, utensils, and other things had been given to her by her husband, or by any other person by his consent or approbation in his life-time, the same to be delivered to or retained by the defendants *Fownes* and his wife, as the said Master should direct. (Reg. Lib. B. 1736, fo. 496.)

(The statement of this case is taken from Lord *Hardwicke's* Note-book. The judgment from a manuscript report by Mr. *Forrester*. This case is reported in *Atkyns*, under the name of *Seymore v. Tresilian*.)

[111] ELIZABETH TAYLOR, Widow and Executrix of THOMAS TAYLOR, Plaintiff; and JOHN TAYLOR, Brother of THOMAS TAYLOR, and Administrator of JOHN TAYLOR the Father, HENRY MOORE, and THOMAS JORDAN Lord of the Manor, Defendants.

July 18th, 1737.

S. C. 1 Atk. 386.

A father purchases a copyhold estate in the name of his son, then of the age of eighteen, and the father continues in possession till his death. Upon evidence, that the father had declared that he had made the purchase for his son's benefit, this shall be considered as an advancement of the son, and not a trust for the father, though the son had given two receipts for rent for the use of his father.(1)

The bill was for an account of the personal estate of *John Taylor*, the father, and for payment of the distributive share which belonged to *Thomas*, the son, and to supply the surrender of certain copyhold estates devised by the will of *Thomas*, the son.

In 1720, the father purchased a copyhold estate in the name of *Thomas*, his son, who was then eighteen years of age. The father continued in possession till his death, which happened in 1731, upon which *Thomas*, the son, entered. On behalf of the plaintiff, evidence was adduced of the father's having declared that he had purchased the estate for the sole use and benefit of his son *Thomas*, and of the de[112]-fendant

John having admitted that he knew that his father had purchased the estate for the benefit of *Thomas*. On the part of the defendant, it was proved that *Thomas* had in 1723 and 1724 given two receipts for rent, for the use of his father.

In 1733, *Thomas*, the son, married the plaintiff, and by his will, dated the 24th of June 1734, devised as follows :—All my estate, whether real or personal, including my copyhold lands, which I have or intend to surrender to my will, I give two-thirds thereof to my dear wife, and the remaining third I give to the child or children with which my wife is now ensient, and to the heirs of such child or children for ever ; and if such child or children shall not be born alive, or being born alive, shall die without leaving lawful issue, or before he or she, or they have power to dispose of the same ; then I give the said one-third to my wife and her heirs.

Thomas, the son, died without having surrendered the copyhold to the uses of his will, and his wife the plaintiff proved not to have been with child.

The personal estate of *Thomas* was insufficient to pay his debts. The distributive part of the personal estate of *John*, the father, was considerable.

The questions were—

1st. Whether *Thomas*, the son, was entitled to the copyhold purchased by his father in his name.

2dly. Whether the want of a surrender ought to be supplied for the benefit of the plaintiff.

3dly. Whether the plaintiff was entitled to the remaining one-third of the copyhold estates of *Thomas*, the son, under his will.

Mr. Attorney-General, Mr. Browne, and Mr. Green, for the plaintiff.

In *Grey v. Grey*, 1 Ch. Ca. 296, and *Mumma v. Mumma*, 2 Vern. 19 ; Eq. Ca. Abr. 382, pl. 8, a purchase by a father was held to be an advancement of the son, in whose name it was made, although the father continued in possession.

So in *Hobart v. Hobart*, before Lord Talbot.

Mr. Fazakerley, for the defendant *John Taylor*, contended that the father's continuing in possession was inconsistent with any intention of advancing the son, and that the receipts given by the son for the use of the father, amounted to a declaration that he was not beneficially entitled.

[113] As to supplying the defect of the surrender, that the heir at law had no other provision from his brother, and as to him, would in that case be absolutely disinherited.

That as to the devise of the one-third of the copyholds, it was made upon a contingency which has not happened, namely, that of the wife being with child, and of the child not being born alive.

Lord Chancellor (July 18, 1737). I am of opinion it should be considered as an advancement for the son, and found my opinion greatly on the case of *Mumma v. Mumma*, 2 Vern. 19.(2) And though two receipts are produced under the son's hand, for the use of the father, I think that will not alter the case, for the son, being then under age, could give no other receipt in discharge of the tenants who held by lease from the father ; and in this case I am of opinion, parol evidence may be admitted, though indeed improper, when offered against the legal operation of a will, or an implied trust, but here it is in support of law and equity too. (1 Vern. 467 ; Eq. Ca. Ab. 382, *Shales v. Shales*. *Gray v. Gray*, 1 Ch. Ca. 216.)

As to the one-third of the copyholds, I am of opinion it was well devised, and passed by the will, so as to have a surrender supplied, and that it ought to be construed as if he had said, " And if no child be born alive."

His Lordship declared the copyhold estate at *Little Shellwood*, was purchased by *John Taylor*, for the benefit of, and by way of advancement for *Thomas Taylor*, the son, and decreed that the defect of the surrender to the use of the will ought to be supplied, and that the defendant, the heir at law of the testator should surrender the copyhold land accordingly. (Reg. Lib. B. 1736, fol. 488.)

(The statement of this case, and the arguments of counsel, are taken from Lord Hardwicke's Note-book. The judgment from *Atkyns*.)

(1) So *Elliott v. Elliott*, 2 Ch. Ca. 231. *Mumma v. Mumma*, 2 Vern. Rep. 19. *Stileman v. Ashdown*, 2 Atk. 478. And when the father is dead, the same rule prevails between grandfather and grandchildren, *Elrand v. Dancer*, 2 Ch. Ca. 26. So where a father buys an estate in the name of his son and a trustee, the son being only of the age of eight years at his father's death, *Lamplugh v. Lamplugh*, 1 P. Wms. 111. So where

a purchase is made by a father in his own and his son's name, *Scroop v. Scroop*, Ch. Ca. 28. *Back v. Andrews*, 2 Vern. 120. So where a father purchased a copyhold which was granted according to the custom of the manor, to himself, his wife, and his son, to take for their lives in succession, and the life of the survivor, *Dyer v. Dyer*, 2 Cox Ca. 92. *Murless v. Franklin*, 1 Swan. Rep. 14. But in order to repel the presumption that a purchase by the father is intended as a provision for his children, it is necessary that the evidence should be contemporary with the purchase. Subsequent acts will not convert an advancement for his son, into a beneficial purchase for himself, per Lord Eldon, *Murless v. Franklin*, *ibid*.

(2) There the father purchased a copyhold in the name of the defendant, his eldest son, an infant of eleven years old, and enjoyed during his life, and afterwards having surrendered it to the use of his will, devised it to his wife for life, remainder to his younger children, and made other provisions for the defendant; who having recovered in ejectment, the bill was to be relieved against it. Lord Chancellor *Jefferies* conceived that he being but an infant at the time of the purchase, though the father did enjoy during his life, that the purchase was an advancement for the son, and not a trust for the father. Eq. Ca. Ab. 382, pl. 8.

[114] JOANE ATKINS, Administratrix of ELIZABETH HICCOCKS, *Plaintiff*; and MARGARET HICCOCKS, Executrix of SAMUEL HICCOCKS, who was surviving Executor of WILLIAM HICCOCKS, GEORGE THOMAS and MARY his Wife, *Defendants*.

July 19th, 1737.

S. C. 1 Atk. 500.

A testator bequeaths to his daughter £200 to be paid to her at the time of her marriage, or within three months after, provided she marries with the consent and approbation of his two sons, or the survivor, and he directs that his daughter until marriage, shall yearly receive the sum of £12, and he charges a leasehold estate with the payment of the yearly sum of £12, and also of the said sum of £200, when the same shall become due as thereinbefore is appointed; his daughter having died without having been married: It was held, that this legacy was not vested, and not transmissible to her representative.(1)

Lord Chancellor. William Hiccocks, father of Elizabeth Hiccocks, to whom plaintiff is administratrix, made his will December 21, 1713, and makes a bequest in these words:—

Item, I give unto my daughter Elizabeth Hiccocks, the sum of £200, to be paid her at the time of her marriage, or within three months after, provided she marries with the consent and approbation of my sons William Hiccocks and Samuel Hiccocks, or the survivor of them, and my will and [115] meaning is, that my said daughter Elizabeth shall yearly receive and be paid (until such time as she shall marry), the sum of £12 free and clear of all taxes and impositions whatsoever. And my will and meaning further is, that my leasehold estate commonly called *Hall's* lease, shall stand and be charged and chargeable with the payment of the said yearly sum of £12 as aforesaid, and also of the said sum of £200, when the same shall become due, as hereinbefore is appointed and declared.

Then he gives to his son William Hiccocks, the said leasehold estate called *Hall's*, subject nevertheless to the payment as aforesaid, and makes his two sons William and Samuel Hiccocks and his daughter Elizabeth, executors and executrix of his will, and gives them the residue of his personal estate, equally to be divided between them.

The testator died, afterwards Elizabeth the daughter died without having ever been married, and the plaintiff as her administratrix, has brought this bill to have the legacy of £200 raised out of the leasehold estate on which it is charged, and that it may be paid to her.

The general question is, whether this legacy is due, the legatee dying before marriage.

That depends on this question, whether the legacy was vested in the legatee so as to be transmissible to her representative. And I am of opinion, that it never vested in the legatee; and, consequently, that the plaintiff, her administratrix, cannot demand it.

It has been settled by many resolutions, and therefore must be admitted, that where a legacy is given to one *to be paid at a time certain*, or which can be reduced by computation to a certainty, as at the age of twenty-one, in that case, though the legatee dies before the time of payment comes, the legacy is vested and transmissible upon this difference, that the *time* is annexed not to the *thing* or substance of the legacy, but to the *payment*, or (as it is called) the *execution* of it. This has been established in this Court ever since *Clobery's* case in 2 Vent. 342, and is the rule both of this Court, and of the ecclesiastical courts, and the executor or administrator may demand it at such time as the legatee would have attained her age of twenty-one.

But in that case the time of payment is *certain*; and must in all events necessarily come, and therefore it was reasonable to construe it as being *debitum in presenti sol-[116]-vendum in futuro*, agreeably to the rules of law in other cases.

But I can find no case or authority whereby it has been determined either in this Court or in the ecclesiastical court, where these legatary questions properly arise, that when the *time* annexed to the payment or execution of the legacy is merely eventual or contingent, and may by possibility either come or not come, and the legatee dies before it happens, that in such case the legacy is vested and transmissible to his representative.

This being so, I am left to determine upon the reason of the *thing*, and the general rules laid down in the law books.

1. Upon the reason of the thing taken abstractedly from the authorities, there appears to me a substantial difference between the one case and the other.

Where the *time*, though *future*, is certain, and must in all events arise, it is a plain indication of the testator's intention that the legacy should in all events be paid, and the question is only upon the *time when*, which either is or by computation may be made certain, upon the rule *certum est quod certum reddi potest*.

But where the time is absolutely uncertain, depending upon the happening of a fact or an event, it is plain that the testator did not regard the *point of time*, but that *fact or event*, and intended the legacy should be paid only on the happening of the fact or event, and this makes such an appointment of the time of payment amount to the same thing as if the legacy was made payable on a *condition or contingency*, in which case it is clear that the legacy cannot be demanded unless the condition be performed, or the *contingency* happens.

In the case at bar, the sum of £200 is made *payable at the time of Elizabeth's marriage*, therefore it was the event of her marriage, and not merely the time which the testator had in his own view and intention, and as she is dead without being married, that event can now never happen.

To this it was objected by Mr. Attorney-General, on the arguing of the case, that the case does not differ in this respect from a legacy made payable *at the age of twenty-one*, for there is not only a point of time included, but an event also, which is contingent, whether the legatee will ever attain that age or not.

But to this the answer is, that it has always been con-[117]-sidered as a description of time, and by computation is as certain and fixed as any other time; and the testator's intention in suspending the payment till the age of twenty-one has always been taken to be only by reason of the legal incapacity of the legatee till he arrives at that age, when the law presumes him competent to give a discharge for it, and to manage himself and his affairs.

2dly. Agreeably to this reasoning are the rules laid down in the law books which relate to those questions.

Dig. Lib. 35, tit. 1, *de conditionibus et demonstrationibus*, Leg. 1.

Legatis quæ relinquuntur aut dies incertus aut conditio adscribitur; aut si nihil harum factum sit, præsentia sunt, nisi si vi ipsa conditio insit.

Here you observe a time absolutely uncertain is put upon the same footing with a condition; but what follows is still more express, and that is in the same Book of the Digest, and the same title, Leg. 75.

Dies incertus conditionem in testamento facit.

Both these passages are the text law, and full to the present purpose.

But as the civil law is no otherwise of authority in *England* than as it has been received and allowed by usage, let us see how it is laid down by writers of our own who treat of it upon that footing.

Swinburne, part 4, sec. 17, treats professedly of this question; and there he fully

allows the difference between a time certain and a certain age being annexed to the substance or to the execution of the legacy, according to the rule in *Clobery's case*; but he expressly takes the distinction between a time certain and a time or event uncertain, and in page 267 of the old Edition says, an uncertain time is compared to a condition. And page 268 he has these words:—"Neither is it material whether the uncertainty be joined to the substance of the legacy or disposition, or to the execution thereof, for in both cases the legacy or disposition is reputed conditional."

And page 272, he puts this case in point:—"If the testator bequeaths to A. B. £100, which he willeth to be paid at the day of her marriage; if she die in the mean time the legacy dieth also; and therefore is not recoverable by her executors or administrators."

Godolphin, in his *Orphan's Legacy*, page 453, is very full to the same purpose.

[118] If the day be certain, he says, though the legatee dies before it comes, the legacy shall accrue to his executors; for in that case the legacy was due at the testator's death, though not payable till that time certain be come. But if the day or time be altogether uncertain the legacy is then *as if it were conditional*, and the breach or non-accomplishment of a condition in itself lawful or possible, doth either suspend or extinguish the legacy.

In order to encounter the doctrine laid down in these books, a case was cited by Mr. *Attorney-General*, adjudged on a devise of a real estate in a court of common law. It was *Thomas v. Howell*, Trin. 4 W. & M. B. R. 1 Salk. 170.

One devised land to his eldest daughter upon condition that she should marry his nephew at or before her attaining the age of twenty-one.

The nephew died young, and the daughter never refused and indeed never was required to marry him. After the death of the nephew, the daughter being about seventeen, married J. S., and it was adjudged in C. B. that the condition was not broken being become impossible by the act of God; and the judgment was afterwards affirmed in error in B. R.

But that case differs totally from the present; there the condition was subsequent and plainly became impossible by the act of God, which always excuses the non-performance of a subsequent condition.

The daughter had time to marry him till he attained twenty-one. And he died long before.

In the case in question, the condition did not become impossible for she was not restrained to marry a particular person, but might have married any man; and it must be presumed that it was in her power to have married somebody or other before her death.

Besides, I take the *condition of marriage* in this case to be a condition precedent.

One objection was made on the part of the plaintiff, which deserves to be considered in this place, that by the intent of the testator appearing in his will this legacy must be taken to be vested, because he has given interest (2) for it in the mean time.

[119] That the £12 *per annum* was at the time of making this will just equal to the legal interest of £200; and in cases of legacies *given at the age of twenty-one*, if interest has been given in the mean time they have been held to be vested; and that this case falls under the same reason.

The case referred to is right, but it is not similar to the present, for there the *time is certain*, and there is no resolution or book-case where that has been so held upon an uncertain time of payment or a time depending on a contingent event; consequently no inference can be drawn from that case.

Besides in this will it is not given as interest, but by way of annuity issuing out of a leasehold estate; and it is material to observe upon the penning of this will, that the testator has charged the same leasehold estate *with the payment of the said sum of £200, when the same shall become due as hereinbefore is appointed*.

These words express that he intended and understood that the £200 should not be *due*, i.e. in other words *vested* till the time at which he had appointed it to be paid.

But here is another point in this case which makes it a very strong one against the legacy being transmissible to the administrator, which is the condition of marrying with the consent of the executors; *provided she marries with the consent and approbation of my sons Wm. Hiccocks and Samuel Hiccocks, and the survivor of them*.

It is true that as the legacy is not given over in case of marrying without such consent, it would have been construed to be only *in terrorem*; but still according

to all the books and cases on this multifarious head a marriage in fact is necessary to make the legacy become due and payable.

So is Swinb. part 4, sect. 12 : his words are " Where it is said, before that the condition of marrying with the consent of another is void, so that the executor or legatory on whom the condition is imposed is neither bound to obtain or yet to crave such consent ; yet the person on whom the condition is imposed cannot be executor, nor get the legacy unless he do marry. For though he need not so much as crave the consent of the other, seeing that part of the con-[120]-dition is unlawful, yet he must marry e'er he can pretend any title to the executorship or legacy, seeing that part of the condition is not unlawful."

This differs from 1 Salk. 170, for there the condition did not become impossible by the act of God, for it must be presumed that she might have married during her lifetime.

As I think this is the legal construction of the will so it appears to me to be perfectly agreeable to the real, actual intention of the testator. His meaning plainly was this :—

That if his daughter married she should have £200 for her portion, to be taken out of his leasehold estate ; and a maintenance of £12 *per annum*, by way of annuity, out of it in the mean time ; but that if she did not marry at all, the £200 should not be taken out of his leasehold estate to the prejudice of his sons ; but should sink into it for their benefit ; and that she should have the £12 *per year* for her maintenance during her living single.

The consequence of this is, that the bill must be dismissed : but I will give no costs.

(This case is copied *verbatim* from a manuscript in Lord Hardwicke's handwriting.)

(1) So *Garbut v. Hilton*, 1 Atk. 381. *Elton v. Elton*, 3 Atk. 504. *Hemings v. Munckley*, 1 Bro. Ch. Ca. 303. But a distinction has been made between a particular legacy and the bequest of a residue, upon the ground of preventing an intestacy ; as where a testator after giving a legacy to *R.*, and whom he made sole executor, bequeathed the residue of his estate to *R.* and *J. C.* upon trust to invest upon government, or real securities in their names, or the name of the survivor, and to pay the *dividends* and *produce* equally between his two great nieces, until their respective marriages, and after their respective marriages, to assign and transfer their respective moiety or shares thereof unto them respectively ; it was held under the circumstances of the nieces being adult at the date of the will, the whole of the interest being given to them, the marriage not being a condition precedent to the vesting, and of its being a residue without any bequest over, that upon the death of one of the nieces without being married, the moiety of the residue vested in her and passed to her representative. *Booth v. Booth*, 4 Ves. 399. With respect to *Booth v. Booth*, Sir William Grant says, " Lord Alvanley felt he had a difficult case to deal with. Some violence was done to the words in favour of what he conceived to be, and what in all probability was, the intention." *Leake v. Robinson*, 2 Meriv. Rep. 387. But if it be a residue with a bequest over, there is no difference between a residue and particular legacies, *ibid*.

(2) Where the whole interest has been given it has always afforded a strong presumption of intention to vest the capital, *Fonnereau v. Fonnereau*, 3 Atk. 645. *Booth v. Booth*, 4 Ves. 399, but which presumption is not afforded by a direction for maintenance, out of the interest, *Pulsford v. Hunter*, 3 Bro. Ch. Ca. 419. *Leake v. Robinson*, 3 Merivale's Rep. 386.

[121] The ATTORNEY-GENERAL at the Relation of JOHN BREWRIDGE and Others, on behalf of themselves and all the rest of the Inhabitants of the Hamlet of *Sandford*, in the Parish of *Crediton*, in the County of *Devon*, *Plaintiffs*; and Sir JOHN DAVY, Bart. and Others, being the Twelve Governors of the Hereditaments and Goods of the Church of *Crediton*, in their private capacity, and the said Twelve Governors in their corporate capacity, and the BISHOP of EXETER, and JAMES LONG, and THEOPHILUS BLACKHALL, Clerks, *Defendants*.

'July 25th, 1737.

By letters patent three of twelve governors, together with the assent of the major part of the inhabitants of *Sandford* were empowered to nominate and appoint a chaplain for the village or hamlet of *Sandford*, and with the like assent to remove

him on reasonable cause. One of the three governors with the assent of the major part of the inhabitants appointed one person; and the other two of the three governors, with the assent of a smaller number of the inhabitants, appointed another person to be chaplain—both appointments were held invalid:—but where a chaplain was appointed by two of the three governors, with the approbation of the major part of the inhabitants, but the other of the three governors refused to join in the appointment,—such appointment was held valid.

King Edward the Sixth, by letters patent, dated the 2nd of April, in the first year of his reign, granted to the inhabitants of *Crediton*, that thenceforth there should for ever be within the said parish, of the inhabitants thereof twelve governors of the hereditaments and goods of the said church, whereof three were always to be inhabitants of the hamlet of *Sandford*, which is part of the same parish; and that such twelve governors should be one body incorporated for ever by the name of the twelve governors of the hereditaments and goods of the church of *Crediton*, otherwise *Kirton*; and the parish church of *Crediton*, *St. Swythin's* chapel, in *Sandford*, and other premises; and the advowson and right of patronage of the vicarage of *Crediton* were [122] granted to the said twelve governors and their successors. And it was further granted that the church of the late college of *Crediton* should be the parish church of the parish of *Crediton*; and that *St. Swythin's Chapel*, at *Sandford*, should for ever be annexed to the church of *Crediton*, for the use of the inhabitants of that hamlet; and that the inhabitants of *Sandford*, or the major part of them should from time to time, from amongst themselves, choose keepers or wardens of the goods and chattels of the chapel of *Sandford*; and that the said twelve governors or their successors, or the major part of them, one of which was to be always of *Sandford*, was to present a sufficient clerk to the ordinary to be vicar preacher of the church of *Kirton*. And it was further granted that the said twelve governors should find two chaplains, in aid of the vicar of *Crediton*, which two chaplains the said twelve governors were to name and appoint from time to time, and for reasonable cause to remove at their pleasure and place others in their stead, as there should be occasion.

And further *quod illi tres duod. gubernat. qui ex parte vill. de Samford pred. de tempore in tempus fuerunt una cum assensu majoris partis inhabitant. ejusdem vill. de Samford nominabunt appunctuabunt unum capellanum ad servitia et sacramenta administrand. in dicta capella et per illos tres duodecem guber. qui ex parte, &c., fuerint una cum assensu predict. majoris partis inhabitant. ejusdem vill. de tempore in tempus pro rationabili causa [capellanus] expellatur et amoveatur et alius in ejus loco ponatur.*

These letters patent were confirmed by letters patent of Queen *Elizabeth*, dated the 5th of July, in the second year of her reign.

In the year 1730 the chaplain of *Sandford* died, upon which the three governors for *Sandford* appointed a day for the election of a chaplain in his room. The defendants *Long* and *Blackhall*, were candidates. *John White* one of the three governors, and a great number of the inhabitants voted for Mr. *Long*. Sir *John Davy* and *Brown*, the other two governors, and some of the inhabitants, voted for Mr. *Blackhall*. It appeared, upon a poll, that the former had 104 and the latter 31 votes. *White* and those inhabitants who voted for Mr. *Long* declared him duly elected, and signed a paper to that effect. Sir *John Davy* and *Brown* refused to sign it, and signed another paper naming and appointing Mr. *Blackhall* to be chaplain.

[123] These two papers were presented to the twelve governors; and they all except Mr. *White* refused to admit Mr. *Long*, and insisted that Mr. *Blackhall* was duly elected chaplain.

The information was filed calling for an account of the revenues of the charity lands, and that a chaplain might be forthwith appointed, for the hamlet of *Sandford*; and if the said *Long* was duly elected chaplain, then that he might be admitted to the office. The information likewise complained of some supposed irregularities in the election of some of the governors.

This cause was heard before Lord *Talbot*, on the 28th of January, and the 1st and 2nd of February 1736, and by the decree it was declared; that neither *Long* nor *Blackhall* were duly elected; and the three governors for *Sandford* were directed to proceed to nominate a chaplain, and to give notice to the inhabitants to meet on the Sunday se'night next after such nomination, in order that they or the major part of those present might assent to or dissent from such nomination; and in case they,

or the major part of them should assent, then the person nominated was to be admitted, but subject to be removed in the manner mentioned in the charter. Accounts were directed relative to the revenues of the charity, and the costs relative to the election of the chaplain, and such accounts were directed to be paid out of the estate, and as to the other matters, the information was dismissed with costs.

Against this decree, the relators presented a petition of rehearing.

1st, Because it declared the election of Mr. *Long* void.

2dly, In respect of the manner in which it directed the new election to be made, because the intent of the grant was as they apprehended, either that the three governors, and the inhabitants, or the major part of them should together join in the choice of a chaplain, or else that the said three governors, or the major part of them should nominate as duly elected, and appoint whom the major part of the said inhabitants should elect.

3dly, Because as to the other matters the information was dismissed with costs.

Mr. *Attorney-General* and Mr. *Fazakerley* for the relators, and Mr. *Mills* for the defendant *Long*, contended, that by the grant, the three governors were appointed to preside at the election, but not to exercise any further power. That it [124] was an election by the inhabitants, and these three governors were to be of the quorum. That if a charter be granted to a mayor and aldermen, *quorum* (mayor) *unum esse volumus* the assent of the mayor is not necessary. That if the construction contended for on the other side should prevail, the hamlet might for ever continue without a chaplain, as no provision is made against the event of the inhabitants dissenting from the nomination of the governors. That it is the assent which gives validity to the act. The governors have indeed the presentation, but the inhabitants are entitled to the nomination. The governors can only nominate such person as the inhabitants assent to.

Mr. *Brown*, Mr. *Pauncefort*, and Mr. *Hamilton* for the governors.

If there be a bare authority vested in the governors, all must concur, 1 Salk. 476. *Case of New College Oxford*, Dyer, 247. This alone would be sufficient to invalidate Mr. *Long's* election. The power of removing is granted in the same manner as the power of appointing. The word assent cannot be construed to import a joining in the original act. *Attorney-General v. The Inhabitants of Ottery St. Mary's*, Hob. 308. This resembles the case of a bishop authorised to grant leases with the assent of the dean and chapter, 14 H. 6, 16, 17. In *The Attorney-General v. Gilbert*, 31 May, 1 Geo. 2, in Chancery, the testator gave his estate to six trustees and executors, and directed that his executors, with the consent of the inhabitants, should choose a minister to officiate when the parson should be at another place. The court declared that the right of election was in the trustees, and directed them to meet and agree upon a proper person; and that they should give public notice in the church for the inhabitants to elect, &c.

The *Lord Chancellor* (July 25, 1737). The first thing to be considered is, what is the true construction of this charter? Secondly, What will be the consequence of such construction?

As to the first, I am of opinion, that the right of nomination and appointment is given to the three governors; and that the inhabitants, or the major part of them, have a power of assenting to, or dissenting from it. That this is the true construction, appears not only from the words of the particular clause, but from the whole tenor of the charter. By the clause itself, these three of the twelve governors, together with the assent of the major part of the inhabitants, are to [125] nominate and appoint. Here are two distinct acts. The nomination is given to one, the approbation to the other. The words must receive the same construction which is given to them in similar cases. Officers are frequently directed to be elected with the approbation of the Crown. Bishops are authorised to grant leases with the assent of the Chapter. By other clauses in the charter, the church and chapel are granted to the twelve governors; and the right of nominating the vicar is expressly granted to the twelve governors. The right of nominating the chaplain is taken out of the twelve, and restrained to the three governors, for the hamlet of *Sandford*; but the act to be done is the same, excepting that the assent of the inhabitants is required. Upon the construction contended for, there would be no reason for naming these three governors, and severing them from the twelve.

It would, indeed, be a strange construction, that because these three governors

are to do an act with the assent of the major part of the inhabitants, *ergo*, the major part of the inhabitants are to do the very same act without them. The intent of the Crown was to give to the one a negative upon the other. The power of removal is granted under the same form of expression; and it would be monstrous if the parishioners were to have that power without the concurrence of the three governors. The case cited is in point, but the present appears to me to be stronger.

It only remains to be considered, what will be the consequence of this construction? It may be made a matter of doubt, whether the two governors can bind the other; but it is not material to decide that point at present.

Cases have been put, in which this construction might defeat the objects of the charter. These events are not to be presumed, and certain inconvenience would arise from the other construction, which would take away all right and authority from the three governors; but whatever inconveniences may arise, I cannot vary the charter. The parties must take it, subject to the terms imposed upon them by the Crown. There may, however, be some objections to the form of the decree.

His Lordship declared, that the defendant *Blackhall* is not duly nominated or appointed chaplain of the chapel of *Sandford*, and that the defendant *Long* is not likewise duly nominated or appointed chaplain thereof, and therefore doth order and decree, that the defendants, Sir *J. Davy*, *Robert Snow*, [126] and *Robert Read*, being the three governors on the part of the vill or hamlet of *Sandford*, do forthwith proceed to nominate a chaplain to perform divine service in the said chapel of *Sandford*, and do thereupon give public notice in writing to the inhabitants of the said vill or hamlet, by affixing such notice, on the door of the said chapel, before the first Sunday after such nomination whereon divine service shall be performed in the said chapel as aforesaid, in order that they, or the major part of them, who shall be present at such meeting, may assent to or dissent from such nomination; and in case they, or the major part of them, shall assent thereto, the person so nominated is to be admitted to hold and enjoy the said office according to the charter; but in case the said inhabitants, or the major part of them, shall not assent to such nomination, so to be made, then either party is to be at liberty to apply to the Court; and his Lordship declared, that the three defendants, the governors, have no right to vote as inhabitants, in giving such assent or dissent. (Reg. Lib. A. 1736, fo. 671.)

In consequence of this decision a new election took place, at which Mr. *Barker* was nominated by two of the three governors, and was approved of by a majority of the inhabitants. The other of the three governors refused to join in the nomination of Mr. *Barker*.

Mr. *Barker* and two governors presented a petition, praying that he might be declared duly elected, and might enjoy his office, and have the salary paid him.

This petition coming on to be heard on the 27th of July 1741, Mr. *Attorney-General* and Mr. *Murray* were heard against the petition.

In corporations the majority will conclude the rest, and what is done by them, is the act of the whole body; but here these three governors are not a separate corporate body, but have a special power by the charter delegated to them to do this act, and the words of it are express, *Ubi tres, &c.* These three are expressly directed to choose. If two only concur, how can it be said that the three choose? Where powers are given to particular persons all must concur, as in the case of powers of attorney, and such powers will not survive. So it was, where executors had a power by will to sell lands, till the statute of Hen. 8th. The question then is, whether these three can be considered as a common council of the [127] corporation. Where the charter intended that a majority should do the act, it has expressly said so, as in the election of new governors. Nothing is here to be done by the corporation. This act is not to be done under their seal, nor is any report to be made to them. Therefore, it is not like a corporate act to be done by a select body, but the whole power is in them, and the inhabitants are no part of the corporation, but a distinct power is given to them; though the governors are described as governors, yet notwithstanding that description, the power may be given to them in their private capacity.

Lord Chancellor. This case must be determined on the rules of law in the construction of the charters of the Crown, and in the same manner as if the question arose on an information or mandamus.

The charter incorporates the twelve governors, and the rest of it consists in the distribution of particular powers to the members of the corporation; whereas in

charters for public or private government powers are given to particular parts of the body. They vest in respect of interest in the whole body, and in point of exercise only in the part of the corporation to whom the power is given, as in common council, &c. Of this kind is the power in question. It is not every act of a corporation which need be under the seal of the corporation. Elections never are, nor need they by law be so.

I think that this election is a corporate act, and that the three governors make the election as a select number of the corporation, appointed for that purpose.

By the rules of law, where corporate acts are to be done by the whole body, or by a select number of it, it is not necessary all should concur.

This is a rule of law, and no words are required to give this power to the majority, where an act is directed to be done by them, or a major part. The true construction is, that the words do not respect the doing the act itself, but respect the meeting, and give a power upon a proper summons to the whole body, for the major part to meet, for the purpose of doing such acts. In such cases, if a major part of the body meet a major part of those thus met, though less than a major part of the whole may do the act; but without such a clause all must meet, and then the major part met conclude the whole body.

In the present case all met, and the major part concur. [128] I think, therefore, that the majority present must have the power to nominate, and this *ut res magis valeat quam pereat*.

This is not to be compared to powers delegated to private persons, because in those cases the acts to be done are not corporate acts, and the powers do not vest in them in a body, but are to be exercised by them individually.

It is probable that the number three was selected that there might always be a majority, and a construction giving a negative to a single governor, might be attended with great inconvenience.

His Lordship declared, that the petitioner *Barker* was duly nominated and appointed to be chaplain of the said vill of *Sandford*, and that he should hold and enjoy the place, and that the corporation should pay him the arrears, and the salary for the future. (Reg. Lib. A. 1740, fo. 594.)

(The first part of this case is taken from Lord *Hardwicke's* Note-book; the second part of the case where it came on to be heard, on the 27th of July 1741, from a Manuscript Report of Mr. *Forrester's*.)

MEDLEY v. PEARCE.

July 28th, 1737.

Lord Chancellor. The course of the Court, according to strict rule, is, that an order is necessary for the examination of a witness, to matters of account, before the Master, who had been examined to other facts before the hearing, but the practice is *contra*. (This case is taken from Lord *Hardwicke's* Note-book.)

[129] ANONYMOUS.

July 30th, 1737.

Plea of bankruptcy allowed though it did not aver that the commission was in force.(1)

If a commission abates by the death of the King, or is superseded by the consent of the creditors, the property remains in the assignees until a re-assignment; but if it is superseded for irregularity it is void, *ab initio*, and the assignment made is void.

To a bill by an executor for an account and discovery of moneys due to the testator, the defendant pleaded that the testator was a bankrupt, and that the assignees under the commission were not made parties to the suit. It was insisted that this plea was bad, because it was not averred that the commission was in force, and that in fact it had been superseded.

Lord Chancellor. Where a commission has been regularly issued, and an assignment made; that vests the property of the bankrupt's goods in the assignees, and if the commission abates by the death of the King, or is superseded by consent of the

creditors, yet the property remains in the assignees until a re-assignment is made. But if it be superseded for irregularity in the commission, the whole becomes void, *ab initio*, and the assignment made in pursuance of it is therefore void likewise, but I cannot intend that such a supersedeas has taken place.

Plea allowed.

(The report of this case is taken from Mr. *Forrester's* manuscript. It is not to be found in Lord *Hardwicke's* Note-book.)

(1) Plea of bankruptcy to a bill by an heir at law against a devisee, must aver distinctly, and in succession, the facts upon which the bankruptcy rests. Not sufficient for the devisee to aver, by his plea, that a commission of bankruptcy was issued against the plaintiff, under which he was afterwards duly found and declared a bankrupt and that his estates and effects were thereupon duly assigned to the assignees. *Carleton v. Sir W. Leighton*, 3 Mer. Rep. 667.

[130] SHERIFF v. SPARKS.

July 30th, 1737.

A mortgagor cannot be finally foreclosed, until an order absolute be obtained for that purpose. (So *Senhouse v. Earl*, 2 Ves. 450, and see *Thompson v. Grant*, 4 Madd. Rep. 438.)

This was a bill to redeem to which the defendant pleaded the usual order obtained in a former suit by the mortgagee to foreclose that the mortgagor should stand foreclosed unless the money was paid by a certain day.

Lord Chancellor. A mortgagor cannot be finally foreclosed until an order absolute is obtained for that purpose. It was the ancient practice than on a decretal order to stand foreclosed, unless the money was paid by a certain day, that after that day the mortgagor was of course absolutely foreclosed, but now that order is in the nature of an order to shew cause, and must be made absolute on an affidavit that the money was not paid at the day, by another order that the mortgagor shall stand absolutely foreclosed.

Plea overruled. And the usual account directed of what was due for principal and interest, &c. (Reg. Lib. B. 1737, fo. 334.)

(The report of this case is taken from Mr. *Forrester's* manuscript. It is not to be found in Lord *Hardwicke's* Note-book.)

BENNETT v. WALKER and COLEBROOK.

August 1st, 1737.

Where a purchaser without notice has conveyed to a purchaser with notice, the latter purchaser may plead that the first purchase was without notice. (So *Brandlyn v. Ord*, post. *Lowther v. Carlton*, 2 Atk. 242. *Macqueen v. Farquhar*, 11 Ves. 478.)

This was a bill for the discovery of defendants' title to the advowson of *Lymington*. The defendant *Walker* pleaded that he purchased from the defendant *Colebrook*, and that *Colebrook* was a purchaser without notice, but admitted that [131] he had himself notice of the claim before the conveyance was completed.

Mr. *Floyer*, Mr. *Hamilton*, and Mr. *Clarke* in support of the plea, cited *Lowther v. Carleton*, coram *Talbot*, 11th April 1736, and 2 Atk. 242. *Harrison v. Forth*, Prec. Ch. 51. In which Lord *Somers* held that a purchaser with notice might avail himself of a prior purchaser without notice, for otherwise an innocent purchaser might be deprived of the benefit of ever selling his estate.

Lord Chancellor. Where a purchaser without notice has conveyed to a purchaser with notice, the latter purchaser may plead that the first purchase was without notice.

The plea was ordered to stand for an answer, with liberty to except, saving the benefit to the hearing of the cause.

(This case is taken from Lord *Hardwicke's* Note-book.)

HUGGINS v. ALEXANDER and Another.

October 13th, 1737.

An infant being in contempt to an attachment for want of an answer upon production of the attachment, a messenger ordered to bring the infant into court, the attachment not having been served, or the return out.

Lord Chancellor. A bill was brought against an infant and others. The infant appeared and was in contempt for want of an answer to an attachment which was issued, and returnable the first day of Michaelmas Term. Upon producing the attachment, Mr. *Floyer* moved for a messenger to bring the infant into Court, of which I doubted, the attachment not being served, nor the return out. Mr. *Scott* the register could not take upon himself to say how the practice was, so I ordered precedents to be searched, and the next day Mr. *Edwards* the other register certified the practice to be so, for that the attachment is not to be served on the infant, but the infant is to be brought into Court to have a guardian assigned, and it is in his favour. He said it is done on issuing the attachment, and that the constant suggestion is that the infant is in contempt to an attachment, of which he produced a precedent.

I ordered a messenger accordingly.

(This case is taken from Lord *Hardwicke's* Note-book.)

[132] STYLES v. ATTORNEY-GENERAL.

October 19, 1737.

A judgment creditor not entitled to interest under a decree in this Court. (So *Creuze v. Hunter*, per Lord *Roslyn*, 2 Ves. jun. 157; and see the cases there cited.)

In Hilary Term 1722, a bill was brought by the Duke of *Wharton's* judgment creditors, and in August 1723, a decree was made for a sale of the trust estates, and that the money arising therefrom should be paid to the creditors according to their priority.

Upon the Master's report, a question arose whether a judgment creditor should have interest allowed by way of damages for a debt on a judgment.

The original debt was by bond with a penalty, and in Easter Term 1723, judgment was given on a *mutuatus* for the real debt.

Mr. *Clarke*, in support of the claim. The Duke of *Wharton's* estate being vested in trustees, the creditors could get at it only through this court. A judgment creditor delayed by the injunction of this Court has interest allowed in damages, and cited Gro. El. 151; 1 Salk. 208. *Holdipp v. Otway*, 2 Saund. 106; 1 Sid. 442, and *Turner v. Main*, Pasch. 8 Anne, in Chancery, where interest was given in damages on a bill obligatory, by Lord *Couper*. *Harvey v. Parker*, 9 May 1715, and cases in the House of Lords, 1726, and 3 Bro. P. C. 187. *Maxwell v. Wettenhall*, 2 P. Wms. 27.

Mr. *Browne* for the trustees of the late Duke of *Wharton*, contended, that there was no instance in which the estate had been affected with more than the legal debt, nor where interest had been allowed beyond the judgment, where the creditor was plaintiff, though there possibly might, where the debtor was plaintiff and came into this Court to be relieved.

Lord Chancellor (Oct. 19, 1737). The assignee of the judgment is not entitled to any interest under the decree in this cause, because such interest, although possibly it might have been turned into a debt by judgment, is not now a debt by judgment so as to create a present lien on the real estates.

(This case is taken from Lord *Hardwicke's* Note-book.)

[133] *Ex parte* the Committee of Lord BRADFORD.

22nd October 1737.

A lunatic being tenant for life, with a power to grant leases, the *Chancellor* cannot authorise the committees to execute this power. (But now by the 43 G. 3, c. 75, s. 3, the committee may execute such a power under the authority of the Great Seal.)

Lord *Bradford* being tenant for life, with a power to grant leases, and being a lunatic, his committees presented this petition that the Court might authorise and direct them to execute this power.

Mr. Browne and Mr. Clarke in support of the petition, cited Lady Grosvenor's case, where building leases were ordered to be executed upon a petition on behalf of the lunatic's estate. Acts done by a feme covert in execution of a power are good, 1 Co. Litt. 112 b. *Daniel v. Upley*, 1 Jones, 137; Noy, 80. *Tomlinson v. Dighton*, 10 Ann. 1 Salk. 239; 1 P. Wms. 149. *Rich v. Beaumont*, 3 Bro. P. C. 308 [2nd ed. 6 Bro. P. C. 152]. So, infants may execute powers, *Artherton v. Coverley*, Lord King, Lev. 47; 1 Inst. 22.

Lord Chancellor. None of the precedents come up to this case. There is no ground to say that the committee can execute this power. It is to take effect out of another's estate, and must therefore be strictly pursued, but the leases now proposed to be made, would not be warranted by the power.

Suppose a lunatic before his lunacy had made a voluntary settlement with a power of revocation; no one can think that the committee could execute that power. Or suppose there was a power to charge an estate with a sum of money, the committee could not do it.

Another question has been made whether the lunatic himself can execute this power, and for this purpose, the cases of feme coverts and infants have been cited. But the coverture of a woman is only a civil incapacity, and a feme covert cannot execute a power coupled with an interest, though she may execute a bare power. A power that can be executed by an infant, must be appointed to be executed by him whilst an infant.

[134] In this case there are several discretionary acts to be done. It is not the case of an act merely ministerial.

The cases cited out of Lord Coke, are of civil incapacities. The case in *Lutwich* is not in support of this application, but against it, for it was there held that neither a lunatic Lord nor his committee could grant copies, but that his steward might, that being part of his office.

The strongest case is that of Lady Grosvenor, but in that case there was no power to be executed. She was owner of the fee, and all persons interested joined in the petition. Besides I have some recollection that there was an act of Parliament afterward obtained.

I would not do this if consented to by all parties.

Petition dismissed.

(The report of this case is taken from Mr. Forrester's manuscript. It is not to be found in Lord Hardwicke's Note-book.)

[135] HANS STANLEY an Infant, *Plaintiff*; and SARAH STANLEY Widow of GEORGE STANLEY Esq. and Mother of the Plaintiff, ELIZABETH, ANN, and SARAH STANLEY her Infant Daughters, Sir H. SLOANE, Lord CADOGAN, and WILLIAM ROBERTS Trustees in the Marriage Articles, EDWARD HOOPER Esq. WILLIAM SLOANE Esq. Trustees named in the Will of said GEORGE STANLEY, PHILLIPPA STANLEY Widow and Administratrix of HOBY STANLEY Clerk, Executor of the said GEORGE STANLEY his Brother, Deceased, *Defendants*. In the *Cross Cause*, ELIZABETH, ANN, and SARAH STANLEY, *Plaintiffs*; and HANS STANLEY Infant, and all the other *Defendants* in the Original Cause, *Defendants*.

October 25th, 1737.

S. C. 1 Atk. 549.

By marriage articles, £20,000 was agreed to be laid out in the purchase of lands, to be conveyed to trustees to the use of the husband for life, then as to so much as should amount to £800 per annum to the use of his wife for her jointure, remainder to trustees for 500 years, remainder to the first and other sons in tail male, with a power to the husband of disposing by will or deed of the surplus of the said lands above the said £800 per annum amongst the younger children, remainder to the husband in fee, and the trusts of the term were, that in case there should be issue male of the marriage who should enjoy the inheritance of the premises so to be purchased, £8000 was to be raised and paid for younger children at twenty-one or marriage, share and share alike, with interest for maintenance until the principal was payable: the father

dies ; portions not payable till the mother's death. The sense of the words *enjoy the inheritance* being, *enjoy in possession*. And the husband by his will having mentioned that the provision for the younger children by the marriage articles, was not to take effect till after his wife's death, was held to be further evidence of the husband's intent, where the intent upon the articles was doubtful and ambiguous.

By the articles made previous to the marriage of *George Stanley* deceased, and the defendant *Sarah Stanley*, then *Sarah Sloane*, dated 27th January 1719, *William Stanley*, the father of *George Stanley*, covenanted to pay £12,000, and Sir *Hans Sloane*, the father of *Sarah*, covenanted to pay [136] £8000, which two sums of £12,000 and £8000 it was agreed should be laid out in the purchase of lands, and that such lands, when purchased, should be settled and conveyed to the trustees therein named, to the use of *George Stanley* for life, then as to so much thereof as should amount to £800 *per annum* to the use of his wife for her jointure, remainder to trustees for 500 years, upon certain trusts thereafter mentioned, remainder to the first and every other son of the marriage in tail male, with a power to the husband of disposing by will or deed of the surplus of the said lands above the £800 *per annum* amongst the younger children of the marriage, as he should think fit, over and above what was thereby provided for such younger children, and for want of issue male, and after the determination of the term of 500 years, to the use of *George Stanley* in fee. The trust of the term of 500 years was declared to be for raising portions for younger children ; and that in case there should be *issue male of the marriage, who should enjoy the inheritance of the premises* so to be purchased and settled, and one or more son or sons, daughter or daughters of the said marriage, then the sum of £8000 should be raised and paid for the portions and maintenance of such younger son or sons, daughter or daughters, to be equally divided amongst them, share and share alike, and payable at their respective days of marriage, or age of twenty-one years, which should first happen ; and in case of the decease of any of them before their marriage or attainment of age, the parts or shares of such child so dying, to go to the survivors equally to be divided, and the interest or produce of each such younger sons' or daughters' respective parts or shares of the said £8000 in the mean time, and until the principal becomes payable, was to go and be for their respective maintenance and education. And it was declared that the said sum of £8000 for the said provision of younger sons and daughters, was to be raised by the said trustees out of the rents, issues, and profits, of the premises, or by lease or leases, mortgage or sale of a sufficient part thereof, with such usual clauses and powers as are made in settlements for that purpose ; and in case there should be no such younger son or sons, daughter or daughters, or that they should die before their respective portions should become payable then the said sum of £8000 appointed to be raised for their portions was not to be raised, and the term of 500 years was to cease and be void. There were issue of the marriage, one son and three daughters.

[137] Mr. *George Stanley*, by his will, dated 9th December 1731, devised several parts of his real estate to trustees for the term of 500 years, upon trust, by and out of the rents, issues, and profits, or by demise, mortgage, or sale, of all or any part of the premises, for the whole or any part of the term, or by any other means they should think fit to raise the sum of £4000 for his three daughters as an addition to the fortune provided for them by his marriage articles to be equally divided amongst them at their respective ages of twenty-one, or days of marriage, which should first happen ; and in case he should leave only one daughter, he appointed that the sum of £4000 should be paid to her at twenty-one or marriage, declaring that this was not to be an augmentation ; but upon a discharge given of the sum of £4000 to the trustees of his marriage articles as half of the provision made by the said articles for younger children, after the decease of his wife, and upon further trust, that in the mean time and until such daughter or daughters should be respectively entitled to the said sum, they his trustees should out of the rents, issues, and profits of the said premises, from time to time raise the several sums of £50 *per annum* for the respective maintenance and education of his daughters, and he declared his will to be that as soon as the said sum of £4000, and the annual sum of £50 a-piece for maintenance and education should be fully answered that the said term should cease ; and he gave the freehold and inheritance of the premises so devised for the term of 500 years to his son *Hans Stanley*, in fee, to whom he gave the residue of his personal estate, and appointed his brother, *Hoby Stanley*, sole executor thereof.

Mr. Stanley died in 1733, leaving his wife, the defendant *Sarah Stanley*, the plaintiff his only son, and the defendants, his three daughters, all infants.

The original bill was brought for carrying into execution the marriage articles made on the marriage of *George Stanley, Esq.*, with the defendant, *Sarah Stanley*, then *Sarah Sloane*, for an account of the estate of *Wm. Stanley* and *George Stanley*, plaintiff's grandfather and father, and praying directions for the interest of the infant and estate. The principal question was, whether the £8000 provided as a portion for the younger children should be raised presently in the mother's lifetime, or not until the trust term of 500 years should be actually come into possession by the death of Mrs. Stanley.

[138] The cross-bill was brought for the purpose of having the £8000 raised and paid to the younger children, and interest from the death of their father.

Mr. Chute and Mr. Frazier, for the plaintiffs.

There are three things insisted on in behalf of the infant daughters. 1st, That the £8000 ought to be raised at twenty-one, or marriage, during the life of the mother. 2nd, That they are entitled to interest immediately from the death of their father. 3rd, That the surplus profits over and above the £800 *per annum*, ought to go to them, because the father might appoint among his younger children.

First, As to raising the portions, the cases have generally been on settlements executed; here it depends on articles executory, which are to be expounded by this Court, and in the construction of which greater latitude is allowed than in that of a strict settlement executed, so that words in articles which in a settlement would create an estate tail have been construed to give an estate for life to the father, with remainders over. The term itself is not to commence till after the death of the mother; for there are no words to be found which enable the trustees to raise the portions in her lifetime, any more than *in that of the father*, and there is certainly no colour for supposing that had a bill been brought during his lifetime, to raise the maintenance of the daughters immediately, that it could have been supported.

The trustees are empowered to raise the portions by rents and profits, or sale, or by mortgage; it is an alternative, and it is left to their discretion in which way the portions shall be raised, consequently they must have the power of doing it either way. Such a construction as is contended for by the other side, would tend entirely to strip the son of his estate. There is something peculiar in the description of the trust of the term which limits the raising of the portions to the case of there being issue male, *who shall enjoy the inheritance of the premises*; a clause which can reasonably be construed to mean nothing less than the possession of the inheritance, *Evelyn v. Evelyn*, 2 P. Wms. 659, and *Brome v. Berkley*, 1 Eq. Ab. 340: 2 P. Wms. 484.

Secondly, As to the interest and maintenance, these are to arise out of the rents and profits, when in the hands of the trustees, and not by sale of the inheritance, and it was intended that the parents should maintain the children in the mean time; besides, Mr. Stanley by his will, has made a provision of £50 a-piece for the maintenance of his daughters.

[139] Thirdly, With respect to the surplus over and above the £800, no question can arise at present, because there is now no surplus.

Mr. Attorney-General and Mr. Clive, for the defendants, the daughters.

There are two questions,—1st, Whether the daughters are entitled to have the portions raised out of the provisionary term; 2nd, Whether they are entitled to have maintenance, and interest raised in the mean time.

As to the first.—First, Consider it as if a settlement was actually made; it is the plain intention that the daughters should have the provision when they attained their age of twenty-one years, or were married. The question depends on this, whether the contingency on which the trusts of the term are to take effect has happened; it has been objected that the contingency rests on this, *that there should be a son who should enjoy the inheritance of the estate*; which it is contended means *that there should be a son in possession*, which there has not yet been; to this it may be answered, that a person may be said to enjoy an estate in reversion or remainder, for though he cannot receive the profits; yet he may dispose of his reversionary interest for its value. The words cannot be intended to mean, being in the actual receipt of the profits; for if that had been meant, the sentence would have been framed thus, *who shall be in the possession*. It has been further objected, that the plaintiff had the reversionary estate in the lifetime of his father; that upon our principles the daughters would have had the same right

to have enforced their claim during their father's lifetime : but that is no valid objection, for most of the cases alluded to, have come on in the lifetime of the father, and it is certain that this Court has never laid a stress on the convenience or inconvenience which might accrue to the remainder-man. It is also argued, that our construction would exhaust the whole estate of the son's, but such may have been the intention of the parties, for it is to be observed, that this is not a settlement of the family estates, but the disposition of a sum of money to be turned into land, and that it was apparently more the intention to provide for younger children out of this fund, than the eldest son, whose establishment was referred to the family estate.

Secondly, It is to be considered whether any difference arises by reason of these being *executory* articles.

And upon this point, it cannot be reasonably insisted that [140] there is any real difference, for both instruments are to be construed according to the intention of the parties ; where articles are framed for settling lands upon the father, and then upon his issue ; the reason for varying them is, that otherwise the object of the contract which is to provide for the children would be defeated. Articles entered into upon a valuable consideration, are considered in equity, as if carried into execution, and are held to have all the same consequences.

As to the *second* point respecting the interest and maintenance, if interest had not been given by the instrument, there would have been reason to insist that none should be given till the time of payment of the principal was arrived ; but here it is expressly given, and then it must come out of the reversionary fund.

A *third* point arises on the will of *George Stanley*, and as to this the £150 *per annum*, for the maintenance of the three daughters *cannot* be raised out of the annual profits of the particular lands charged by the will, for their value does not exceed £100 *per annum*, but it is clearly the intention that £150 should be annually paid ; and the term is not to cease till it is paid ; it must therefore be raised as it can, a devise of the rents and profits is a devise of the lands itself. So a trust to raise out of rents and profits, includes the power of mortgage or sale, *Ivy v. Gilbert*, Pre. in Ch. 583 ; 2 P. Wms. 13. It appears too that there is a vast quantity of timber on the estate, this is to be considered as part of the *profits*, and it is impossible that the trust can be performed in any other way than by resorting in some degree to the inheritance. In *Brome v. Berkley*, there was a clear intention to postpone the disposal of the term till it actually came into possession. *Hellier v. Jones*, 1 Eq. Ca. Ab. 337. *Davy v. Hooper*, 2 Vern. 665, and 1 Eq. Ab. 336, were likewise cited.

Lord Chancellor. The question is, whether the daughters are entitled to have their portions raised immediately out of the term ; and are to have the maintenance until the money can be raised, or whether they are to wait until their mother's death, which is *vexata questio*, it being difficult to reconcile the various resolutions upon this head, without entering into very minute circumstances. But however the latter authorities have generally been against raising portions in the life of the father or mother, unless the words [141] were so express as not to admit of any other construction, and that because the raising portions in the lifetime of the parent, tends to an absolute destruction of the inheritance : here the doubt is, whether the contingency upon which the trust of the term is to take effect, hath yet happened ; for as to the term itself, that is not contingent, but vested in the trustees by the father's leaving younger children, and I am of opinion, that the contingency upon which the trust is to take effect, hath not yet happened ; for it is not sufficient that there should be issue male, and likewise other children ; but that issue male must *enjoy the inheritance*, which must be understood enjoying it in possession, for otherwise the effect of the words *enjoy the inheritance*, if taken to mean an enjoyment in *reversion*, would be absolutely annulled ; the issue male being the very moment after his birth entitled to the inheritance in remainder, after the particular estate is spent.

The portions are to be paid at twenty-one or marriage, and the interest to be for their maintenance and education ; but that must be understood from the time only that their portions became payable, since otherwise the younger children might as soon as they were born in their father's lifetime, have brought a bill for maintenance, which it is absurd to suppose could ever have been meant by the parties. It must therefore be understood an *actual possession*, it being a very metaphysical notion of an enjoyment that a man enjoys an estate because he hath a reversion or remainder after the estate for life is spent, during the continuance of which he doth not receive

one shilling of the profits. The party's intent is further manifested by an expression in Mr. *Stanley's* will, wherein he mentions the provision made by his marriage articles for his younger children *after his wife's death*: now although these words could not take away the daughters' right, if any they had; yet that right being ambiguous and doubtful, they evince by this latter act of his, what his intent was in the former; in the present case there are certain words sufficient to postpone the raising the portions until the mother's death; in that of *Brome v. Berkley*, 1 Eq. Ca. Ab. 340, and 2 P. Wms. 484, the term was for raising portions for daughters, to be paid at twenty-one or marriage, which should first happen, by and out of the rents and profits, or by mortgage and sale, as the trustees should think fit, and in the mean time and until the portions should become payable, the trustees were to raise £100 *per annum* for their maintenance. The father [142] died, and the daughter married, having attained her age of twenty-one; but because the maintenance was to precede the portion, and the first payment of that maintenance was to commence only upon the first feast after the term was come into the trustees' possession, which could not be until the mother's death; for that reason, hard as the young lady's case might appear to be, it was held in this Court, and afterwards in the House of Lords, that the portion should not be raised till the mother's death. So in *Butler* and *Duncomb's* case, 2 Vern. 760, and 1 P. Wms. 448. Though by consent of all parties, a medium was found out to satisfy the husband and wife's demands. Now the present case seems to bear a great likeness to that of *Brome v. Berkley*, and to that of *Corbet v. Maidwell*, 1 Eq. Ca. Ab. 337, pl. 5.

The Lord Cowper said, that he would not go a step further than the resolution in *Greaves v. Mattison*, Jones, 201, and that had it been *res integra* before him, he would not have gone so far as the judgment does in that case; (1) besides [143] the widow is by the articles to have £800 *per annum*, clear of all taxes; but if these portions are to be raised in the mother's lifetime, there would be nothing left for the issue male; and the intent of the party as to him, that he shall have and enjoy the estate after the mother's death would be entirely frustrated.

His Lordship declared, that the three daughters, plaintiffs in the cross-cause were not entitled to have either their portions of £8000, or any interest or maintenance in respect thereof raised out of the reversionary term of 500 years during the life of their mother. (Reg. Lib. B. 1737, fol. 120.)

(This case is taken from a manuscript of Mr. *Forrester's* which corresponds with the same case reported in Lord *Hardwicke's* Note-book.)

(1) In *Gerrard v. Gerrard*, 2 Vern. 459, an estate was settled upon the husband for life, remainder to the wife for life, remainder to trustees for a term of years, to raise a portion for a daughter of the marriage to be paid at twenty-one or marriage, which should first happen *after the decease of the father and mother*. The daughter's portion was decreed to be raised in the lifetime of the mother; and see *Greaves v. Mattison*, Jones, 201. *Staniforth v. Staniforth*, 2 Vern. 460. *Sandys v. Sandys*, 1 P. Wms. 707. *Hebblethwaite v. Cartwright*, Cases Temp. Talbot, 31. *Smith v. Evans*, Ambl. Rep. 633. *Hall v. Carter*, 2 Atk. 354.

The cases of *Gerrard v. Gerrard*, and *Greaves v. Mattison*, have been considered by Lord Cowper, Lord Macclesfield, Lord Hardwicke, and Lord Alvanley, as extraordinary determinations, see *Butler v. Duncombe*, 1 P. Wms. 452. *Stevens v. Dithicke*, 3 Atk. 41. *Clinton v. Seymour*, 4 Ves. 440. And in relation to those cases, and in order to avoid the inconveniences which have resulted from them, the destruction of the inheritance, and the disobedience of children, judges have been eager to lay hold of words by which to distinguish subsequent cases; as where the portion was to be paid at twenty-one or marriage, but maintenance was to commence only when the term came *into possession*; which could not be till after the mother's death, *Brome v. Berkley*, 2 P. Wms. 484.

So where it was to be paid at similar times, but one of the contingencies was, that the daughter should be unprovided for at the father's death, *Corbet v. Maidwell*, 2 Vern. 640, it was decreed that the portion should not be raised in the one case in the mother's, in the other case in the father's lifetime. See likewise *Reresby v. Newland*, 2 P. Wms. 94. *Worsley v. Earl Granville*, 2 Ves. 332. Lord Eldon in *Codrington v. Foley*, 6 Ves. 380, says, "The proper rule is what Lord Talbot states; that the raising or not raising must depend upon the particular penning of the trust, and the intention of the instrument. I do not think the Court ought to be eager to lay hold of circum-

stances. The Court ought to hold an equal mind whilst construing the instrument, and I cannot agree with what is said in *Stanley v. Stanley*, that very small grounds are sufficient. If they are sufficient to denote the intention, they are not small grounds; if they are not sufficient to denote the intention, the Court does not act according to its duty, by treating them as sufficient, thereby disappointing the true intention of the instrument."

LASSELLS RAYMOND IRONMONGER, an Infant, *Plaintiff*; and EDWARD LASSELLS, CHRISTOPHER LETHIVALLIER, Executor and Trustee of the Will of EDWARD LASSELLS, *Defendants*.

October 26, 1737.

Where a testator by his will gives certain estates to trustees upon trust to pay the rents and profits towards the payment of his debts and legacies, until the same shall come to his son *Thomas*, and then gives the said estates to his son *Thomas* when he attains twenty-six; but in case his son *Thomas* should die before twenty-six, then he gives the plaintiff £1000, and gives all the estates given to *Thomas* to his son *Edward*. *Thomas* having died before twenty-six, it was held, that in case the personal estate was deficient, the rents and profits of the estates devised in trust for *Thomas*, should be applied in payment of the £1000 and interest, until *Thomas* would have attained the age of twenty-six. (See *Boraston's Case*, 2 Coke's Rep. 19. *Taylor and Smith v. Biddall*, 2 Mod. 292.)

Edward Lassells, by his will, dated 20 June 1726, devised as follows:—

As to such worldly estate as it hath pleased God to bless me with, after my just debts shall be thereout first paid, and my personal charges defrayed, I give as follows:—

Imprimis, I devise my lands at *Datchet*, to my son *Edward Lassells*, for life, remainder to his first and other [144] sons in tail, remainder to his daughters. And I give all other my freehold and copyhold lands, tenements, and hereditaments, to my trustees in trust to pay the rents and profits thereof, towards the payment of all my debts, annuities, and legacies, until the same shall come to my son, *Thomas Lassells*.

The testator then appoints *Christopher Lethivallier*, his executor, and directs all the residue of his personal estate, after his debts, legacies, and annuities have been paid, to be laid out; and gives all the residue of his personal estate, and all his lands and real estate (except that at *Datchet*), to his son *Thomas*, and his heirs, when he attains twenty-six years, provided always, that in case his son *Thomas Lassells*, should die before his age of twenty-six years, then he gives to the plaintiff £1000, over and above what was before given to him, and in that case he gives all the lands, &c., given to *Thomas*, to his son *Edward*, and as to all such moneys, cloaths, and personal estate, as would have come to *Thomas*, if he had attained twenty-six, he gives the same, after payment of the legacies, to *Edward*.

Thomas Lassells having died before he attained the age of twenty-six years; this bill was brought for the legacy of £1000, and it prayed that if the personal estate was not sufficient, then that the plaintiff might have satisfaction out of the real estate.

Mr. *Browne*, for the plaintiff.

The annuities being charged upon the real estate, the plaintiff has a right to come upon the real estate for so much as has been paid towards those annuities out of the personal estate.

By the first clause in the will, the whole of his estate is subjected to his debts. This construction has often been given to words of this kind. *Lord Warrington v. Leigh*, 1 Vern. 45. But should that be otherwise, there is a subsisting trust for the payment of debts; for the devise of the real estate in trust to pay debts, &c., till *Thomas Lassells* should attain twenty-six years, will continue notwithstanding his death, until such time as he would have attained that age, *Taylor v. Biddall*, 2 Mod. 292.

Mr. *Attorney-General*, and Mr. *Fazakerley*, for the defendant.

The gift to the plaintiff was made on the supposition that there would be sufficient personal estate to satisfy it. The question will be, how much of the personal estate [145] would have been coming to *Thomas*; there would have been nothing without this circuitry, and *Thomas* could not have had the benefit of this circuitry. Specific devisees shall not be affected in order to make good the legacies. As to how much of the real estate is subject to debts; the general words in the first clause, will be restrained by

the particular provision made afterwards for debts, and there is no reason to extend those general words, unless the particular fund is not sufficient to pay the debts. The devise in trust till *Thomas* shall have attained the age of twenty-six, cannot be carried further, for the estate is devised over in case *Thomas* should die before he becomes entitled.

Lord Chancellor (Oct. 26, 1737) decreed payment of the legacy and interest, at 4 per cent. out of the personal estate, and if that shall not be sufficient, then out of the profits of the real estate devised to *Christopher Lethvallier* till *Thomas* should have attained twenty-six, and if that not sufficient, then the plaintiff to stand in the place of the annuitants to receive satisfaction for so much as they have exhausted of the personal estate. (Reg. Lib. A. 1737, fol. 280.)

(This case is taken from Lord *Hardwicke's* Note-book.)

[146] *PHILIPPA STANLEY*, Administratrix of *HOBY STANLEY*, Plaintiff; and *ANN STANLEY*, Widow of *WILLIAM STANLEY*, *HANS STANLEY*, an Infant Son of *GEORGE STANLEY*, *RICHARD BELLWARD*, the Personal Representative of the Surviving Trustee of the Settlement, Defendants.

October 28, 1737.

Where by marriage settlement the estate of the wife was settled to the husband for life, remainder to the wife for life, remainder to trustees for a term of ninety-nine years, remainder to the first and other sons of the marriage in tail male, remainder to the heirs male of the husband by any other wife, remainder to his heirs in fee, and the trusts of the term were declared to be, that if the husband should have one or more younger son or sons living at his decease, which should respectively attain twenty-one years, then that the trustees should and might out of the rents, issues, and profits, or by sale, of the premises, raise the sum of £5000, payable at such times, and in such proportions as the husband should by deed or will appoint, and in default thereof, to be equally divided amongst them, and to be paid at the age of twenty-one, or marriage; and to raise a sum for the maintenance of such children from and after the decease of the husband, until the portions should become payable, the first payment to begin and be made at such of the feasts as should first happen after the decease of the husband. A younger son having attained twenty-one in his father's lifetime, it was held, that he was entitled to have his portion raised in his mother's lifetime, with interest for the same, from the death of his father.

By a settlement dated the 15th of March 1692, and made previous to the marriage of *William Stanley*, deceased, and *Ann Hoby*, the defendant, certain premises which were the estate of the wife, were settled to the use of *William Stanley* for life, remainder to trustees to preserve, &c., remainder to *Ann Hoby* for life, remainder to trustees to preserve, &c., remainder to trustees for a term of ninety-nine years, *sans* waste, remainder to the first and other sons of the marriage, in tail male, remainder to the heirs male of the body of *William Stanley*, by any other wife, remainder to his heirs in fee. The trust of the term of ninety-nine years, was declared to be, that if *William Stanley* should happen to have one or more younger son or sons living at his decease, which should respectively attain twenty-one years, and no daughter, then that the trustees should and might out of the rents, issues, and profits of the premises, or by sale of the same or of some part thereof, raise the sum of £5000, payable at such times, and in such proportions as *William Stanley* should by deed or will appoint, and in default thereof to be divided equally amongst them, and to be paid at the age of [147] twenty-one, or marriage, and to raise a sum for the maintenance of such children from and after the decease of said *William Stanley*, until the portions should become payable, the first payment to begin and be made at such of the feasts as should first happen after the death of *William Stanley*.

Hoby Stanley was the only younger child of the marriage, and *William Stanley*, the father, died without having made any appointment of the said sum of £5000. *Hoby Stanley* having attained twenty-one in his father's lifetime, and having been paid by his father £1000, part of his portion of £5000, and having married and died intestate, this bill was brought by his widow and administratrix, in the lifetime of the mother, to have £4000, the residue of the portion raised out of the term for years, created by the settlement.

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The question was, whether that sum was to be raised and paid during the lifetime of the mother.

Mr. *Browne*, for the plaintiff, insisted that as all the contingencies upon which the raising of the portion was to depend had happened, the money ought now to be raised, and that if the money was now raisable, interest would follow of course.

Mr. *Chute*, for the defendant.—If any thing appears in the settlement which even hints at the postponement of the period of raising the portion it cannot now be raised.

This is the wife's estate, and it does not appear that there is any other settlement on the heir male ; a different method is prescribed for raising the maintenance from that in which the principal is to be raised ; the one by rents and profits, the other by rents and profits, mortgage or sale.

This term could not have been sold in the lifetime of the father.

In *Brome v. Berkley*, 1 Eq. Ca. Abr. 340, and 2 P. Wms. 484, the raising of the portions was postponed because the first day of payment of the maintenance was directed to be made after the death of the father and mother. This case is not distinguishable from former precedents in our favour.

Lord Chancellor decreed the sum of £4000 residue of the said £5000 portion to be raised by mortgage or sale as should be least prejudicial to the infant or his estate, together with interest for the same from the death of *William Stanley* the father, on distinctions from the former [148] case (See *Stanley v. Stanley*, ante, page 135) arising from the different penning of the deed, and the precedents. (Reg. Lib. B. 1737, fo. 117.)

(This case is taken from Lord *Hardwicke's* Note-book.)

PEARCE versus WARING.

Appeal.

Oct. 29th, 1737.

S. C. 2 Ves. 548.

Mr. *Hall* being entitled to considerable property under his uncle's will, five weeks after he comes of age settles an account with, and executes a release to, the executor of his uncle ; Under the circumstances of the release being prepared and engrossed by the executor before the accounts had been submitted to Mr. *Hall*,—of Mr. *Hall's* not having examined the accounts,—of the account itself not giving sufficient information without inspecting the books, which were not delivered to him,—of there being likewise an error in the account by a sum of £570 being charged twice ;—of a gift likewise of £3000 East India Stock from Mr. *Hall* to the executor, at the time of the settlement of the will,—of the executor having, since the death of Mr. *Hall*, broken open a box containing papers, some of which related to the accounts, and taken away some papers, and having made entries in the books subsequent to Mr. *Hall's* death : It was held, that the stated account should be opened though many small accounts had been afterwards settled, and though there had been an acquiescence by Mr. *Hall* until the time of his death.

In the month of September 1721, *Serjeant Hall*, being possessed of considerable real and personal estate, died, having by his will made the defendant *Waring* his executor ; and having given, after payment of some pecuniary legacies, the residue of his real and personal estate to his nephew *William Shepherd Hall*.

In December 1731, *William Shepherd Hall* died having made his will, bearing date the 21st of August 1726, whereby he appointed the defendant *Waring* his executor, and whereby after giving £3000 to the defendant *Waring* he gave the rest of his personal estate to trustees upon trust to lay out the same in the purchase of real estate to the use of the plaintiff Mrs. *Pearce*, and the heirs of her body. By a codicil of the 12th August 1727, *William Shepherd Hall*, willed that the defendant *Waring* should be indemnified for all moneys disbursed for his (the testator's) use and paid for his trouble concerning him (the testator) or his affairs.

Mrs. *Pearce* filed a bill for an account of the real and personal estate of *Serjeant Hall* and of the personal estate [149] of *William Shepherd Hall*, which by amendment,

was made to impeach a gift of £3000 East India Stock stated by the defendant to have been given to him by *William Shepherd Hall*.

The defendant *Waring*, as to so much of the bill as sought an account from him of the rents and profits of the real or of the personal estate of *Serjeant Hall* or *William Hall*, from the *Serjeant's* death to the 15th December 1727, by plea insisted that he had kept a particular account of his receipts and payments from that time in two books, and that soon after Mr. *Hall* came of age he being willing to settle the said accounts, desired *Woolley* and *Hemmings* might be employed in taking such accounts. That the two books and the vouchers were delivered by him to *Woolley* and *Hemmings*, who compared the books with the vouchers and drew up the account which was delivered to Mr. *Hall*, who carefully perused it; and by which account it appeared a balance was due from the defendant *Waring* to *Hall*; whereupon *Hall* executed a release to *Waring*, dated the 15th December 1727. That Mr. *Hall* desired the balance might remain in his hands, which he, *Waring*, consented to. And defendant *Waring*, by a second plea, insisted, that after the 15th December 1727, until the 8th November 1731, he had paid and received several sums of money and that he kept an account thereof in his book, and stated the vouchers, and that the said Mr. *Hall*, from time to time, considered the said accounts, and thereon allowed the same as stated accounts.

On the 9th of November 1727, *William Shepherd Hall* came of age, and on the 15th of December following the first accounts were stated and the releases executed; and on the 12th of February, the several stocks were transferred except the £3000 East India Stock claimed by the defendant. The balance of the account continued in *Waring's* hands, and from that time to the death of *William Shepherd Hall*, the accounts were continued between them, and many were signed by the latter.

It appeared in evidence that about the beginning of October, previous to *William Shepherd Hall's* coming of age, the defendant put his books of account and some vouchers into the hands of Messrs. *Woolley* and *Hemmings*; but that they never received any directions from Mr. *Hall*, and understood that they were only to cast up and prepare the ac-[150]-counts for the inspection of Mr. *Hall*, and not to examine or audit them; and that in fact they were unacquainted with the nature of the property and value of the stocks and did no more than cast up the items and make some new entries from the vouchers.

Mr. *Hall* came down to the country from *London* on the 10th or 11th of December, upon which the accounts were laid before him; but there was no evidence of his having examined them, except that one of the account books was once seen before him.

The release dated the 15th of December 1727, recited that *William Hall*, on perusal of the accounts had found them just and true; and that the release was executed in consideration of the premises, and of the payment of the balance, the receipt whereof was thereby acknowledged.

This release had been prepared by order of the defendant before Mr. *Hall* had come down from *London*, but it was read over to him before he executed it.

It was admitted that there was an error in the accounts of £570 twice charged.

The £3000 East India stock did not appear in any of the accounts; but on the 22nd of January, Mr. *Hall* signed a paper expressing his reasons for making the gift.

The defendant admitted that he had made some new entries in the accounts since Mr. *William Hall's* death, particularly relating to the £3000; and it was proved that since that time the defendant had caused the bottom of a box, belonging to Mr. *William Hall*, which had been locked and sealed and left in his custody, to be taken off; that he had taken out several papers, which however, he represented related only to an election at *Ludlow*.

This cause came on to be heard before the *Master of the Rolls*, when his Honour ordered and declared that the accounts preceding the 15th December, insisted on by the defendant *Waring's* first plea be set aside; that the accounts insisted on by the second plea do stand except as to the balance of the preceding accounts brought into those accounts; and directed an open account of the real and personal estate of *Serjeant Hall* and the personal estate of *William Hall*, and reserved the consideration of the £3000 India Stock until after the Master had made his report. This cause now came on before the *Lord Chancellor* upon an appeal from that decree.

[151] Mr. *Attorney-General* and Mr. *Clarke* for the defendant. Accounts so solemnly settled ought not to be overturned. It is not necessary that every allegation should be proved. *Woolley* and *Hemmings* had the vouchers before them, and it was

not the defendant's fault that they did not examine them ; but, in fact, some new entries were made by them from the vouchers. Mr. *Hall* himself had full opportunity of examining the accounts, and if, with his eyes open, he preferred trusting to the confidence he reposed in Mr. *Waring*, he is equally bound by what he has done,—if not, a careless man would fare better for being careless.

Mr. *Browne* for the plaintiff. Every allegation necessarily made in support of the defendant's case is disproved. He alleges that Mr. *Hall* gave directions to *Woolley* and *Hemmings* to state the account. That the accounts and vouchers were delivered to them, and that they compared them.

That the accounts contained entries of particular items, and that they were laid before Mr. *Hall* himself, and that he inspected the receipts and vouchers, whereas the entries are of gross sums without any distinction of principal and interest.

As to the £3000, there was no notice taken of it in the accounts delivered at that time, although the defendant has since Mr. *Hall's* death, made an entry of that sum as if done at the time. Mr. *Hall*, by his will, made when he was only seventeen, had given the defendant £3000, and he conceived this gift to be of that amount, whereas the £3000 East India stock is worth near £5000.

Lord Chancellor (Oct. 29, 1737). The first general question on this appeal is, whether the account as it is called of the 15th of December 1727, insisted upon by the defendant's first plea, ought to be allowed and established generally. Next, admitting that it ought not, whether it ought to be set aside totally, and an open account decreed ; or whether it ought to be directed to stand, with liberty for the plaintiff to surcharge and falsify it.

As to the first, whether the account ought to be allowed and established generally, I think that there is no colour for it ; because, first, the plea is not proved, so far from it that it is rather disproved by the defendant's own witnesses. It is truly said, that it is not necessary to prove every circumstance pleaded, but all material facts must be proved. To shew that that has not been done in this case, it is only necessary to compare the material facts pleaded with the [152] evidence. 2dly. There are material errors affecting sums of considerable amount shewn in these accounts. The next question is, whether these accounts ought to be set aside totally, and an open account decreed, or whether they ought to stand, with liberty for the defendant to surcharge and falsify.

This is a point always in the discretion of the Court, and in deciding which, the Court ought to be governed by the fairness of the defendant's proceedings and the circumstances of the case. The material circumstances in this case are, 1st, The facts preceding the account and release. 2dly, The manner of stating this account, and the circumstances attending it. 3dly, The circumstances subsequent to it. As to the facts preceding the account and release, it is admitted that Mr. *Hall* came of age on the 9th of November 1727, and a design appears to have been formed to gain a stated account of an estate of the value of nearly £80,000, and to get releases executed as soon as he came of age. But how was Mr. *Hall* assisted in the examination of these accounts ? by two persons employed by Mr. *Waring*, and not acting under any authority from Mr. *Hall*, for nothing has been proved to have been said or written by him to that effect. Then the release was prepared with all its recitals by Mr. *Waring*, containing an ample commendation of his own fidelity, and in which Mr. *Hall* is made to admit that he had perused the account, and that he had found it just and true ; and so far was this carried, that the defendant got the release engrossed before Mr. *Hall* came down, or had (so far as appears) been made at all privy to it.

2dly. As to the manner of stating the account, and the circumstances attending it, it appears that Mr. *Hemmings* and Mr. *Woolley* were strangers to the estate, and that they were employed only to cast up and methodize the account. They have sworn that the vouchers were not laid before them, and that they did not inquire into the truth of the entries, but took them upon the credit of the defendant. It is objected that this is contradicted by the fact, for that it is sworn that some of the vouchers were produced, and that they compared several of them with the entries in the books, from whence it is said, that it ought to be inferred that they saw all the vouchers, but that is more than is sworn by the plea, which only alleges that they inspected the vouchers, or such of them as they thought fit. I cannot make a presumption that their authority, or what they did, [153] was different from what they, who are his own witnesses, have sworn it to be. It is very probable, that those vouchers which were produced were only to enable them to make the new entries.

It appears then, that these persons did not audit or state this account. But what did Mr. *Hall* himself do ?

There is no evidence that he examined it, indeed he had no time for it ; he only asked *Woolley* and *Hemmings* if it was rightly cast up, and there is no evidence that he saw any vouchers.

What then does all this come to ?—That Mr. *Hall* executed a release, reciting an account stated when it was not, or stated only on one side, and extending to the whole estate, which in the words include every thing in Mr. *Waring's* hands, though not delivered over. It does not appear that Mr. *Hall* had any part of the account, or so much as a copy delivered to him, and if he had, and had read it over, he could not have learned any thing from it without looking through all the books, none of which it is pretended he saw, except one marked C. C., which was once seen laying by him, and at the same time a gift, or a promise at least of £3000 East India stock was obtained from him by way of present.

This was an act unbecoming a guardian, such an act as if any young man, within a month after he came of age, had offered to do, his guardian should have advised him against and withstood. This is a circumstance of very ill appearance, and demonstrates a prodigious influence over the young man. The value of the stock was between £4000 and £5000.

3dly, As to the circumstances subsequent to the account and release. Some of them are in favour of the defendant, others in favour of the plaintiff.

Those in favour of the defendant are the many small accounts stated afterwards, and the acquiescence of Mr. *Hall* up to the time of his death.

These circumstances might have been of weight, if Mr. *Hall* had been fully informed ; if he had had one part, or a copy of the account, to have examined and sifted ; but it is plain that he took the whole upon trust. It is, however, objected, that a man may state an account on a confidence in another if he pleases. So he may ; and if the person deals fairly and justly, and does not abuse the trust, it is [154] well ; but here it appears plainly, that the defendant abused his confidence.

The argument, from Mr. *Hall's* acquiescence, proves too much ; for it is admitted that there is a double charge in an item of £570. Mr. *Hall's* acquiescence must extend to justify and cover that error. Such an acquiescence is of no weight where imposition appears.

But there are subsequent circumstances in favour of the plaintiff ; and, first, the breaking open the box clandestinely, and taking out the papers. The box was sealed up, and left with the defendant as a sacred deposit. This has been called an imprudent act ; but I must call it a great breach of good faith,—an act of fraud. It is said, indeed, that no other papers were taken out, but such as related to the election. This, however, it is difficult to ascertain. It is like the case of a spoliator, every thing is to be presumed against him.

2dly, Entries are made in the books since Mr. *Hall's* death. These are so many instances of falsification. These circumstances, though subsequent to the account, shew how little ground Mr. *Hall* had for his confidence, and strengthen the evidence of imposition in passing it.

These two last facts are sufficient to determine my judgment against letting this account stand, with liberty to surcharge and falsify, for there is reason to think that evidence may have been clandestinely subtracted and concealed, and new entries made.

Besides, I think that it is not possible from the nature of this account. Surcharging and falsifying can only be done where an account contains particular items of particular sums received and paid. Here are no such particular items ; but the receipts and payments of many years are lumped together. Surcharging and falsifying in this case must be not of any items allowed by Mr. *Hall*, but of the defendant's books, which it does not appear that he ever inspected. It would be for the Court to establish the defendant's own books, unless the plaintiff can disprove them ; no such thing was ever heard of in this Court ; I see no ground in this case to give them so much credit, especially as now altered.

If any difficulty or inconvenience should arise from hence, ought it to be turned on the plaintiff or on the defendant. Surely on the defendant, who has behaved himself in this manner.

[155] Decree affirmed, with this addition, that the defendant *Waring's* first plea be set

aside as a stated account, but without prejudice to the defendant *Waring*, making use of such evidence as may properly arise from the facts and circumstances relating to that transaction on the open account hereinafter directed; and that the said defendant's second plea do stand, except as to the balance of the preceding accounts brought into those accounts. (Reg. Lib. B. 1737, fo. 12.)

(This case is taken from Lord *Hardwicke's* Note-book.)

BENJAMIN HUDSON and Others, *Plaintiffs*; and BENJAMIN HUDSON, JUN., and ELIZABETH, his Wife, JOSEPH HUDSON, and CATHERINE HUDSON, *Defendants*; and THOMAS HUDSON, the Executor of WILLIAM HUDSON, a Defendant by Bill of Revivor.

October 31, and November 4, 1737.

S. C. 1 Atk. 460.

The administrators of *J. H.* empower the defendants, by joint letters of attorney, to get in an intestate's effects in *Flanders*. One of the administrators (being the father of the defendants) afterwards settles the account with them, without the privity of the other administrator, executes general releases, and dies. Upon a bill brought by the surviving administrator against the defendants, the releases executed by their father, being unfairly obtained, were set aside. It seems that the release of one administrator will not bind the other; but it is otherwise in the case of an executor: and it seems that the release of one administrator to two persons, acting under a joint power of attorney, will bar the other at law; but being obtained by fraud, will be set aside in equity.

John Hudson died intestate, upon which letters of administration were granted to the plaintiff, *Benjamin Hudson*, and *William Hudson* deceased.

On the 14th of March 1728, the administrators, *Benjamin*, the plaintiff, and *William Hudson*, executed joint letters of attorney to the defendant *Benjamin Hudson*, who resided in *Flanders*, and to the defendant *Joseph Hudson*, then in [156] *London*, who were both sons of *William Hudson*, empowering them to get in and receive all moneys due to them as joint administrators of *John Hudson*.

On the 27th of March 1732, *William Hudson*, the joint administrator with the plaintiff, without his privity, settled the account with the defendants, *Benjamin* and *Joseph*, and gave them general releases.

The object of the present suit was to obtain an account of the personal estate of *John Hudson* against *Thomas Hudson*, executor of *William* the administrator, and to set aside the stated accounts and the releases which were executed, and to obtain an account against *Benjamin* and *Joseph Hudson*, for what they had received under the letters of attorney.

The defendants, *Benjamin* and *Joseph*, insisted upon the accounts stated, and the release.

Mr. *Browne* for the plaintiff, contended that a release by an administrator was very different in effect from one by an executor. *Wentw.* 373, in *addendis*. That it was more like the case of two trustees, and that in the present case there was evidence of fraud. That the account was collusive, and was not so much as sworn to be just and fair.

Mr. *Attorney-General* and Mr. *Fazakerley* for the defendants. An executor may release a debt and assign a term, and an administrator stands in his place. Before the statute of 22 & 23 *Car. II.* the administrator might retain the estate. It is not material that administrators do not resemble executors in all respects, it may be granted that one cannot assign a term; but payment to one of several executors is good, and that one may give a discharge. Administrators may release, which shews that they have an interest in them. *Adams v. Buckland*, 2 *Vern.* 514. There is an authority coupled with an interest. *Dyer*, 339. *Dr. Drury's Case*, 8 *Co.* 143 b. In this cause a demurrer was put in, upon the ground that the administration did not survive upon the death of one: but the Court held that it did, *Ca. Temp. Talb.* 127, which shews that there is an interest. Supposing that a release by one administrator would not in ordinary cases be binding upon the others, yet, in the present, the letters of attorney make the difference. Here is a joint letter of attorney. The defendants acted as

factors to two joint merchants. The administrators must be considered as partners, in which case one may release.

[157] *Lord Chancellor* (Nov. 4, 1737). There are two questions in this case which are merely matters of law.

First, Whether a release of a debt, or conveyance of a term, by one administrator, will bind his companion, where there is a joint administration granted.

Secondly, Whether the defendants acting, and collecting part of the estate, under a letter of attorney from both the administrators, will vary the case.

As to the first point. I am of opinion that one administrator cannot release a debt, or convey an interest, so as to bind the other; and that the case of an administrator differs from that of an executor.

It is certain that executors have such a power, and the reason is, that each executor is considered as entirely representing the testator. If an action is brought against joint executors, who plead different pleas, some books say, that plea shall be received which is most for the benefit of the testator's effects, and this shews each executor may plead in right of his testator.

But the case of executors differs essentially from that of administrators; executors receive all their power and interest from the testator, and though, before they can maintain an action, they must prove the will,(1) yet the probate is only a declaration of the proper court that they are executors, which, by the law of *Scotland*, is called confirming the executors to the testator, and is the same in effect as is done here, and still the interest arises not from the probate, but from the testator; therefore, an executor may release a debt (*Middleton's case*, 5 Co. 28 a; 9 Co. 39 a; Co. Lit. 292 b), or assign a term before probate (*Dyer*, 367 a, pl. 39), and if after probate he sues for the same, the precedent act done by him may be pleaded in bar: but not so of an administrator, for upon an action brought by such an administrator after letters of administration granted to him, his release or assignment will not bar him. If an executor appoints another to be his executor, and dies, such second executor shall be the immediate representative to the first testator; but on the death of an administrator, his whole interest determines, and [158] administration *de bonis non*, &c., must be granted to another.

So if a creditor makes his debtor his executor, the debt is totally extinguished, and cannot be recovered,(2) though the executor should afterwards die intestate, and administration *de bonis non*, &c., of the first testator should be granted: but if a debtor be appointed administrator, that is no extinguishment of the debt, but a suspension of the action, and his representative on his death would be chargeable at the suit of the administrator *de bonis non*, &c., of the first intestate, *Salk.* 299, 8 Co. 135. These cases evince the different foundations on which the rights of executors and administrators depend, the power of the latter arising wholly from the ordinary, of the former from the testator.

The right of an administrator is expressed so differently in the books, as if they were at a loss how to describe it. In 8 Co. 135 b, it is called an authority, because the administrator has nothing to his own use; in *Vaughan* 182, it is with greater propriety called a private office of trust, for it is more than a bare authority, and less than the interest of an executor, which seems to have been the foundation of *Lord Cowper's* opinion in the case of *Adams v. Buckland*, 2 Vern. 514.

If therefore an administration be in the nature of an office, what will the consequence be in the present case, for if an office is granted to two, they must join in the executing the acts of the office, and one cannot act unless in the name of both, and on this kind of reasoning the present case will depend.

There has been no case cited, except *Dyer* 339, and Co. 143 b, which turns on the repeal of letters of administration; and, indeed, I can find but one authority in the present case, and that in a little book, but that little book the work of a very great man, *Lord Bacon*, in his *Elements*, 4th vol. new edition, page 83 and 93, seems to correspond [159] with my opinion, as to the nature of the different rights of executors and administrators, therefore I think the release of one administrator will not bar the other.(3)

The next question is of another consideration, whether the defendants having acted under the letters of attorney of both administrators, and being therefore accountable to themselves in their own right, and not as administrators, the release of one may not bar both, and I think it may.

The cases consider them as representing the intestate, and suing in that right, where they must name themselves administrators, and so says Lord *Bacon*; but here both administrators execute a letter of attorney, to empower the defendants to collect the effects, and receive the intestate's debts, and so far as they have acted under that authority, they are answerable to the administrators in their own right, and might be charged as their bailiffs and receivers, and they need not name themselves administrators, and if non-suited, they must pay costs as suing in *jure proprio*.

If there is a joint debt owing to two, and one releases, the action is gone, whether it arises on bond or simple contract.

It has been said, that some part of the intestate's estate has been received by the defendants in specie, upon which [160] the right of administration should subsist; but I apprehend in such case, the release of one administrator would be a bar, for these things were in effect delivered to them by the administrators themselves, for which they must sue in their own right, and therefore the release of one bars the other; for though in trover they may name themselves administrators, yet they need not do it.

Then the question is, what a court of equity will do with a release that is effectual at law. If it was unfair and collusive, a court of equity ought to set it aside, and upon the evidence here, the releases appearing to be unfairly obtained, were set aside.

And as to the defendants *Benjamin* and *Joseph Hudson*, His Lordship declared that the plaintiff is not barred by the accounts stated, and the releases executed by their father, from demanding an account against them in equity, and directed an account against them of the personal estate of *J. Hudson* (Reg. Lib. A. 1737, fol. 138). (4)

On the 22nd of April following, this cause was re-heard upon some matters of account directed by the decree, but which did not affect the present question, and the decree was affirmed in every point but one.

(The statement of the case, and the arguments of counsel, are taken from Lord *Hardwicke's* Note-book; the judgment (which corresponds with a manuscript of Mr. *Forrester's*, except with some few additions which have been taken from that manuscript) from *Atkyns*.)

(1) Before probate an executor may commence an action, though at the trial the probate must be produced. 11 Vin. Abr. p. 203, pl. 2. 1 Rol. Abr. 917, a 2. *Duncombe v. Walker*, 1 Vent. 370. So he may file a bill before probate. *Humphreys v. Humphreys*, 3 P. Wms. 351, and it is sufficient if he obtain probate before the hearing, *Patten Executrix v. Panton*, cited 3 Bac. Abr. 53.

(2) So *Wankford v. Wankford*, 1 Salk. 299. But in equity the executor is only considered on a deficiency of assets as a trustee of the debt for creditors, *Holliday v. Boas*, 1 Rol. Ab. 926. *Askwith v. Chamberlain*, 1 Ch. Rep. 138. *Field v. Clarke*, ib. 242. So he is considered as trustee for legatees or next of kin, where it can be collected from the testator's intention, that he did not mean to extinguish the debt; see *Fox v. Fox*, post, p. 162, and the cases there cited.

(3) A release of one administrator will not prejudice the other, *Horner v. Burrell*, Toth. 264, 265, and in *Bacon's Law Tracts*, 162, "Any one executor may convey the goods, or release debts, without his companion, and any one by himself may do as much as all together; but it is not so with administrators, for they have but one authority given them by the bishop over the goods, which authority being given to many, is to be executed by all of them joined together." In *Jacomb v. Harwood*, 2 Ves. 267, Sir *J. Strange* says, "That though in *Hudson v. Hudson*, it was said that the Lord Chancellor had been of opinion, that one administrator could not release so as to bind the other, yet when that case was more narrowly looked into, it appeared clearly that that was applicable to the particular circumstances of that case. But he said in *Willan v. Fenn*, it was held in B. R. after three arguments, that one administrator stood on the same ground and foundation with one executor." The following statement of the case of *Willan v. Fenn*, appears in Serjt. *Hill's Viner*, "Debt by plaintiff as administrator,—plea, release from the plaintiff's co-administrator, on which the plaintiff demurred, and after much argument, and many authorities cited, the Court inclined against the plaintiff, notwithstanding the case of *Hudson v. Hudson* was cited; a distinction was taken at the bar, between payment to one and release by one, without payment; but no notice was taken by the Court of that distinction, and the case was adjourned. Trin. 1738, B. R., and the Court inclined against the plaintiff, but the cause was adjourned, and there is a note, that it was afterwards compromised; but in another

manuscript it is said that judgment was afterwards given for the defendant " 11 Vin. Ab. 72. See Shep. Touch. 484.

(4) *Hudson v. Hudson*, came before Lord *Talbot* upon a question whether administration survives, upon the death of one of the administrators, and Lord *Talbot*, in conformity with *Adams v. Buckland*, decided by Lord *Cowper*, 2 Vern. 514, but in contradiction to *Bowden v. Bowden*, which was determined in the ecclesiastical court, Held, that administration survives. Cases Temp. Talb. 127.

[161] JOHN PALMER, and SUSANNA his Wife, JOHN MAYSENT PALMER, and SUSANNA PALMER, Infants, *Plaintiffs*; and WILLIAM MAYSENT, Executor of JEREMIAH MAYSENT, and Others, *Defendants*.

Nov. 7th, 1737.

S. C. 1 Atk. 505; 1 Dick. 70. [See Reporter's note, Dick. 70.]

A testator gives to his grand-daughter a legacy, to be paid to her at twenty-one or marriage, but if she dies before, then he gives the same to his executor. Upon a bill for interest, and to secure the principal; it was held, she was not entitled either to the interest, or to have the principal secured. (The cases have now decided that the Court will secure a contingent legacy, *Studholme v. Hodson*, 3 P. Wms. 300. *Green v. Piggott*, 1 Bro. Ch. Ca. 105. *Cary v. Askew*, 1 Cox, 244.)

The testator by his will, dated 8 August 1723, gave to the plaintiff *Susanna*, the wife of *John Palmer*, £10. To *John Maysent Palmer*, £500 to be paid to him at twenty-one, and if he dies before that time, then he gave that sum to the defendant, his executor. The testator also gave £100 to his grand-daughter, the infant, *Susanna Palmer*, to be paid to her at twenty-one, or marriage with consent, and if she dies before, then he gave the same to his executor, and made him residuary legatee.

The bill prayed amongst other things, that these legacies to the infants might be paid and secured, and that if the personal estate was not sufficient for that purpose, that they might be raised out of the real estate, and that interest might be allowed and paid for their maintenance.

The defendant admitted assets, stated that he had paid the legacy of £10, and insisted that he had a right to retain the two other legacies of £500 and £100 without interest, till they should respectively become payable.

The Lord Chancellor decreed that the plaintiff, the infant, should have liberty to apply for payment of the £500 and £100 when they should become payable under the will.

Mr. *Atkyns* states, that another point arose in this cause between a specific devisee of land under the will, and the heir at law of the testator, whether the former should contribute equally with the latter in the payment of debts where the personal estate was not sufficient, and that the [162] Lord Chancellor said, that where there is a specific devise of lands, the specific legatee shall never contribute upon an average with the heir at law towards satisfaction of creditors while the real assets of the heir are sufficient. No mention is made of this point, either in Mr. *Dickens's* report of this case, or in Lord *Hardwicke's* Note-book.

(This case is taken from the statement of the bill and answer as extracted by Mr. *Dickins*, in 1 Dick. 70, and from Lord *Hardwicke's* Note-book.)

Fox v. Fox.

Nov. 7th, 1737.

S. C. 1 Atk. 263.

William Fox mortgages his estate to *Thomas Fox*, who paid no money, but gave a bond to *William* for £130.—*William Fox* by his will makes *Thomas* his residuary legatee, and appoints him his executor. Upon a bill filed by the heir at law of *William*, against *Thomas*, to have the real estate exonerated from the mortgage debt, it was held, that the bond debt was not extinguished in equity: (1) and that the debt due from the executor must be brought into the account of the testator's personal estate, and after the payment of the other debts, funeral expences, and legacies, the testator's personal estate was to be applied in satisfaction of the mortgage debt.

By indenture of mortgage, dated the 25th of February, 1730, *William Fox*, in consideration of natural love and affection to *Thomas*, his brother (the defendant),

G. v.—28*

and of £130 paid, or secured to be paid, by *Thomas*, conveyed a certain tenement to *Thomas*, to hold to him and his heirs, with a proviso for the redemption thereof, upon payment of £135, 8s. 4d. on the 25th of February following.

Thomas Fox gave a bond of the same date for the payment of the sum of £130 to *William Fox*.

William Fox by his will, bearing date the 10th of September 1731, gave and bequeathed to his loving brother, *Thomas Fox* (the defendant), all the rest of his personal [163] estate, goods and chattels whatsoever, and appointed him executor. The plaintiff, who was the heir at law of *William Fox*, filed the bill, to have the real estate exonerated of this mortgage.

Mr. *Browne* and Mr. *Fazakerley* were counsel for the plaintiff.

Mr. *Floyer* for the defendant admitted, that generally the heir is entitled to have the personal estate applied in exoneration of the real, but contended that the plaintiff was not entitled to have this sum of £130 so applied, for that the will operates as a release and extinguishment of the debt, and amounted to giving a legacy of that sum.

Lord Chancellor (Nov. 8, 1737). In this case I was of opinion that the debt of £130, due from the defendant, the executor, should be brought into the account of the personal estate, in order to exonerate the real estate from the mortgage; because the creditor might recover it at law on the covenant, and this would be considered as assets notwithstanding the legal extinguishment, *Yelv.* 160, and the heir stands in the place of the creditor. That a residuary legatee might call for this debt out of the hands of the executor as assets, and so it was determined in the case of *Phillips v. Phillips*, 1 Ch. Ca. 292, and *Brown v. Selwyn*, in Dom. Proc. 21 March 1734, and the right of the heir to be exonerated is stronger than, and superior to the right of the residuary legatee, because he could take away the assets from the residuary legatee in ease of his inheritance, and therefore in the cases of *Phillips v. Phillips*, and *Brown v. Selwyn*, if there had been an heir who had sued afterwards to have his inheritance exonerated, he might have recovered the assets for that purpose after the residuary legatee had recovered against the executor, which would be absurd if he had not this right. As to the objection that the heir at law stands in the place of the testator, so doth the residuary legatee as to the personal estate.

Decreed a redemption, and account of the personal estate, and this debt from the executor to be brought into the account.

Referred it to the Master to see what was due for principal and interest on the mortgage; and that the defendant should account for the personal estate of the testator, and in such account the sum of £130 and interest, due from the defendant on bond to the testator, is to be brought in and considered as so much assets in his hands; and decreed that the testator's personal estate be applied in a course of [164] administration; and if any thing shall remain after payment of the testator's other debts, funeral expenses, and legacies, the same is to be applied in satisfaction of the said mortgage debt; and if that shall be sufficient, then it is ordered that the defendant reconvey the said mortgaged premises; but if the same shall not be sufficient, upon the plaintiff's paying to defendant so much, or such part as the same shall not be sufficient to satisfy the mortgage, together with the costs of the suit, then it is ordered that the defendant reconvey the said mortgaged premises. (Reg. Lib. A. 1737, fo. 789.)

(This case is taken from Lord *Hardwicke's* Note-book.)

(1) At law the debt is extinguished, but in equity, the executor, on a deficiency of assets, as to creditors is a trustee in respect of the debt, which is considered as part of the testator's personal estate, *Wankford v. Wankford*, 1 Salk. 299. *Brown v. Selwyn*, For. Rep. 242. So he is a trustee for legatees, where it can be collected from the will that the testator did not intend to extinguish the debt; as where the debt is expressly devised to pay a legacy, *Flud v. Rumsay*, *Yelv.* 160; or where the words, in a residuary clause, are sufficiently comprehensive to embrace it. *Brown v. Selwyn*, For. Rep. 240; 4 Bro. P. C. 179. *Phillips v. Phillips*, 2 Freem. 11. See *Askwith v. Chamberlain*, 1 Ch. Rep. 138. *Field v. Clarke*, 1 Ch. Rep. 242. So where the testator leaves his executors legacies, *Carey v. Goodinge*, 3 Bro. Ch. Ca. 110; or where an executor is considered by the testator as a mere trustee of his whole property, *Berry v. Usher*, 11 Ves. 87.

MARY RIDOUT, Widow and Executrix of WILLIAM RIDOUT, *Plaintiff*; and DOWDING and Others, *Defendants*.

November 8th, 1737.

S. C. 1 Atk. 418.

A testator devises his estate to his wife for life, subject to a term of 2000 years, which he gives to his trustees, from the day of his death, upon trust, with the consent and direction of his wife to raise money for the payment of his debts. The term, though subsequent, shall take place of the wife's estate for life, in case of a deficiency of personal estate to pay debts.

William Ridout being entitled to a certain real estate by lease and release of the 24th and 25th of October 1727, conveys the same to trustees and their heirs to the use of himself for life, remainder to the use of such person and persons, and upon such trusts as he shall declare and appoint by will, deed, or writing. By his will of the 27th October 1727, he limits and appoints his real estate to *Mary*, his wife, for life, without impeachment of waste, except in houses, with power to take all necessary votes, subject and liable nevertheless to the trust of a certain term of 2000 years; which he then gives to trustees from the day of his death upon trust, *with the consent and direction of the plaintiff, testified in writing under her hand and seal, in the presence of three witnesses*, to raise money for the payment of his debts and funeral charges, with remainder after his wife's death to [165] the heirs of his body, remainder in fee as to part to *James Dowding*, remainder in fee as to the residue to *Joseph Dowding*, and gives the residue of his personal estate to his wife, whom he appoints his executrix, and dies without issue.

The defendants set up several demands upon the estate of *William Ridout*, and particularly the defendant *Dowding*, who claimed by bond and otherwise.

Lord Chancellor (Nov. 8, 1737). A testator in the first part of a will gives his wife an estate for life in particular lands, and in the latter part creates a term for years, to take place from the day of his death, in trust for raising sums of money to discharge his debts, in such manner as the wife should direct.

The question is, Whether the wife is entitled to have her estate for life discharged of the term.

Notwithstanding the testator has in the outset of his will given her an estate for life, yet, I am of opinion, the term, though subsequent, shall take place of the wife's estate for life; and it is plain it was his intention it should be so, by making use of these words, "the term to take place from the day of his death." (These words appear in *Lord Hardwicke's* Note-book, though they do not appear (as stated by *Mr. Sanders*, in his edition of *Atkyns*) in the Register's Book.) And it is immaterial how a testator places the several devises in a will, because the whole must be construed together, so as to make it consistent; and here it is not subject to a bare naked term only, which might have admitted of some doubt, but to the trust of a term to raise money for discharging the testator's debts, and the words that follow, "in such manner as his wife should direct," do not intend the wife shall have a power of exempting her estate for life, but only that she may raise it in the most convenient method, either by mortgage or otherwise.

His Lordship decreed, if the personal estate of *William Ridout* was not sufficient to pay his debts, that the trustees should, with the approbation of the Master, sell the term of 2000 years to make good such deficiency. (Reg. Lib. B. 1737, fo. 99.)

(The statement of this case is taken from *Lord Hardwicke's* Note-book. The judgment from *Atkyns*, which corresponds with the minutes of the judgment in *Lord Hardwicke's* Note-book.)

[166] SHRAPNELL, *Plaintiff*; and BLAKE, a Bankrupt, and TROTT and HUTCHINS his Assignees, *Defendants*.

Nov. 9th, 1737.

S. C. 2 Eq. Ca. Ab. 603.

A mortgagee cannot tack his subsequent bond debt against a second mortgagee, or against creditors.(1)

Blake was seised in fee of a copyhold estate, held of the manor of ——— and upon the 5th of October 1725, made a conditional surrender of it to the plaintiff to secure £400 and interest, and afterwards borrowed of the plaintiff £50 upon bond, and afterwards by two surrenders, the first dated the 26th of May 1733, the other the 27th of May 1734, *Blake* mortgages his estate to the defendant *Trott* for £650. The 29th of August 1734, *Blake* became a bankrupt. Some time in October 1734 the plaintiff delivered ejectment against the tenants to get possession of this estate. Upon the 30th of October 1734, the defendants, *Trott* and *Hutchins*, as assignees, gave the plaintiff notice that they would pay him his money, due upon the mortgage, the 11th of November following, at the Exchequer, in the castle of ——— where it is made payable, by the surrender, and which, as appeared by full proof, was the usual place for the receipt for the money due upon mortgages. Upon the 6th of November 1734, the plaintiff filed his bill in this court for a foreclosure, not having attended at the time and place [167] appointed to receive the money. The defendant *Trott* brought a cross-bill to redeem the plaintiff's mortgage, upon payment of principal and interest, due to the 11th of November 1734. *Shrapnell*, the defendant in the cross-cause, insists upon being paid the bond due of £50 as lent upon security of the mortgage, and that at the time of lending it it was agreed that the mortgage should stand as a security for it, and insists upon *Trott's* mortgages being only colourable and fraudulent, to cover the estate from his debts. *Note*: *Trott* was *Blake's* son-in-law, and *Trott* had made no proof in the cause of the payment of the pretended consideration money for the two mortgages.

Lord Chancellor (between 9th and 12th Nov. 1737). This bond debt cannot possibly be tacked to the mortgage; an heir shall never redeem without paying both. because the equity of the redemption is chargeable as assets in the hands of the heir to pay off the bond debts; and therefore, to avoid circuitry, the heir must pay them both before he can be entitled to a redemption. By all the late cases, a mortgagee cannot (2) insist upon being paid a bond debt, even against the mortgagor himself, and it is still stronger against a second mortgagee, or assignees of a commission of bankrupt; and in the latter case the creditor is not entitled to the whole debt, but rateably and proportionably with the rest of the creditors. As to the interest since the tender, it is a very particular case; in common cases, six months' notice is necessary to raise the interest, and, except a particular place is agreed upon, there must be a personal tender. In the present case the Exchequer at the castle is fixed upon by the mortgagee for the payment of the money, but in strictness that relates to the payment of it upon the day mentioned in the mortgage: though as it appears by proof that it had been the usual method to pay off mortgages there, I think the notice is in that respect sufficient. A tender after a bill or ejectment brought, is quite different from one made before, because a demand is thereby made of the mortgage money, and therefore he is obliged to take it at less notice than six months, and within a reasonable time according to the circumstances of the case. But in the present case, there was a controversy to whom the equity of redemption belonged; the assignees, indeed, gave [168] the notice, but one of the assignees, *Trott*, now insists upon a right to redeem in his own private right; and it was impossible that any assignment could be made till that point was settled; and it is a point very properly controvertible by the plaintiff; for, if the mortgages were substantiated, they will exhaust so much of the estate as would otherwise be liable to pay off this bond debt in proportion to the rest of the creditors, and there must be an enquiry before the Master, or by directing an issue whether any money was really lent upon these mortgages: and must the plaintiff's interest cease till the point be settled? Suppose no bill or ejectment had been brought, and there had been regular six months' notice, and it had been controvertible to whom the assignment should be made, the interest of the mortgage would certainly not cease from that

time, because he refused to receive the money. The plaintiff must have his interest till the time fixed by the Master for his receiving it, after it has been settled whether the mortgages were made upon a good consideration or not.(3)

(This case is taken from *Equity Cases Abridged*, which agrees with the statement of the case in Lord *Hardwicke's* Note-book. The only judgment found in Lord *Hardwicke's* Note-book, is "Decree, a redemption.")

(1) Nor can he tack his bond against creditors under a trust created by the will of the mortgagor for the payment of debts. *Heams v. Bance*, 3 Atk. 630. *Price v. Fastnidge*, Amb. Rep. 686. *Hamerton v. Rogers*, 1 Ves. jun. 513. Nor against an assignee of the equity of redemption. *Vanderzee v. Willis*, 3 Bro. Ch. Ca. 22. *Adams v. Claxton*, 6 Ves. 229. *Troughton v. Troughton*, 1 Ves. 88. Nor, by the modern dicta of judges, against the mortgagor, *Anon.* 2 Ves. 663. *Challis v. Casborne*, 1 Eq. Ca. Ab. 325, pl. 9. *Lowthian v. Russell*, 3 Bro. Ch. Ca. 162. *Jones v. Smith*, 2 Ves. jun. 376. Though in some former cases the contrary has been decided, *Baxter v. Manning*, 1 Vern. 244. *Anon.* 1 Salk. 84. But a mortgagee may tack his subsequent bond against the heir of the mortgagor, *Shuttleworth v. Laycock*, 1 Vern. 245. *Pearce v. Saxby*, 6 Vin. Ab. 222, pl. 4. *Coleman v. Winch*, 1 P. Wms. 775. Or against his executor where the mortgage is for a term of years, *Anon.* 2 Vern. 177. Or against the devisee of the mortgagor, *Challis v. Casborne*, 1 Eq. Ca. Ab. p. 325, pl. 9.

(2) The word "not" has been inserted in order to make the passage intelligible. This alteration is consistent with the decree, and a dictum of Lord *Hardwicke's* in 2 Ves. 663.

(3) By the decree in the Register's Book it was referred to the Master to see what was due to the plaintiff *Shrapnell*, for principal, interest, and costs on his mortgage, and to enquire whether the sums mentioned as the consideration of the mortgages claimed by defendant *Trott*, were really and *bona fide* paid and advanced by him to *John Blake* the bankrupt; and if the Master should find that nothing was advanced, then upon payment by defendants *Trott* and *Hutchins* to plaintiff *Shrapnell* of what was due to him for principal, interest, and costs, in respect of his mortgage, he should convey to them the mortgaged premises; but in default of payment they should be foreclosed; but if the Master should find that anything was advanced by defendant *Trott*, then he was to be at liberty to redeem; but in default should be foreclosed, and the cross-bill exhibited by *Trott* against *Shrapnell* should be dismissed with costs. And it was ordered that the defendants *Trott* and *Hutchins* should pay unto *Shrapnell* his mortgage money and costs, or should be foreclosed. But in case the Master should find anything due to *Trott* in respect of his mortgages, and he should pay to plaintiff *Shrapnell* what was due on his mortgage, then it was ordered that the mortgaged premises should be sold; and out of the moneys arising from the sale, the defendant *Trott* was to be paid what was due to him in respect of *Shrapnell's* and his own mortgage; and in case sufficient was not raised by sale, *Trott* was to be a creditor under the commission, to receive a satisfaction with the bankrupt's other creditors. And it was ordered that the Master should compute what was due for principal and interest to *Shrapnell* in respect of his bond, and for so much as the Master should find due, interest to be computed to the time of issuing the commission, he was to come in as a creditor under the commission to receive a satisfaction with the other creditors of the said *John Blake*. Reg. Lib. B. 1737, fo. 58.

[169] BICKLEY v. DORRINGTON.

Appeal from the Rolls.

Nov. 12th, 1737.

A suit cannot be maintained by a creditor or legatee against a debtor to the testator's estate.(1)

The bill was brought by the creditors, and one of the residuary legatees of the testator *Penny* against his executors, the other residuary legatee, and *Olley* as a debtor

to the testator's estate for the purpose of having the debt due from *Olley* applied in satisfaction of the plaintiff's demands.

The bill stated that for several years prior to June 1715, the testator, *Thomas Penny*, and *Olley* carried on the trade of leather-sellers in partnership together; but in 1715, the testator agreed to give up the management of the trade to *Olley*, until one of the testator's sons was capable of undertaking the trade, and become partner with *Olley*. On the 24th June 1715, articles of agreement were entered into between the testator and *Olley*, reciting that they had that day divided their stock, and that there remained due to the testator £2261, 3s. 0½d. That *Olley* was indebted to the testator in £200 on bond, and *Olley* thereby covenanted to pay to the testator £1261, 3s. 0½d., with interest, and also the said £200 with interest till paid, and the testator agreed that he would let £1000, residue of the said £2261, 3s. 0½d., remain in the hands of *Olley* for five years without interest; and it was thereby agreed that the sole benefit of the said trade for five years then next should accrue to *Olley* for his sole use without account; and *Olley* agreed to pay the testator £200 yearly for five years; and it was thereby agreed that *Olley* should, within the five years admit *Samuel Penny*, the testator's son into partnership, who was to have an equal benefit with *Olley*, and that from the commencement of such partnership, *Olley* should cease to pay £200 *per annum* to the testator, but should nevertheless, at the end of the said term, pay the said £1000. That afterwards *Olley* entered into a bond, bearing even [170] date with the said articles for payment of the said £1000, and performance of the articles; and a judgment was entered up thereon, and *Olley* also signed a note for £800 payable to *Thomas Penny* with interest. That after entering into the said articles, the said trade was carried on and continued in the joint names of the testator and *Olley*, but the profits thereof were solely received by *Olley*. That upon the death of *Samuel Penny* on the 25th September 1728, *Thomas Penny* the younger was taken into partnership with *Olley*. That from the year 1715 to 1727, there was a running account between *Olley* and the testator, and on the 29th of September 1727, they came to a general account, and mutual memorandums were signed by them to each other, whereby there appeared due to the testator, the sum of £2896, 5s. 9d., which *Olley* promised to account for on the 25th December then next. That on the 25th September 1728, they signed a memorandum of their having made a balance of the testator's account, whereby there appeared due to him the sum of £1901, 5s. The bill further alleged, that after stating the said account, all the proceedings in the said trade were carried on in the names of *Olley* and *Thomas Penny* the younger. And the plaintiffs by their bill alleged, that the balance of £1901, 5s. ought to have been paid, but that *Olley* had refused to pay the same.

The defendant *Olley* by his answer admitted the copartnership between him and the testator for several years prior to June 1715, but that the same was dissolved on the 24th of June 1715, when he and the testator settled a general account of the copartnership till the 20th of June 1715, in which the share and interest of the said testator in the copartnership were included, and that upon the balance of that account *Olley* was indebted to the testator £2261, 3s. 1½d. That the testator at the time of the articles being entered into, agreed to give up the trade and the whole benefit thereof to *Olley*, and that till December 1727, the testator's name was continued in the trade, but the same was done only least the same should suffer from leaving out his name, and for no other purpose. And he likewise stated, that from the 24th of June 1715 till the testator's death there was an open account between them, and upon the balance of these accounts, he claimed to be a creditor upon the estate to the amount of £6005, but submits to deduct from that sum what might be due to the testator upon the foot of the articles, and said that he was willing that the plaintiffs or their solicitor should inspect his books.

[171] The testator died in 1730, and the executors who are parties to this suit have never attempted to call the defendant *Olley* to an account. On the 10th March 1736, this cause came on to be heard before the *Master of the Rolls* who ordered the bill to be dismissed as against *Olley*, and on the 12th November 1737, it came on before the *Lord Chancellor* upon appeal.

Mr. Attorney-General for the plaintiffs.

Mr. Fazakerley for the defendant *Olley*.

The plaintiffs have not made out any special case of laches against the executors.

The testator died in 1730, and the bill was filed in 1733. It is a common direction for the Master to enquire what debts are proper to be put in suit.

Lord Chancellor (Nov. 12, 1737). This bill is totally improper as against the debtor, and inconsistent with the principles of law and the rules of this court. No action or suit can be brought against a debtor to the estate but by the executor or personal representative of the testator. The whole management of the estate belongs to him. The right of it is vested in him, and cannot be taken from him by creditors or legatees. If he release a demand and is solvent, it is a devastavit in him, and he is personally answerable for the sum released. In cases of collusion or insolvency it may be proper to come here for satisfaction against the debtor; but there must always be some special case which is not attempted either by the bill or at the bar. Many inconveniences would attend this method of proceeding, except in cases particularly circumstanced. The bill must be dismissed but without costs, because it might have been demurred to. (Reg. Lib. A. 1736, fo. 402. Reg. Lib. A. 1737, fo. 56.)

(The statement of this case is taken from the Register and Lord *Hardwicke's* Note-book, the arguments of counsel from his Lordship's Note-book, and the judgment from a manuscript report.)

(1) Unless there be collusion between the debtor and the representative of the estate, *Doran v. Simpson*, 4 Ves. 651, or the representative of the estate be insolvent, *Utterson v. Mair*, 2 Ves. jun. 95, and S. C. 4 Bro. C. C. 270, and see *Alsager v. Rowley*, 6 Ves. 748; or unless he be the surviving partner of the testator's or intestate's estate, *Newland v. Champion*, 1 Ves. 106.

DAWSON v. DAWSON.

Nov. 13th, 1737.

S. C. 1 Atk. 1.

Where a defendant sets forth a stated account, it is a bar to a general one till particular errors are assigned.

Lord Chancellor. Where a bill is brought for a general account, and the defendant sets forth a stated one, the [172] plaintiff must amend his bill. So, *Sumner v. Thorpe*, ante, p. 11. *Willis v. Jernegan*, 2 Atk. 251. For the stated account is, *prima facie*, a bar till particular errors are assigned to the stated account. (1)

To support a stated account it is not sufficient to say, that there has been a dividend, which implies an account stated, for a dividend may be made upon a supposition that the estate will amount to so much; but still subject to an account that may be taken afterwards.

(It appears by the *Lord Chancellor's* note of this case that the bill was filed by one who claimed one sixth of the surplus of a real and personal estate under a will against the trustees and those claiming the other shares, and that the trustees insisted upon a stated account, and gave in evidence that a meeting between the plaintiff and all those interested in the estate had taken place; that the account was produced, and no objection was made to it; that they had agreed to divide £12,000, and that the plaintiff had received £2000 as his share. Several considerable errors were shewn to exist in the trustees' accounts. His lordship decreed an account, and that if the Master found any account stated, he was not to travel into it. Reg. Lib. A. 1737, fo. 1720.)

(1) If a bill be filed to impeach a settled account, specific errors must be alleged, *Taylor v. Haylin*, 2 Bro. Ch. Ca. 310. *Johnson v. Curtis*, 3 Bro. Ch. Ca. 286. *Chambers v. Goldwin*, 9 Ves. 266. *Drew v. Power*, 1 Sch. & Lef. 192, unless a settled account is suggested only, but not proved by the answer, in which case liberty is given to surcharge and falsify, if the Master should find any settled account, *Kinsman v. Barber*, 14 Ves. 579.

THOMAS HOW LYNN, *Plaintiff*; and THOMAS KERRIDGE, *Executor of MARY KERRIDGE, the Widow, who was Executrix of SAMUEL KERRIDGE, the Testator, WILLIAM SPIDAL, and SARAH his Wife and Others, Defendants.*

[See *Lowe v. Thomas*, 1854, 5 De G. M. & G. 319. Followed, *Hart v. Hernandez*, 1885, 52 L. T. 217.]

Nov. 15th, 1737.

A testator after disposing of his real estate, and giving a general legacy of £100, gives all his moneys not otherwise by his will disposed of to his younger children, and the residue of his personal estate to his wife. Under the word "moneys," East India stock passes to the children. (1)

Samuel Kerridge, by his will, dated the 22nd of September 1677, devised all his real estate to his eldest [173] son, *Thomas Kerridge*, and the heirs of his body; and taking notice that his wife was then with child, devised all his leases whatsoever upon trust, that they should preserve the rents as they should arise, for the use of his son *Samuel* and his daughter *Sarah*, and of the child which his wife then went withal (which child was the plaintiff's mother *Mary Lynn*) to be paid them in equal proportions:—to the said *Samuel Kerridge* and the child unborn, if it should be a son, so soon as they should attain their respective ages of twenty-one years; and to his daughter *Sarah* and the child unborn, if it should be a daughter, at their respective ages of twenty-one years or marriage, which should first happen; and after giving a general legacy of £100, he gave and bequeathed to the said *Samuel*, *Sarah*, and the child unborn, all his monies whatsoever not therein otherwise disposed of; and if any of his said children should die before their shares became payable, the shares of him, her, or them, so dying, should remain to the survivor or survivors of them; and he gave all other his personal estate whatsoever to his wife.

The testator left four children, *Thomas*, his eldest son, *Samuel*, who died an infant, *Sarah*, and *Mary* the unborn child, mentioned in the will.

Mary married *Francis Lynn*, by whom she had issue, the plaintiff.

The testator was possessed of a sum of £767 old East India Stock, the dividends of which, after his death, were carried to the account of the younger children, to which the widow, then the personal representative of the testator, made no objection.

Mary Kerridge died, having, by her will, made her son *Thomas Kerridge*, her executor, who proved her will.

On the 8th of October 1718, *Thomas Kerridge*, by letter of attorney, transferred the East India stock to *Henry Stoakes* and *Mary* his wife.

The prayer of the bill was for a transfer of plaintiff's share of the £767 East India stock.

Mr. *Browne*, for the plaintiff. The word monies will include this stock, which is credit for so much money in the Company's books, and the word would clearly take in securities for money; bonds and mortgages would certainly [174] have passed. The words in the act 9 & 10 W. 3, c. 24, s. 182, are estate, interests, and stocks of money, in the said Company. Land will pass by the words rents at such a place. The testator gives all his monies, not otherwise disposed of, but he had not before given any specific money, he must, therefore, have meant all his personal estate, not otherwise disposed of, for he had given a general legacy of £100. The younger children have no other provision except the leases, producing about £120 *per annum*, and nearly expiring.

Lord Chancellor (Nov. 15, 1737) decreed an account and satisfaction for one moiety of the £767 old East India stock against the defendant *Thomas Kerridge*, the executor *nisi*, &c., he making default. (Reg. Lib. B. 1737, fo. 53.)

(This case is taken from Lord *Hardwicke's* Note-book.)

(1) But the word "money" will not pass stock, where the testator in his will distinguishes stock from money, *Hotham v. Sutton*, 15 Ves. 319. *Ommaney v. Butcher*, 1 Turn. Rep. 260. And it is said by Lord *Eldon*, stock does not pass by the word "money," *Hotham v. Sutton*, 15 Ves. 327.

MANNING v. LECHMERE (1)

[See *Giffard v. Williams*, 1869, L. R. 8 Eq. 498.]

Nov. 16th, 1737.

S. C. 1 Atk. 453.

The rules as to evidence are the same in equity as at law.—Where two leases are set up, you cannot read one of them, till you have proved possession under that lease.—To shew a title in the lessor he must prove actual payment of rent, receipts alone will not do.—Bailiffs' rentals are evidence of payments.

Lord Chancellor. The rules as to evidence are the same in equity as at law, and if A. was not admitted as a witness [175] at the trial there, because materially concerned in interest, the same objection will hold against reading his deposition here.

There are many cases where leases are granted to persons, in which possession upon that lease, and payment of rent, shall be a presumption of right in the lessor, till a better is shewn; but when two leases are set up, you cannot read one of them, till you have proved possession under that lease.

Receipts for rent are not a sufficient evidence of a title in the lessor, unless he proves actual payment, especially where the person who has signed the receipt is living, for he ought to have been examined in the cause.

Where there are old rentals, and bailiffs have admitted money received by them, these rentals are evidence of the payment, because no other can be had.

(1) The points stated to have been decided by the *Lord Chancellor* in this case, having arisen collaterally to the merits of the cause, are not mentioned in his Lordship's note. The facts of the case, as mentioned in *Lord Hardwicke's* Note-book, were shortly as follows. On the 28th of February 1695, the defendant's father granted to the plaintiff's father a lease for 99 years of certain lands, at a rent of £60 *per annum*, and four-pence per ton for minerals dug: covenant by the lessee for the payment of the rent. On the 29th of February, in the same year, articles of partnership were entered into between the lessor and lessee, for carrying on the iron works, by which it was provided that the profits should be applied, first, to the payment of £40 *per annum* to *Manning* for his trouble; and, secondly, to the payment of the rent reserved to *Lechmere*. The surplus to be equally divided, with a power to determine the partnership within six months after the end of the first seven years. In 1699, a judgment having been obtained against *Lechmere* for a large sum, some coal at the furnace was taken in execution, after which the works ceased; no rent had been paid since that time, and the plaintiff and his father had for many years been out of possession. The defendant having obtained judgment in an action for the arrears of rent, the plaintiff filed a bill for an injunction upon the ground, 1st. That the lessor was not seised of the lands in question at the time of the lease. 2dly. That they were not comprised in the lease. 3dly. That the lease was made in contemplation of the partnership, and that the partnership had been determined by the default of the lessor.

At the hearing the injunction was dissolved, and the bill dismissed with costs.

[176] *WALTER HAYWARD*, Son of *WALTER HAYWARD* and Grandson of the Testator, Plaintiff; and *JAMES STILLINGFLEET*, *EDWARD STILLINGFLEET* & *JOHN FLOYD* Executor of the Surviving Trustee under the Grandfather's will, Defendants. (1)

Nov. 18th, 1737.

S. C. 1 Atk. 422.

A testator by his will after declaring his intention of disposing of all his estate, gives to his three daughters £550, to be paid in four years after his decease. He then devises his lands to trustees for ninety-nine years, upon trust, that if his wife should pay or secure to be paid the £550 in four years; then he gave the inheritance of the lands to his wife for life, and after her decease to his son and his heirs male and female, and for want of such issue to his own right heirs for ever; and desired that his

trustees at the request of his wife or son should convey over the term to wait upon the inheritance. This is a conditional limitation in the wife, taking place as an executory devise, and the freehold descended to the son as heir at law to the testator, till the four years were elapsed or his wife had performed the condition, as a part of the inheritance undisposed of; and by this devise the son hath a good estate tail in the inheritance expectant on the determination of the term of ninety-nine years.

Walter Hayward, the grandfather of the plaintiff, made his will bearing date the 31st of January 1680, as follows:

"And for disposing and ordering of all lands, tenements, real and personal estate, which God hath blessed me with, I give and devise as follows." He then gave to his three daughters £550, to be paid in four years after his decease; and directed that the same should be raised and paid out of his lands in *Cranburn*. He then devised those lands to *Stillingfleet*, *Wheeler* and *Floyd* for ninety-nine years, and gave them full power to raise any lesser term or to dispose of the whole term to the uses, intents, and purposes thereafter mentioned; that is to say, if his wife should pay or secure to be paid, the £550 in four years; then he gave the inheritance of the same lands to his wife and her assigns for life, and after her decease he gave and devised the same lands and tenements to his son, *Walter Hayward* and his heirs [177] male and female; and for want of such issue to his own right heirs for ever; and he then declared that all the premises so thereby demised to his trustees should attend and wait upon the inheritance; and thereby desired that his said trustees, at the request of his wife or son should convey over the said term of ninety-nine years to wait upon the inheritance; provided always that out of the profits of the said lands his wife should provide for his said son sufficient maintenance and education, otherwise his mind was that his said son immediately after his decease should have one moiety of the said lands for the performance thereof.

The wife not having paid the money, a bill was filed against *Walter Hayward*, the plaintiff's father, and a decree made for raising the daughters' portions, under which the term of ninety-nine years was sold to *John Lovell* for £650. The £550 was paid, and £49, 13s. 4d. for the trustees' costs, and the residue was laid out for the benefit of the plaintiff's father, who was then an infant.

The plaintiff's father in October 1700 attained his age of twenty-one years, and confirmed the conveyance and executed a release to the trustees.

John Lovell, by his will, devised the premises to *George Stillingfleet*, who devised them to his son, the defendant, *James Stillingfleet*, subject to certain trusts, in his will, and made *James Stillingfleet* his executor, who declining to act as executor released the premises to his mother *Jane Stillingfleet*, who proved her husband's will, and by lease and release, dated the 1st and 2nd September 1720, *Walter Hayward* and *Priscilla*, his wife (the plaintiff's father and mother), in consideration of £275, conveyed the inheritance to *Jane Stillingfleet*; and *Walter Hayward* covenanted that he and his wife would levy a fine of the premises to *Jane* and her heirs (2) with other usual covenants. On the 20th June 1726, *Jane Stillingfleet*, by her will gave the premises to her son, the defendant, *Edward Stillingfleet*.

[178] This bill was filed by the grandson of the testator claiming the estate as tenant in tail for an assignment of the term of ninety-nine years, for an injunction to stay waste in cutting down timber and for the delivery of deeds and writings belonging to the estate.

Mr. Browne, and *Mr. Fazakerley*, for the plaintiff.

This is a condition precedent to the mother's estate for life only, and does not extend to the inheritance. The testator clearly intended to dispose of his estate at all events and could not intend to put the estate tail of the son in the power of the wife. No option is given to the son to pay the sum of £550. Therefore the testator must have intended that his estate tail should take effect at all events. If a devise had been made to a monk for life, remainder over, the remainder would have been good.

The sale appears to have been collusive; for £275 only was given for the inheritance of an estate worth £80 *per annum*. The timber felled is material, as it shews a claim of right; and it is provided that the trustees shall assign over the term, upon the request of the mother or the son which clearly contemplates the event of the mother's not paying the money.

Mr. Attorney-General and *Mr. Chute*, for the defendants.

As to the felling timber the evidence is very slight. It is not pretended that it

sold for more than 30s. ; and this Court will not entertain a bill for any demand of less than £10. As to the point of law, the testator expressly gives his wife an estate for life out of the inheritance, and not out of the term. This is not properly a condition, but an executory devise. The estate for life and the remainder make but one estate. The plaintiff's claim is against a purchaser for a valuable consideration, claiming under one who in all events, had power to bar the plaintiff by fine, which he covenanted to levy.

Lord Chancellor (Nov. 18, 1737). The only question is upon the title, and when that is determined, the decree as to the matters prayed by the bill, will follow of course, and it depends upon the limitations in the will of old *Walter Hayward*.

He plainly declares his intention in the beginning, to dispose of his whole estate at all events, after this he gives to his three daughters £550 to be paid out of his lands in *Cranbourn*, and then appoints the manner of raising it, and says, if his wife pay the £550 within four years after his [179] decease, then he gives her an estate for life, out of the inheritance of his land.

If it be a condition, it is insisted it is annexed to the term for ninety-nine years, and that he intended to give his wife an estate in the term, but I think this cannot be so construed contrary to the words, for though it is awkwardly expressed, yet he meant to carve an estate for life out of the inheritance of the estate, and not out of the term.

The question is, whether the words of payment amount to a condition, or a limitation, and whether a condition precedent or subsequent.

Now I think they cannot create a condition subsequent, for the heir at law to whom an estate tail is after given, must be the person to enter and defeat the condition, because an estate of freehold cannot cease without an entry for a breach of the condition, and here has been no entry, and this would destroy the whole intention of the will, which would not at all serve the plaintiff. If this be a condition at all, it must be a condition precedent, but I think it is not so, because in that case if there was a breach, no body can take advantage of it but the heir at law, who must enter, and such entry would defeat his subsequent limitation. (See 1 Fearn, 406, *et seq.* 4th edit.)

Wherever there is a limitation with remainders over, made in the words of a condition, which would be construed as a condition, if they could take effect, it ought to be construed as a limitation, if they cannot.

I am of opinion that this is a conditional limitation in the wife, taking place as an executory devise : for it cannot be a contingent remainder, for that can never depend upon an estate for years, but must have a freehold to support it.

And though this is an executory devise to the wife, which never took effect, yet the estate tail to the son is well limited, and took place.(3)

[180] The case of *Scattergood v. Edge*, 1 Salk. 229, is in point.

This being an executory devise, the freehold descended to the son as heir at law to the testator, till the four years were elapsed, or his wife had performed the condition, as a part of the inheritance undisposed of.(4) At the end of the four years, the remainders vested, and where an estate vests by descent, it can never divest again.

It has been insisted upon for the defendant, that this is a very hard case against him who claims under a purchaser for valuable consideration, but if it is a purchase of an estate with notice of the title, it takes off from the hardship.

It has been objected too, that the plaintiff comes too early, but though he cannot enter during the term, yet he may apply to this Court to preserve the inheritance.

A surrender of the term would not be proper, because it is not merely in the nature of a security, but an absolute power in the trustees to sell the estate for raising the daughter's portions.

Upon the whole, I think by this devise, the son has a good estate tail in the inheritance, expectant on the determination of the term of ninety-nine years.

Therefore his Lordship declared that the plaintiff was entitled to the inheritance of the said estate in remainder expectant on the said term of ninety-nine years, and decreed a perpetual injunction be awarded to restrain the defendants against committing any waste, and that the defendants produce before the Master all deeds and writings relating to the said estate, except such as relate to the said term, there to remain for the benefit of all parties, and gave no costs on either side. (Reg. Lib. A. 1737, fol. 272.)

(1) Lord *Hardwicke's* judgment in this case, as reported by Mr. *Atkyns*, has been

compared with the manuscript report of Mr. *Forrester*, and with short heads of the judgment found in Lord *Hardwicke's* Note-book. With both these authorities, as far as they extend, Mr. *Atkyns's* report is found to correspond. It has been therefore adopted with a trifling addition extracted from the latter. The statement of the case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book.

(2) A covenant to levy a fine by the tenant in tail does not bind the issue in tail. *Saville's* case, cited in *Attorney-General v. Day*, 1 Ves. 224, and in *Hinton v. Hinton*, 2 Ves. 634. *Leech v. Trollop*, 2 Ves. 662. But where tenant in tail makes a conveyance, and covenants for further assurance, and becomes bankrupt, such covenant binds the lands in the hands of the assignees. *Edwards v. Applebee*, 2 Bro. Ch. Ca. 652 n. *Pye v. Daubuz*, 3 Bro. Ch. Ca. 595.

(3) Where a remainder or executory limitation is devised, to take effect on a condition annexed to a preceding estate, and that preceding estate fails, the remainder over, or executory limitation will nevertheless take place, *Jones v. Westcombe*, 1 Eq. Ab. 245. *Hopkins v. Hopkins*, Ca. temp. Talb. 44. *Andrews v. Fulham*, 2 Str. 1092; 1 Ves. 421; 1 Wils. 107; 3 Burr. 1624. *Gulliver v. Wicket*, 1 Wils. 105; 2 Str. 1093; 1 Ves. 421. *Wigge v. Wigge*, 1 Atk. 382, and post. *Fonnereau v. Fonnereau*, 3 Atk. 315. *Avelyn v. Ward*, 1 Ves. 420. *Bradford v. Foley*, Doug. 63. *Statham v. Bell*, Cowp. 40. *Horton v. Whittaker*, 1 Durn. & East. 340. *Doe v. Brabant*, 3 Bro. Ch. Ca. 393. *Brown v. Higgs*, 4 Ves. 718; S. C. 5 Ves. 495, and 8 Ves. 561. And the same rule prevails as to personal estate, see *Pearsall v. Simpson*, 15 Ves. 29. *Meadows v. Parry*, 1 Ves. & Bea. 124.

(4) So *Pay's* case, Cro. Eliz. 878. *Gore v. Gore*, 2 P. Wms. 28. *Hopkins v. Hopkins*, Ca. temp. Talb. 44. *Trevanion v. Vivian*, 2 Ves. 430. *Bullock v. Stones*, 2 Ves. 521. *Attorney-General v. Bowyer*, 3 Ves. 725.

[181] RAMKISSENSEAT v. BARKER and Others.

November 24th, 1737.

S. C. 1 Atk. 51.

A bill brought for an account against the representatives of an *East India* Governor, who pleaded that the plaintiff was an alien born, and an alien infidel, and could have no suit here. The plea over-ruled; for being a mere personal demand, the plaintiff being an alien infidel, may bring a bill in this Court.

It came on upon the joint pleas of the widow, and the son of the late Mr. *Barker*, governor of *Patna*, in the *East Indies*, who had in his lifetime employed the plaintiff in private trade, as his banyan, or broker: they being made defendants to a bill brought against them as the representatives of *Barker* for an account; it was pleaded that the plaintiff was an alien born, and an alien infidel, not of the Christian faith, and upon a cross-bill incapable of being examined upon oath, and therefore disqualified from suing here.

Lord Chancellor said, as the plaintiff's was a mere personal demand, it was extremely clear that he might bring a bill in this Court; and over-ruled the defendants' plea, without hearing one counsel of either side. (This case is taken from *Atkyns*. It is not to be found in Lord *Hardwicke's* Note-book.)

MICHAELMAS TERM, 1737.

MORGAN v. ———.

S. C. 1 Atk. 408.

An original independent decree may be had in this Court, where all the facts are stated by the bill, notwithstanding a former decree for the same matter in *Wales*.

A bill was brought for a legacy in the Court of Equity in *Brecknock*, in *Wales*, before the *Welch* Judges at the assize, and the legacy decreed to be paid; the defendant

appealed from the decree to the House of Lords, and insisted there was an omission in the decree; for notwithstanding an account was directed to be taken, yet it was not ordered that [182] all just allowances should be made in such account to the defendant: upon the appeal, the decree, as to the payment of the legacy, was affirmed, but varied as to the just allowances; and the House of Lords ordered their decree to be carried into execution by the Court in *Wales*.

The defendant afterwards fled, to avoid the execution of the decree, into *England*; and the bill now brought, sets forth the will by which the legacy was given, and the proceedings and decree in *Wales*, and the appeal to the House of Lords, and their decree, and that the defendant had, to avoid the decree and payment of the money, fled into *England* out of the reach of the process of the Court in *Wales*.

To this bill the defendant demurred, and for cause shewed that it appeared the plaintiff had obtained a proper and complete decree; and that this Court always refused to assist the decree of an inferior court.

On the other hand it was said, that an action of debt will lie upon a judgment, in an inferior court, in the court of King's Bench or court of Common Pleas.

Lord Chancellor was inclined to over-rule the demurrer, and said, that the bill having stated the will, and all the proceedings in *Wales*, &c., for the recovery of the legacy, an original independent decree might be had in this Court for the legacy, but would not absolutely determine it now; and therefore reserved the consideration of the demurrer till the hearing of the cause.

(This case is taken from *Atkyns*. It does not appear in Lord Hardwicke's Note-book.)

[183] RIVERS'S CASE.

S. C. 1 Atk. 410.

Though bastards strictly are not sons, yet, if they have acquired that name by reputation, in common parlance they are; though a person's name be mistaken in a devise, yet if made out by averment to be the person meant, the devise to him is good. (1)

A testator by his will, gives an equal share of his real estate (which shall be his due, when the said estate shall be sold) to his two sons *James* and *Charles Rivers*.

Lord Chancellor. First question, Whether, as it appears that *James* and *Charles* are illegitimate children of the testator, this is such a description of their persons as will entitle them to take under the will.

In the case of a devise, any thing that amounts to a *designatio personæ* is sufficient, and though in strictness they are not his sons; yet, if they have acquired that name by reputation, in common parlance they are to be considered as such.

It has been said, the testator has likewise made a mistake in their names, and therefore they cannot take; but the law is otherwise, for if a man is mistaken in a devise, yet if a person is clearly made out by averment to be the [184] person meant, and there can be no other to whom it may be applied; the devise to him is good.

The second question is, What interest in the estate devised *James* and *Charles Rivers* take by this will? The words an equal share of my real estate, must mean in equal shares, share and share alike, or it cannot be made sensible. And these words can be no further extended than to the surplus due to the testator from that estate which was to be sold, and will not reach to any other estate.

(This case is taken from *Atkyns*. It does not appear in Lord Hardwicke's Note-book.)

(1) And illegitimate children, born and reputed as such, before the date of the will, may take as a *class*, under the general description of children, *Metham v. Duke of Devon*, 1 P. Wms. 529. *Wilkinson v. Adam*, 1 V. & B. 422. But a bastard cannot take as the issue of a *particular person*, until it has acquired the reputation of being the child of that person; which cannot be before its birth, *Earle v. Wilson*, 17 Ves. 528. If the bequest however, had been to the natural child of which a particular woman was *enceinte*, without reference to any person as the father, there would be no uncertainty in that bequest; and probably it would be held good, dict. per Sir William Grant, ib. 532.

The description of son or child means *prima facie* legitimate son, &c., and all the

cases from the passage in Lord Coke (Co. Lit. 3 b.) establishing that a bastard may take by purchase, if sufficiently described, mean no more than he must make that out, upon the will itself, dict. per Lord Eldon, *Wilkinson v. Adam*, 1 V. & B. 466. See *Vanderzee v. Adom*, 4 Ves. 771. *Cartwright v. Vawdry*, 5 Ves. 530. *Godfrey v. Davis*, 6 Ves. 43. *Kenebel v. Scrafton*, 2 East, 530. *Hercy v. Birch*, 9 Ves. 357, and see *Beachcroft v. Beachcroft*, 1 Mad. 430. *Bayley v. Snelham*, 1 S. & S. 78; except where it arises, *ex necessitate*, that the testator must mean natural children, there being no other children, who could by possibility answer the description contained in the will; the parent of such children being dead at the date of the will without ever having had any legitimate children, *Woodhouselee v. Dalrymple*, 2 Mer. Rep. 419.

The BAILIFF and BURGESSES of ILCHESTER, JOHN WINTER, WILLIAM CLEMENT, and THOMAS LOCKYER, Executors of JOHN WINTER, *Excepants*; and HENRY BENDISHE, *Respondent*.

November 26th, 1737.

S. C. 2 Eq. Ca. Ab. 200.

Where a commission of charitable uses was directed to commissioners to enquire by twelve lawful men of the borough of *Ilchester*, in the county of *Somerset*, concerning any appointments to or abuses of any charities within the said borough; held that the commission was well awarded, for the statute did not oblige the Chancellor to issue such commission for entire counties alone. That the direction to the jury of the county instead of being to the jury of the body of the county, was good; and that they might inquire respecting lands lying out of the town, in the county at large.

A commission issued to inquire into the misemployment of several charities within the borough of *Ilchester*, and the commission directed the commissioners to enquire by twelve lawful men of the said borough in the county of *Somerset*, or other lawful means, concerning any appointments to or abuses of any charities within the said borough; and the first exception to the commission was, that it was to enquire for this borough only, and not for the whole county. 2ndly, That if such a commission was proper, yet the authority to summon a jury was not legal; but that especially since the 4 & 5 Ann. c. 16, it should have been to summon a jury of the body of the county.

[185] *Lord Chancellor*. The first objection is grounded on the words of the act, 43 Eliz. c. 4, which says, *Inquiry shall be made by twelve lawful men of the county*; and the objection supposes that it is absolutely necessary that every such commission should be for the whole county; but I can see no foundation for it, the statute does not fix the extent; but only the objects of every such commission. Had the legislature defined the bounds of those authorities, they must have pursued the directions of the act; but as it has not, I do not see any reason to find fault with such a limited commission as this is. As to precedents, there are some produced, viz. eight instances of such commissions between the 1st of Jac. and the 7th of Car. for separate places; and if the words of the act had been stronger, after such a series of precedents, I think it ought not now to be made a question, whether those were called commissions. *A series of precedents against the plain words of an act of Parliament have made a law*, as in the case of *Bewdley*, 13th of Ann., which was a *scire facias* to repeal letters patent, the *venire fa.* was awarded *de vicineto*, and there was no doubt but that (it being a private suit of the crown to repeal its own grant) the case came within the statute; and the King was bound by the Act, as being a remedial law. But upon producing precedents in the Exchequer, in civil suits of the Crown, where the *venire* had been so awarded, after the 4th and 5th of Ann. c. 16, though they had passed *sub silentio*, yet all the judges at Serjeant's Inn Hall were of opinion, that such a series of precedents had cured the mistake. As to the other objection, that the authority to summon the jury is too confined, and should have been from the body of the county, what is said relating to the 4th and 5th of Ann. c. 16, can have no weight; that statute concerning issues only to be tried in actions out of the Courts of Record, at *Westminster*; this is only an inquest awaked by Act of Parliament, and what arises from the 43d of Eliz. that the inquest shall be by men of the county, is answered by the commission itself, viz. Twelve men of the said borough, in the county of S. And this objection

as well as the former, is answered by the precedents in all such limited commissions. But it is said, that it appears by the return, this jury which came out of the town hath enquired about lands lying out of the town, in the county at large; the answer is, that such lands concerning such charities founded within the town, and the jury summoned under [186] this commission might as well enquire into lands out of the town, as juries in general commissions for counties enquire about lands lying in different counties that are annexed to charities founded within the limits of those counties through which their commissions extended; and this is done daily, so I think their commission is good, and properly executed, and the exceptions must be over-ruled. (This Case is taken from *Equity Cases Abridged*. The following Note respecting this Case appears in Lord *Hardwicke's* Note-book.)

Bailiff and Burgesses of Ilchester, and Others, *Exceptants*; and Henry Bendishe, *Respondent*.

November 26th, 1737.

This case first came on on the 6th of July 1737, upon exceptions to a decree of commissioners of charitable uses, when a question having arisen, whether the commission had been properly awarded; it was adjourned till the next term, and precedents were ordered to be produced relating to the form of the commission, and the direction from whence the jury should come.

[In the *Lord Chancellor's* Note-book, under date of the 26th of November 1737, is the following memorandum:—]

This cause coming on again the respondent produced eight or nine precedents of commissions of charitable uses to enquire for particular towns or boroughs within counties from the reign of King Charles First to King James Second inclusive, whereby the commissioners were directed to enquire by the oaths of twelve good and lawful men of the said town or borough in the county aforesaid, and no precedents were produced for the exceptants; but the exceptants' counsel admitted that those were all the precedents on record of such commissions to enquire of charitable uses within particular towns or boroughs and not for counties at large.

Whereupon I was of opinion that the commission was well awarded and right in substance, for that the statute did not oblige the Chancellor to issue such commissions only for entire counties, the words being in any part or parts of the kingdom; and though the words relating to the jury were of the county, that did not necessarily import of the body of the county, but might be construed according to the rule of the common law as it then stood, *de vicineto*; and if the words had been more strict, yet the precedents produced would have made the law, being all the precedents in this case, and none to the contrary. And for this I likened it to the case of the style of the Great Sessions, in *Wales*, 4 Inst. 240, and of the bailiff and burgesses of *Bewdley*, Mich. 11 Ann. B. R., on the award of a *venire facias*, and I overruled the exception. On hearing the merits of the exceptions, I overruled some of them, but allowed most of them, and varied the decree of the commissioners.

[187] WILLIAM WRIGHTSON and Others, Executors and Trustees of the Will of Sir LAWRENCE ANDERTON, *Plaintiffs*; and The ATTORNEY-GENERAL, MARY BLUNDELL, the Sister, ROBERT BLUNDELL, a Devisee, FRANCIS ANDERTON, the Brother and Heir at Law, and THOMAS FORTESCUE, the Residuary Legatee of Sir LAWRENCE ANDERTON, *Defendants*. CHRISTOPHER TILSON, a Purchaser of part of the Estate from Sir LAWRENCE ANDERTON, *Plaintiff*; and All the Parties to the Original Cause, *Defendants*. THOMAS FORTESCUE, *Plaintiff*; and All the Parties to the Original Cause, and CHRISTOPHER TILSON, *Defendants*.

December 5th, 1737.

Sir L. Anderton having entered into a contract for the sale of part of his real estates, by will devises his real and personal estate to trustees to raise money by sale or mortgage, to pay and perform his debts and contracts; and by a codicil, directs his trustees, after payment of his debts and legacies, to settle the whole estate upon the children of his brother *Francis Anderton*, and their issue, and by a second codicil, he gives

his personal estate to *Thomas Fortescue*, and directs that his debts, legacies, and funeral expences, shall be paid out of the money to be raised by the mortgage and sale of his real estate; *Francis Anderton*, who was his heir, had been attainted of high treason, and was unmarried; held, that the Crown, subject to the payment of the interest of the debts, was entitled to the rents and profits of the devised estate, until a son of *Francis Anderton* shall come *in esse*; and that the personal estate bequeathed to *Thomas Fortescue* was exempt from the payment of debts and legacies; and that *Thomas Fortescue* had a right to insist upon the execution of the contract, though the purchaser and trustees had agreed to abandon it, subject however to the contract being set aside, if it should turn out that a considerable part of the estate were leasehold, or creditors being concerned, if it should turn out upon inquiry that the consideration was very inadequate.

Sir *Lawrence Anderton*, by his will, bearing date the 27th of December 1723, devised his real and personal estate to his trustees, upon trust to raise money by sale or mortgage, to pay and perform all his debts and contracts by him then or thereafter to be entered into, contracted, or [188] made; and after giving some legacies, he willed that his trustees, after payment of his debts, and performance of his contracts, should pay such other legacies as he should by codicil or other deed direct, and the residue of his real and personal estate, he devised and bequeathed to his said trustees, and their heirs and assigns for ever, to be divided amongst them in four equal parts, and no benefit of survivorship to be taken by either of them.

By a codicil dated 18th of January 1723, after reciting the devise to the trustees, and after his giving them £100 each, after payment of his debts and legacies, he directed his trustees to settle his whole estate upon the children of his brother *Francis Anderton*, and their issue, and in default thereof, upon *Robert Blundell*, the son of his niece, and his issue-male, and in default thereof, upon any male issue of his said niece, and he desired that the executors before the making any settlement, should pay certain legacies therein mentioned, to be paid one year after his decease.

By another codicil dated the 3rd of September 1724, he gave his personal estate to the plaintiff, *Thomas Fortescue*, and directed that his debts, legacies, and funeral charges should be paid out of the money to be raised out of the mortgage and sale of his real estate.

By articles of agreement dated the 8th of June 1724, and which were executed by the parties, after reciting that the lands were of the annual value of £230, Sir *Lawrence Anderton* covenanted with the plaintiff *Tilson*, that he would before the 25th March then next, convey and assure to the plaintiff and his heirs, the manor of *Lestock*, free from incumbrances, except leases of tenants, and plaintiff covenanted to pay Sir *L. Anderton*, his heirs and assigns, £4600 at the time of executing the conveyances. Before the execution of the articles, a memorandum was made in the words following:—all the timber, except what shall be necessary for common botes and repairs, to be valued by two indifferent persons, which is to be paid for over and above the purchase-money, and in case the estate shall appear to be of a greater or less value than £230 *per ann.*, then either party is to make allowances for the same in proportion to the sum above mentioned.

The testator died on the 4th of October 1724, before the purchase was completed; his heir at law, *Francis Anderton*, had been attainted of high treason, and was unmarried. *Thomas Fortescue*, his residuary legatee, was a creditor to the amount of £200.

[189] The original bill prayed the execution of the trusts of the will.

The bill by *Tilson*, prayed a specific performance of the contract, and certain allowances on account of part of the premises being leasehold, and of incumbrances affecting it; but having at the hearing, proposed to abandon the contract upon being repaid his purchase-money, with interest, the proposal was accepted by the trustees, who had resisted the purchase, on the ground of inadequacy of price.

The bill by *Fortescue* prayed an account of the personal estate, that the debts and legacies might be paid out of the real estate, and that the contract with *Tilson* might be carried into effect, and that the purchase-money might be considered as part of the personal estate.

Mr. *Hamilton* was counsel for the plaintiffs in the original cause. Mr. *Mills*, for Mr. *Tilson*. Mr. *Wilbraham*, for Mr. *Fortescue*. Mr. *Chute*, and Mr. *Fazakerley*, for the devisees of the real estate, and Mr. *Attorney-General*, for the Crown.

The questions were,—1st, Whether *Fortescue* was entitled to the whole personal estate, and the debts, &c., to be paid out of the real estate.

2dly, Whether *Tilson's* purchase-money was to be considered as part of the personal estate, and go to *Fortescue*, or to be applied in part payment of the debts.

3dly, Whether *Fortescue* had a right to insist upon the contract being carried into execution, although the purchaser and trustees agreed to abandon it.

4thly, Whether the Crown was entitled to the rents and profits, until a son of *Francis Anderton* should come *in esse*, as part of the estate undisposed of by the will, such son taking by way of executory devise, or the trustees under the devise to them for payment of debts.

5thly, Whether *Fortescue*, the residuary legatee of the personalty could insist upon payment out of the real estate of the debt due to him.

To shew that the residuary bequest was to be considered as a satisfaction of the debt, *Blandy v. Widmore*, 2 Vern. 709. *Smith v. Duffield*, 2 Vern. 177, 258. *Lingen v. Souray*, Prec. in Ch. 400. *Lechmere v. Lechmere*, Ca. temp. Talb. 92. *Kemp v. Kemp*, 2 Ch. Ca. 63, were cited.

Lord Chancellor (Dec. 15, 1737). I think it is plain that the testator intended this as a specific bequest of his personal estate. He [190] has charged all his debts upon his real estate, and has created a trust for that purpose.

As to the second question, In many cases where a man by his will directs a thing to be done, and afterwards does it himself in his lifetime, it shall in equity be considered as a satisfaction, as where a legacy is given for a portion, *Lechmere v. Lechmere*, Ca. temp. Talb. 92; but it is unnecessary for me to decide this point in the present case, until it be ascertained whether these articles are to be carried into execution or not, and this depends upon the 3rd question. As to which, as these articles affect the interest of a third person, the devisee of the personal estate, I am of opinion that the agreement between the trustees and the vendee to waive them, cannot affect him. But objections have been made to the articles themselves. It has been urged, that there is no counter-part, and that the date is written upon an erasure; but I do not think that these objections are of sufficient weight, as it is clearly proved that these articles were executed by the testator. It has been objected, that the consideration is very inadequate, and that twenty years purchase only is given for this estate. In this respect the present case resembles that of the Duke of *Wharton*, in which articles were set aside by the *Master of the Rolls*, on behalf of the creditors of the Duke of *Wharton's* estate, although the Duke submitted to execute them. The same reason applies in this case; I will, therefore, direct an enquiry into the consideration. It appears too, that of this estate, which was sold as fee simple, a part is in fact leasehold, and the purchaser does not insist upon going on. If the leasehold is considerable, it will make an alteration, and will be a reason for setting aside the purchase; these points must, therefore, be enquired into.

As to the fourth question, the Crown must be considered in the same light with the heir at law. The money is directed to be raised by sale or mortgage expressly, and not by perception of the profits, and the trustees are directed to convey to the first son, after the debts are paid. The interest of the debts must, therefore, be charged on the Crown, which will be entitled to the overplus profits. The principal must be charged on the devisee's interest, when he comes *in esse*.

As to the last question, the consideration of it must be reserved until after the accounts have been taken.

[191] By the decree, it was declared that *Thomas Fortescue* was entitled to the personal estate of the said testator, Sir *Lawrence Anderton* as a specific legacy, exempt from the payment of his debts, funeral expences, and legacies; and after reciting that the articles had at the hearing been waived by the vendee and trustees, but were insisted upon by Mr. *Fortescue*, in order to increase the personal estate, the Master was directed to enquire whether the articles were fairly entered into, and whether the consideration was adequate, and what part of the estate was leasehold, and what part of the consideration-money was paid or satisfied by the said Mr. *Tilson*, and all directions as to the execution of the contract, and the application of the purchase-money, in case the same should be carried into execution, were reserved.

The Crown was declared to be entitled to all profits of the estate above the interest of the debts, until the defendant *Francis Anderton*, who was attainted of high treason, should have a son born, or should die, and it being uncertain whether there would

be occasion for the mortgage or sale of the estate, his Lordship reserved the consideration of that matter until the Master had made his report of the debts and legacies, and touching the said contract with Mr. *Tilson*.

The consideration was reserved, whether in case the personal estate given to *Fortescue* as a specific legacy, should on an account taken, appear to be equal in value to or more than the debts due to him, the same ought to be deemed a satisfaction of such debts. (Reg. Lib. B. 1737, fol. 367.)

(The statement of this case is taken from Lord *Hardwicke's* Note-book, the language of the judgment from Mr. *Forrester's* manuscript.)

HIGHMORE v. MOLLOY.

December 11th, 1737.

S. C. 1 Atk. 206.

Pawnbrokers within the statutes of bankrupts, and seem particularly included in the general word brokers, in the 39th section of the 5th of Geo. 2. Though a man be a public officer, as an exciseman, yet if he will trade, he makes himself subject to the statutes of bankrupts. See *Green's Spir. of the Bankrupt Laws*, 4th ed. 5.

Lord Chancellor.—I am inclined to think a pawnbroker within the several statutes concerning bankrupts, and especially within the general words of the 39th clause of the 5th of Geo. 2, the words of which are, "Whereas persons deal-[192]-ing as bankers, brokers, and factors, are frequently intrusted with great sums of money, and with goods and effects of very great value belonging to other persons, it is hereby further enacted, that such bankers, brokers, and factors shall be, and hereby are declared to be subject and liable to this, and other the statutes made concerning bankrupts."

For though pawnbrokers are not expressly named, yet the general word brokers is the genus, and all other kinds of brokers the species.

His Lordship said in the same case, though a man be a public officer, as an exciseman, &c., yet, if he will trade, he makes himself subject to the statutes of bankrupts.

(This case is taken from *Atkyns*. It is not to be found in Lord *Hardwicke's* Note-book.)

NICHOLLS v. NICHOLLS.(1)

Dec. 11th, 1737.

S. C. 1 Atk. 409.

Though a man is arrested by due process, yet if a wrong use is made of it against him by obliging him to execute a conveyance while under arrest, this Court will relieve.(2)

Though a man is arrested by due process at law, if a wrong use is made of it against the person under such arrest, by obliging him to execute a conveyance, which was never under consideration before, this Court will construe it a duress, and relieve against a conveyance executed under such circumstances.

(1) It appears from Lord *Hardwicke's* Note-book, that in this case there was strong evidence of fraud and actual duress. The estate was expressed to be conveyed in consideration of the party conveying being discharged from the debt for which he had been arrested, and certain other debts, and being furnished for the remainder of his life with meat, washing, lodging, &c. By the decree it was declared that the conveyance had been obtained by fraud and imposition. Reg. Lib. B. 1737, fo. 508.

(2) See 2 Roll. Abr. 687. *Hinton v. Hinton*, 2 Ves. 635. *Wilkinson v. Stafford*. 1 Ves. jun. 42. *Knight v. Norton*, 3 Leon. 239. *Roy v. Duke of Beaufort*, 2 Atk. 193.

[193] GOODERE v. LAKE.(1)

Dec. 15th, 1737.

S. C. 1 Atk. 446.

Where an original note is lost, and a copy of it is offered in evidence, you must shew the original note was genuine, before you will be allowed to read the copy.

Where an original note of hand is lost, and a copy of it is offered in evidence to serve any particular purpose in a cause, you must shew sufficient probability to satisfy the Court that the original note was genuine, before you will be allowed to read the copy.

(1) This case is taken from *Atkyns*. It does not appear from Lord *Hardwicke's* Note of this case, which came before the Court upon exceptions to the Master's report, what the objection was to the proof of the Note, but it appears by the Register's Book that the copy of the Note was admitted in evidence. Reg. Lib. A. 1737, fo. 276.

PHILLIPS v. PHILLIPS.

At the Third Seal before Christmas, 1737.

An original allowed to be filed after a writ of error brought to reverse a judgment in a penal action. The time limited by the statute for bringing a new action having elapsed. (So *Beachcroft v. the Hundred of Burnham*, 3 Lev. 347 ; and see *Anon.* 1 P. Wms. 411 ; and *Anon.* 3 P. Wms. 314.)

In an action at law upon the Bribery Act for a penalty of £500 the defendant had been found guilty, and judgment had been given for the plaintiff. The defendant having brought a writ of error, the plaintiff applied to the Court for an original to warrant the judgment.

In this application it was objected that the party came too late ; that this was an action on a penal statute which is not favoured even in courts of law ; that the statute of jeofails does not extend to actions of this nature, although it remedies defects in civil suits ; this Court ought not, therefore, to remedy that which the legislature intended should continue to be error.

[194] The Lord Chancellor granted the motion, saying it was discretionary in the Court ; that though this was an action on a penal statute, yet that was no reason why the Court should not assist it after the defendant had been found guilty.

That courts of law were in the habit of assisting penal prosecutions by their discretionary powers in the cases of amendments.

That the statute having appointed prosecutions to be commenced within two years of the offence, and that time being elapsed, the effect of denying this motion would be to grant an indemnity to the crime.

That the revenue of the Crown in this case could not stand in competition with the impunity of an offence of this nature.

(The report of this case is taken from Mr. *Forrester's* Manuscript.)

BRIDGE v. JOHNSON.

Dec. 17th, 1737.

A bill of review cannot be brought until the decree it seeks to impeach is signed and enrolled ; but a party not bound to sign and enrol a decree against himself for the purpose of bringing a bill of review, but he may bring a bill in the nature of a supplemental bill, and have the former cause re-heard at the same time. (So *Standish v. Radley*, 2 Atk. 177.)

This bill was brought to be relieved against an imposition in the sale of a real estate. The defendant pleaded the proceedings and decree in a former suit, in which the same transaction had been in question, but the decree had not been signed and enrolled. The present bill alleged some new circumstances, which were not denied by the defendant's answer.

To the above statement of the case, the *Lord Chancellor* has subjoined the following memorandum in his Note-book.

I thought the plaintiff could not bring a bill of review, the former decree not being signed and enrolled, and that it was hard to put him to sign and enrol a decree against himself. That this bill was to be considered as in the nature of a supplemental bill, and the plaintiff might apply to have the former cause re-heard at the time of hearing this new cause, and have complete directions in both.

[195] Therefore ordered that the plea should stand for an answer, with liberty to except, saving the benefit to the hearing of the cause. Reg. Lib. A. 1737, fo. 100.

(This case is taken from Lord *Hardwicke's* Note-book.)

HILL v. TURNER.

[See *Marshall v. Marshall*, 1879, 5 P. D. 24.]

Dec. 20th, 1737. S. C. 1 Atk. 515.

Though this Court cannot on petition prohibit the Ecclesiastical Court, yet it will restrain a person who has married clandestinely a ward of this Court from proceeding in an excommunication against the guardian and against the infant, either for restitution of conjugal rights or alimony.

This was a petition by the mother of the infant for a prohibition or an order to restrain proceedings in the Ecclesiastical Court in a cause for restitution of conjugal rights against an infant, married without the leave of the court.

By a decree of February 1732, in the cause in which the infant was plaintiff, by *Mary Stuart*, his mother and next friend, it was referred to the Master to take an account of the plaintiff's real estate, and to state what was proper to be allowed for his maintenance and education.

On the 20th July 1733, the Master made his report, certifying that the plaintiff was about fourteen years of age, and that £100 a-year for the time to come was a proper allowance.

In October 1735, when the plaintiff was about seventeen years of age, and a ward of this Court, he was seduced by *Sarah Knott*, *Mary Knott*, *Penelope Knott*, and *Martha Dean*, to marry *Mary Knott*. He was taken by them to an ale-house in the liberty of the *Fleet*, and persuaded by them to drink till he was intoxicated, and then was married to *Mary Knott* clandestinely and without the leave of the Court.

On the 6th November 1735, it was ordered by the Court, that *Mary Knott*, her sister, and *Martha Dean* should stand committed to the prison of the *Fleet* for their contempt. *Mary Knott* continued in the prison of the *Fleet* a considerable time, and was only discharged on payment of costs. On the 31st of March following, an order was made on the Master's report, for placing out the infant as an apprentice to a mer-[196]-chant in *Holland*, and for the payment of £250 for that purpose.

The wife instituted a suit in the Ecclesiastical Court for a restitution of conjugal rights, or for alimony. The petitioner was appointed his curator, and guardian, and pleaded that the infant was under the care of the Court of Chancery, that *Mary*, the pretended wife, had been committed for this clandestine marriage, that the Court had allowed the infant a certain maintenance, and ordered him to be placed out as an apprentice in *Holland*, that he had no place of abode of his own, and no substance wherewith to maintain his wife till of age, and that he was maintained out of the allowance paid to his mother by order of this Court, and which could not be applied to any other use. On the 27th April 1737, the Judge of the Spiritual Court admitted an allegation as to faculties on behalf of *Mary Hill*, setting forth, that the infant, her husband, was possessed of several real estates of the value of £226 *per annum* at present, and when the leases in being dropt, near £600 a-year; and was entitled to personal estate of near £2000. The minor and guardian were decreed to be cited to give in their answers to the said allegations, and also to the said libel upon oath. And the Judge allotted £10 to the said *Mary Hill* on account of alimony and expences, and decreed a monition against *Mary Stuart* the guardian for payment, and also a monition against the minor to take his wife home.

On the 12th of July following, a decree of excommunication passed against the infant for not taking home his wife, and against the guardian for not paying the £10

for alimony and expences, and the Judge allotted £15 for further alimony and expences, and decreed a monition against *Mary Stuart* for payment ; that *Mary Stuart* and the infant plaintiff both presented petitions praying a prohibition, or an order to restrain the proceedings of the Ecclesiastical Court under this decree, and the excommunication against *Mary Stuart* and the infant plaintiff.

Mr. *Fazakerley* in support of the petition.

The general care of this infant is under the direction of the Court ; nothing is allowed to be paid but what is necessary for his maintenance and education. If the guardian were to pay anything for alimony, it would be a misapplication of the infant's money contrary to the order of the Court. She is only in the nature of a receiver ; besides she is a feme-covert and cannot pay unless her husband pleases.

[197] Doctor *Lee* and Mr. *Clarke* for the wife, *Mary Hill*.

They might have given in an allegation of reasons why the husband should not be decreed to receive his wife, and restore the conjugal rights. There was no such allegation, but only that he was a minor. In Ecclesiastical cases, there is no distinction between majors and minors. It is said that he is a minor and a ward of this Court ; but notwithstanding that the marriage is good, Mrs. *Hill* is his wife, and entitled to maintenance. It is said that he is an apprentice in *Holland*, and that he cannot take his wife home ; but he was sent to *Holland* only to deprive her of the benefit of her marriage. The rule of the Ecclesiastical Courts as to alimony is, that after issue joined it is granted from the time of the receipt of the citation. The mother and guardian in the consideration of the Ecclesiastical Court stands in the place of the infant, and a feme-covert is in the same state as a feme sole. There is no order for the guardian to pay any money out of her own pocket, but the Court took only that which was allowed, for the maintenance of the wife is the same as the maintenance of the husband. The wife could not apply to this Court. The Ecclesiastical Court alone could afford her redress. To grant a prohibition in this case will be to dissolve the marriage, or at least to suspend it till the infant comes of age.

Lord Chancellor (Dec. 20, 1737). I have no doubt at all as to the propriety of applying to this Court ; but the misfortune is, the want of a sufficient law to restrain such clandestine marriages, which are not only introductive of great mischiefs, but put Courts of judicature under great difficulties ; but, notwithstanding this defect in the law, it is incumbent on this Court to prevent, as far as they can, persons from profiting themselves by such infamous methods.

Notwithstanding the wife may have been discharged from the order of commitment, yet, till she has paid the costs of the Court for the contempt, she is still under the authority and jurisdiction of this Court, though she goes at large.

I cannot reverse the sentence which has been pronounced in the Ecclesiastical Court, that can be only done by appeal to the proper Judges, for it cannot be reversed in a summary way ; nor can I, upon a petition, grant a prohibition to the Ecclesiastical Court, for that can only be upon shewing they have no jurisdiction, which must be done by motion, and a proper suggestion : besides, there is no colour to say [198] the Ecclesiastical Courts want jurisdiction, for the authority they exercise in matrimonial cases is the general law of the land, and extends to persons not only of full age, but under, provided they are old enough to contract matrimony.

But the question will be, whether this is not a particular case, and so circumstanced as to give me an authority to restrain the person, without meddling with the jurisdiction of the Ecclesiastical Courts. For an injunction, when awarded, does not deny, but admits the jurisdiction of the Court of common law ; and the ground upon which it issues is, that they are making use of their jurisdiction contrary to equity and conscience. The same with regard to the Ecclesiastical Courts, in case of a legacy left in trust, where the trustee is suing for payment into his own hands, the Court will restrain him, out of regard to the interest of the *cestui que trust* ; and will do it likewise in the case of a portion devised to a daughter upon marriage, where the husband is suing for it before he has made an adequate settlement. (See *Anon.* post, and 1 Atk. 491.)

It is upon this footing I shall proceed, for if I was not to restrain the wife, all the care the Court has exercised, with regard to the estate and person of the infant, would be vain and useless. It has been rightly said, that this Court will not only take care of the infant's maintenance and education, but that he does not marry likewise to his disparagement ; and though there is no particular order to restrain, yet the marriage is a contempt of the Court.

This Court hath the care and ordering of infants, and though by act of parliament the Court of Wards had a particular power over them and lunatics, yet in every other respect, the law as to infants continued as before ; and as the statute of 12 Car. 2, c. 24, has dissolved the Court of Wards and Liveries, the power of this Court over infants is resulted back to them again. The law of England is favourable to infants ; no decree shall be had against them here, but what they may shew cause against when they come of age. This Court will make strangers accountable to infants, in case they take upon them to receive the profits of their estates ; this Court can also ascertain the *quantum* of an infant's maintenance, and to whom it shall be paid, and this is conclusive to all parties.

[199] The allegation of faculties is a term in the Ecclesiastical Court, in regard to the ability of an infant to allow alimony, and is according to the quality of the person, and the quantity of the maintenance ; it is this makes them Judges of the application of the maintenance, and encroaches upon the jurisdiction of this court. And for whom have they now interposed ? for the benefit of a wife, who has in a scandalous manner inveigled an infant, and stolen him away from this Court ; but though I cannot upon a petition prohibit the Ecclesiastical Court, yet I will restrain the wife from proceeding either upon the excommunication pronounced against the infant, or upon the excommunication against the mother, the guardian of the infant ; for as there is a certain sum allotted for his maintenance, the guardian is to be considered as very little more than the hand of this Court ; for if the guardian applies it to other purposes, it is a misapplication, and she would be liable to the censure of the Court.

Suppose this woman had even married the infant in a fair way, and with the consent and approbation of friends, still there ought to have been an application to this Court for an increase of maintenance ; and I have known such instances : and it is highly improper to institute a suit in the Ecclesiastical Court for that purpose.

His Lordship ordered, that *Mary Hill*, who seduced the infant by ill practices to marry her, whilst he was under the care of this Court, in contempt of the Court, should be restrained from proceeding in the Ecclesiastical Court for payment of alimony against the guardian, and from proceeding therein against the infant, for restitution of conjugal rights, and for alimony, or either of the said causes, till the further order of this Court to the contrary.

And on motion or other application to be made to that Court on behalf of the infant plaintiff, and the said *Mary Stewart* his guardian, or either of them, to absolve them, or either of them, from the sentence or sentences of excommunication awarded against them or either of them in the said suits. It was ordered that *Mary Hill* should consent thereto, in the said spiritual Court, to the end that such sentence or sentences might be effectually removed out of the way. Liberty to either party to apply to this Court for further directions, as they should be advised. (Reg. Lib. A. 1737. fo. 269.)

(The statement of this case, and the arguments of counsel are taken from Lord *Hardwicke's* Note-book. The judgment (which agrees with the decree entered in Lord *Hardwicke's* Note-book) from *Atkyns*.)

[200] ANONYMOUS.

December 21st, 1737.

S. C. 1 Atk. 19.

The person of foreigners, subject to the authority of this Court, only, while in *England* ; but though their persons are out of the reach of this Court, yet the property they have here in the funds, is under the control of it.

A foreigner in the King of *Prussia's* service applies to the Court, to compel his wife, now residing at *Dantzick*, to deliver up his children, one of fifteen, and another of thirteen years of age, to be educated by him as having a natural right to the care of them. A bill was brought some years ago by the wife, who had then been separated from her husband a considerable time, to have an allowance out of stocks here in *England*, belonging to her, for the maintenance of the children, which was decreed accordingly.

Lord Chancellor.—I have no power over the persons of foreigners any longer than while they are in *England*, for then they owe a local obedience ; but as they are now in foreign countries, my authority will not reach them ; but though I cannot come

at their persons, yet I might lay my hand upon any property they have here in stocks, &c., but as a sum of money has been already ordered out of a fund belonging to the petitioner's wife, for the maintenance of her children, I cannot make any alteration in that order, while the children continue under her custody, for it is given merely upon their account, and not the mother's. (This case is taken from *Atkyns*. It is not to be found in Lord *Hardwicke's* Note-book.)

[201] In the Matter of the Earl of LITCHFIELD and Sir JOHN WILLIAMS.(1)

December 23d, 1737. 1 Atk. 87.

If an assignee under a commission of bankrupt, employ the clerk of the commission, a person of very little credit, to pay dividends, who misapplies and embezzles the money, the assignee will be liable to make it good to the creditors, unless he consults the body of the creditors in his appointment of the agent.

The rule that trustees shall not be accountable for losses which happen from necessary acts does not extend to their agents.

Lord Litchfield and Sir *John Williams* were assignees under a commission of bankrupt; the latter entrusted one *Gurdon*, the clerk of the commission, to receive some of the effects of the bankrupt's, and to pay some of the debts and dividends; no fraud appeared in the assignees, but the clerk afterwards failing, the question upon petition was, If the assignees should make up the clerk's deficiency to the creditors.

Lord Chancellor. This case has been argued from the common rules of equity, relative to necessary acts done by trustees. In many cases trustees shall not be answerable for losses happening from such necessary acts; but this rule does not hold as to persons employed by trustees, but only to the acts of trustees themselves.

Where assignees under a commission of bankrupt employ an agent to receive money, or pay, and he abuses this confidence; I will not lay it down as a general rule, but at present I am at a loss to distinguish such assignees from any other trustee, employing any agent without the consent of his *cestui que trust*. In which case if his agent deceive him, *respondeat superior* to the *cestui que trust*; so in the present case, as one of the assignees employed the clerk of the commission, a person of very little credit, to pay dividends, who misapplied and embezzled the money, this assignee will be liable to make it good to the creditors, as he did not consult the body of the creditors, who are his *cestui que trusts* in the appointment of this agent. It is no part of the office of the clerk of the commission to receive and pay; he acted solely as agent to the assignees. If it was necessary to have employed some person as receiver it should [202] have been done by the consent of the creditors. What is the chief consideration of creditors in the choice of assignees? Certainly the ability of the persons, that they may be responsible for the sums they may receive from the bankrupt's estate, by virtue of their assigneeship. If, therefore, they could turn this trust over to another, it would deprive the creditors of the benefit of their choice, and destroy the intent of the law, which has taken so much care to secure to them the right of election. But the negligence of one assignee shall not hurt another joint assignee, when he is not at all privy to any private and personal agreement entered into by his brother assignee. But this I cannot properly determine now; for all the Court can do in a summary way, under a commission of bankrupt, is in transactions only between the creditors and the assignees, but cannot upon petition adjust any demands that one assignee may set up against another concerning a private agreement between themselves, independent of the rest of the creditors.

The money embezzled by the clerk of the commission was £1000. His bill of fees and disbursements delivered in by him before his death was ordered to be taxed by the commissioners, and what should be found due to him was to be applied towards satisfaction of the money embezzled; and Sir *John Williams*, the representative of the deceased assignee, was to pay in £700, or whatever the sum may be, into the bank, to be added to the residue of *Gurdon's* money after taxation, so as together they may be sufficient to make up the money embezzled by *Gurdon*.

(1) Lord *Hardwicke's* judgment in this case is principally taken from Mr. *Atkyns's* Report, but some passages have been added from Mr. *Forrester's* manuscript, which more fully express his Lordship's meaning.

[203] THOMAS NORTON, *Plaintiff*; (1) and MARK FRECKER, NICHOLAS PAXTON, JOHN LAUGHTON, *Executors of COLONEL NORTON, Defendants.*

January 24th, 1737. 1 Atk. 524.

Richard Norton being seised to himself and his heirs of a church lease for three lives. on his second marriage, by a settlement made in 1657, covenants to levy a fine thereof to himself for life, with remainder as to part thereof to the first and other sons of the marriage in tail, and as to other part thereof to the use of such children, and for such estates as he should by deed or will appoint, and for want of such to the use of the first and other sons of the marriage in tail, remainder to his own right heirs. By a settlement made in pursuance of articles upon the marriage of the eldest son of the second marriage, who was a party to the articles, *Richard Norton* the father, conveys it to the uses of his son's marriage settlement: held, that the estate tail created as to part of the premises in the church lease by the deed of 1657, was well barred by the articles and settlement made upon the son's marriage, the church lease not being within the stat. *De Donis*, and that the other part of the premises in the church lease, was in pursuance of the power of appointment contained in the deed of 1657, well appointed by the same articles and settlement, but that at any rate it was not competent for the plaintiff, who was the next in remainder, in case the articles and second settlement had not been made (having agreed with *Colonel Norton*, his eldest brother by a former marriage, that the lease should be renewed in the name of *Colonel Norton*, in his own name, and in the name of his eldest son), to bring a bill for an account of the rents and profits which had accrued in *Colonel Norton's* lifetime.

Richard Norton, the elder, having issue by a former marriage, married a daughter of Lord *Say and Sele*, and at that time being seised to him and his heirs, of a church lease in the manor of *Alresford*, for three lives.

By a settlement of 5 March 1657, *Richard Norton*, the elder, covenanted to levy a fine of the manor of *Alresford inter alia*, to the use of himself for life, remainder to his wife for life, remainder as to *Lanham* farm part thereof to *Richard Norton*, the eldest son of the marriage, and the heirs male of his body, remainder to the second and other sons in tail, and for default of such issue, to the use of such persons as he should by deed or will appoint; and as to *Old Alresford*, to the use of such children by his said wife, and for such estates as he should appoint, and for default of such appointment, to the first and other sons of the marriage in tail, remainder to his own right heirs. There was a proviso [204] of revocation, with the assent of Lord *Say and Sele*, in his lifetime, or with the consent of three other trustees, or the survivor of them after his death, except jointure lands, and for limiting new uses for the benefit of the issue of the marriage.

Upon the marriage of *Richard*, the eldest son of the marriage with *Elizabeth Buller*, a settlement was made bearing date the 4th of October 1673, to which both *Richard* the father, and *Richard* the son, were parties, whereby after reciting that by articles on the marriage of the son, dated the 26th of September 1673, to which also the father was a party, it had been agreed that the premises in question should be settled by the father upon the trusts, and for the purposes after mentioned. It was witnessed, that in consideration of the agreement and marriage portion, *Richard Norton*, the elder, bargained, sold, released, and confirmed the said premises to the trustees, and their heirs, upon trust to permit *Richard Norton*, the elder, to receive the profits for his life, then upon trust to permit *Richard Norton*, the younger, to receive the profits for his life, then upon trust, in case *Richard Norton*, the younger, should die without issue male, to raise £4000 for daughters' portions, and in case the daughters should be otherwise provided for, or *Richard Norton*, the younger, should have no issue, then to pay the rents and profits to such persons as *Richard Norton*, the elder, should appoint, and in default of such appointment, to his heirs, executors, and administrators.

The church lease had been renewed between the periods of the two settlements by *Richard*, the father, in whom the legal estate was vested.

By the second marriage, *Richard Norton*, the elder, had three sons, *Richard*, who died without issue in 1708, *William*, the father of the plaintiff, and *Charles*.

Upon the death of *Richard Norton*, the elder, without making any appointment, *Richard Norton*, the younger, came into possession, and upon his death, *Colonel Norton*,

the grandson of *Richard Norton*, the elder, by his first marriage, and his heir at law, took possession, and retained it until his death in 1732.

In 1721, the plaintiff applied to Colonel *Norton*, and requested permission to renew the lease in the name of himself and his son, he paying the fine, which was accordingly done; and in 1722, Colonel *Norton*, by deed, declared the [205] trusts of the lease to be for himself for life, remainder to the plaintiff for life, remainder to his eldest son.

The plaintiff denying Colonel *Norton's* right to these premises during his life, by his bill prayed an account of the profits whilst he was in possession, and for satisfaction out of his personal estate.

By an act of parliament of 10 Geo. 2, the executors were prohibited from pleading the statute of Limitations in this suit.

Evidence was produced to shew that the plaintiff had expectations from Colonel *Norton*, and was not aware of his title under the settlement of 1657.

Mr. Browne, Serjt. *Barnardiston*, Mr. *Fazakerley*, and Mr. *Noel* for the plaintiff.

There are two questions,—1st, Whether the plaintiff has any title. 2dly, Whether he has any remedy for the profits.

As to the first, his title under the deed of 1657 is clear; what then has happened to take that title away? For this purpose the deed of 1673 is relied upon; but there was no power of revoking the uses of the former deed without the consent of the trustees, who did not concur in the latter.

It is plain that the settlement of 1657 was concealed from *Richard*, the son. The deed of 1673, does not mention it, and in this latter settlement, *Richard*, the father, who had only an estate for life, is made to convey, although *Richard*, the son, who had a sort of estate tail, might have done it more effectually, for *Richard*, the father, could only act under the power in the settlement of 1657, which is confined to appointing amongst the children of the second marriage.

As to the remedy, the length of time is insisted upon, but the plaintiff's title did not accrue until the death of *Richard*, the eldest son, in 1708; from that time the deed continued in the possession of Colonel *Norton*. The plaintiff was ignorant of his title, and having expectations from Colonel *Norton*, who was his uncle, would have been afraid of offending him.

After the renewal of the lease in 1721, the plaintiff had not the legal title, and from that time Colonel *Norton* may be considered as a trustee for him. Besides the act of parliament may be construed to go a little farther than to prevent the statute of Limitations from being set up, and may be held to remove the objection arising from the length of time. The legislature intended that the case should be determined according to the mere right.

[206] Mr. Attorney-General, for the defendant.

From the accession of the plaintiff's supposed title in 1708, to the renewal of the lease in 1721, there was no claim of title during that time; whatever the plaintiff's title might be, he agreed, that Colonel *Norton* should occupy the premises; but the plaintiff had in fact no title. As to part indeed the limitation is to *Richard Norton*, the younger, and the heirs male of his body; but as to the rest of the manor, it is limited to such children of the marriage as the father should appoint. There was no necessity that *Richard*, the younger, should join in conveying by the deed of 1673, because he had no legal estate, and any equitable interest he might have was sufficiently bound by the articles.

Lord Chancellor. I am of opinion, that the plaintiff would have been entitled to the manor of *Alresford*, and *Lanham* farm, by virtue of the remainder limited to the first and other sons by the deed of 1657, if nothing had been done subsequent to that to bar his right.

In the case of *Wastneys v. Chappell* (1 Brown P. C. 457 [2nd ed. 3 Bro. P. C. 50], S. C.), in the House of Lords, 1712, it was determined that in respect to estates thus granted in fee, determinable on lives, a person may take by way of remainder, as a special occupant; but that as such an estate tail is not within the statute *de Donis* nor barrable properly by a recovery as an estate tail, any limitations depending thereupon are entirely in the power of the first taker in tail, and may be destroyed by any conveyance or even articles in equity; and so it was determined in the case of the Duke of *Grafton v. Lord Euston* (2) in 1722, in which I myself was counsel, the duke being the first person in the settlement who would have been tenant in tail if the property had been an inheritance, was held to have an absolute power over the estate.

The question then is, whether the deed of 1673, amounted to a good disposition. The lease had been renewed between the periods of the two settlements by *Richard*, the father. The whole legal estate was in him; and it was, therefore properly agreed that he should convey. As to [207] *Lanham* farm the settlement is clearly good, for both in that settlement and in the articles the tenant for life and remainderman in tail join in the conveyance. As to the manor of *Alresford*, the tenant for life, with power of appointment, joins with the tenant in tail in default of such appointment. The limitation in the deed of 1657, under which the plaintiff claims, is only in default of an appointment; but here is an appointment which *Richard Norton*, the elder, might make at least, with the consent of the tenant in tail. But if there had been originally any doubt, there can be none after the plaintiff has agreed that *Colonel Norton* shall receive the profits for his life.

There is no pretence for saying that the plaintiff's title was concealed from him, or that he was ignorant of it.

As to the remedy—The plaintiff's bill for an account of rents and profits is improper and premature, the possession never having been recovered against *Richard*, the defendant's ancestor; and in this respect the proceedings in equity are the same as at law, where trespass will not lie for mesne profits till the possession is recovered by ejectment.

Even supposing the Court should now have been of opinion that *Richard*, the heir at law of old *Richard*, had no right and ought to be considered only as a trustee for the plaintiff; yet as he was in possession claiming the estate as his own right, and insisting on his own title, this Court cannot decree an account of rents and profits without having any regard to the recovery of the possession. (See *Curtis v. Curtis*, 2 Bro. Ch. Ca. 622. *Dormer v. Fortescue*, 3 Atk. 129. *Pulteney v. Warren*, 6 Ves. 73.) The bill was dismissed without costs.

N. B.—The *Chancellor* said, in this case no executor was compellable either in law or in equity to take advantage of the statute of Limitations against a demand otherwise well founded.

(1) The statement of this case, and the arguments of counsel, are taken from Lord *Hardwicke's* Note-book. The judgment where it varies from the Report of Mr. *Atkyns*, is taken from the manuscript report of Mr. *Forrester*, compared with and corrected by short notes in the handwriting of Lord *Hardwicke*.

(2) 3 P. Wms. 266, note (E). S. C. So *Forster v. Forster*, 2 Atk. 259. *Saltern v. Saltern*, ib. 376. *Williams v. Jekyl*, 2 Ves. 682. *Blake v. Blake*, 1 Cox, 266. *Blake v. Luxton*, Cooper, 178. *Grey v. Mannoch*, 2 Eden, 339. But a will notwithstanding a dictum of Lord *Kenyon's* to the contrary, in 6 T. R. 292, does not operate as a bar to a quasi estate tail and the limitations over, *Dillon v. Dillon*, 1 Ba. & Be. 95. *Campbell v. Sandys*, 1 Sch. & Lef. 294.

[208] THE ATTORNEY-GENERAL v. JEANES.(1)

January 27th, 1737. 1 Atk. 355.

The court will give a proper direction as to a charity, without regard to an impropriety in the prayer of an information.(2)

It was said by the *Lord Chancellor* in this case, that in an information by the Attorney-General for the regulation of a charity, it is the business of the Court to give a proper direction as to the charity, without any regard at all to the propriety or impropriety of the prayer of the information, and that this case herein differed from all others, wherein the decree must be founded on the prayer of the plaintiff's bill.

(1) This case is taken from *Atkyns*. It appears from Lord *Hardwicke's* note of this case, that the information was for the establishment of a charity for a free school, and that it prayed for the removal of the schoolmaster; that he might pay a sum of £200 in his possession, to be invested in land for the benefit of the school; that the premises might be repaired, and trustees appointed. And it appearing in evidence that the acting trustee had been appointed by a deed executed by one only of two surviving trustees, his Lordship declared that the conveyance of the charity estate being made by one only was not warranted by the deed of trust, and ought therefore to be set aside; and decreed the same accordingly. And that the surviving trustees should

proceed to nominate other trustees ; and convey the estate to themselves, and such new trustees subject to the trusts of the original deeds ; and he directed the £200 to be laid out in land, with the approbation of the Master ; and that the defendant *Jeanes* should pay the £200 when a proper purchase could be found ; he giving proper security in the mean time ; and his Lordship ordered that no fine should be taken on the lease of the charity estate. And as to all other matters the information was dismissed.*

(2) The Court has gone a vast way in relieving against want of form and mistakes in pleading as to charities, per Lord *Eldon*, *Attorney-General v. Jackson*, 11 Ves. 372. *Attorney-General v. Parker*, 1 Ves. 43. *Attorney-General v. Smart*, ib. 72. *Attorney-General v. Scott*, ib. 413. *Attorney-General v. Whiteley*, 11 Ves. 247.

* Reg. Lib. A. 1737, fo. 608.

[209] *Ex parte* THOMAS LAMPREY.(1)

January 27th, 1737.

Upon a question whether the chaplain of *Christ Church* had been properly deprived by the dean of *Christ Church* of his chaplainship on account of marriage ; it was held that *Christ Church* was both a college or a house of learning, and a cathedral church ; and from the chaplains being admitted as members of the college, being prohibited from accepting livings except at a certain distance and of a certain value, and from being obliged to preach in the University, and attend prayers in the Latin chapel, and keep exercises in the house, and have servitors allowed them ; but inasmuch as they were obliged to read prayers in the choir which has necessary relation to the church, it was held that the chaplains were to be considered members of this society in both its capacities, as well in that of a college as that of a cathedral church. And in the absence of any general statute of the University, or any particular statute relating to the foundation of *Christ Church* as a college, it was held, from the general usage of the Universities of *England* prohibiting fellows from marrying, and from general reputation relating to this foundation, and from particular usage of this society, in like cases, which prohibited students from marrying ; that marriage was a lawful cause for a chaplain of *Christ Church* being expelled or removed from his chaplainship.

Mr. *Thomas Lamprey*, a chaplain of *Christ Church, Oxford*, having been deprived of his chaplainship by the dean, on account of his marriage, presented a petition to the Lord Chancellor, as visitor, complaining of the deprivation and praying to be restored.

The question made was, whether the marriage of a chaplain was a sufficient cause to entitle the dean to remove him.

The case was argued on the 29th of November and the 21st of December, by Dr. *Lee* and Mr. *Fazakerley*, in support of the petition ; and by Doctor *Andrews* and Mr. *Murray*, against it.

On the 27th of January the Lord Chancellor delivered the following judgment in Lincoln's Inn Hall.

Jan. 27, 1737.—Lord Chancellor. There are three questions in this case :—

1st, Whether *Christ Church* be a college or house of learning, or a cathedral church only, or both.

2dly, Admitting that it ought to be considered both as a college and a cathedral church, whether the chaplains are members of this society in the one capacity or the other or in both.

3dly, Whether marriage be a lawful cause for the removal of a chaplain by the dean.

[210] Upon the first of these questions I have already given my opinion ; and it is clear that *Christ Church* is both a college or house of learning, in the University of *Oxford*, and also a cathedral church, the chapter of the bishop of that see.

As to the second question, the evidence upon it is not so clear and decisive. The chaplains are not mentioned in the charter erecting the bishoprick, nor has any instrument been produced relating to the foundation either of the college or cathedral church, which takes any notice of chaplains.

There is an entry in which mention is made of eight petty canons and eight clerks, and in subsequent entries of the names of the members *ministri in ecclesia* eight, *et clerici* eight, are mentioned; but it does not appear that the chaplains were meant by either of these denominations. The number in both instances is the same, but the name is different, and it hath not been shewn that the chaplains ever received the particular salaries there set down.

As there is this uncertainty in the evidence of this matter, there is room to believe that *Christ Church*, when a mere college or house of learning, before its erection into a cathedral church, might have had chaplains.

It is natural to think so, because many other colleges have, and the statutes of the University take notice of them as members upon the foundation. They are called, indeed, by various names, *Capellani*, *Sacellani*, and *Conducts*, in *King's College*, *Trinity College*, and *Catherine Hall*, in *Cambridge*.

And as the college might have had chaplains, it is highly probable that the dean and chapter, upon the erection of the bishoprick, transferred and applied them to be officers or ministers of the cathedral church.

This notion is much favoured by their bearing a name not mentioned in the charter, a name usual and frequent in colleges, but I believe unknown in any cathedral church in *England*, at least I never heard of a chaplain of a cathedral church.

As this appears probable to have been the case originally, so the proof arising from subsequent facts falls in with and supports it.

The admission of a chaplain is as of a member of the college by putting his name in the buttery book. He makes no subscriptions before the bishop, which as a member of a cathedral church merely he would be obliged to do.

The chaplains are prohibited from accepting livings out of [211] the precincts of the University under certain restrictions as to value and distance, which, as minor canons or members of a cathedral church they could not be; even an act of chapter for that purpose would be void.

They are obliged to preach by turns in the university; and, by the ancient order of 1637, were required to attend five o'clock prayers in the *Latin* chapel.

By a decree of the chapter of 15th May 1651, those chaplains who are under the degree of Master of Arts, are obliged to keep exercises in the house, as the students are; and they are, by a former decree, allowed a proportionable number of servitors to attend upon them, and are obliged to residence.

All these circumstances indicate a member of a collegiate body bound to academical rules, and have no relation to a cathedral church.

But then it is admitted to be a principal branch of their duty to read prayers in the choir, which has an immediate and necessary relation to the church.

From all these circumstances taken together, I think that the natural inference is, that the chaplains are to be considered as members of this society in both its capacities, as well in that of a college as that of a cathedral church.

But the determination of the two preceding questions will not afford any certain conclusion to determine the third; for admitting a chaplain to be a member of this society in both the capacities I have mentioned, it still remains to be considered,

3dly, Whether marriage be a lawful cause (*causa legitima* are the words of the charter) for the amotion or expulsion of a chaplain, by the dean of *Christ Church*.

Touching this point, there is no general statute of that great collective body of learned societies, the university of *Oxford*; neither is there any particular statute or *lex scripta* of this foundation.

The rule of judging must then be sought for from the particular usage of this society on this or the like occasions, and from the general customs and usages of the Universities of *England* in like cases, which by ancient and approved practice have been received as a kind of *jus commune*, the common law as it were of those societies.

As to the particular usage of this society, strict custom or prescription cannot be pleaded on either side, because the [212] foundation is within the time of memory; but notwithstanding this, it has been rightly admitted by the counsel on both sides, that the usage ought to make a law, otherwise strange confusion would be introduced into both Universities.

It is objected, that there is no ground to insist upon usage in this case, because no instance has been produced of the removal of a chaplain for being married, except that of *Maurice Wheeler*, which is not proved by positive evidence of the fact.

I will consider that instance when I come to observe upon the affidavits, and supposing at present that there is no instance of an expulsion for this cause, it is material to observe, that on the other hand, no instance has been shewn of the appointment or admission of any married man to a chaplainship.

Considering the number of chaplains, and the length of time during which this College has flourished under its last foundation, now near two hundred years, it is almost impossible but that some such instance might have been produced if a person so circumstanced had been taken to be qualified.

But in the proving of usage, even in cases of strict custom or prescription it is not always absolutely necessary to make positive direct proof of instances exactly parallel.

Instances in other cases of the like sort, general reputation, the opinion of ancient persons, long resident and conversant in the manor or place in question, will be evidence even to a jury in such a case.

Now it appears to me that the instance of students is of the like sort ; and that they cannot enjoy their studentships after being married is plain from the books.

This fact was so much beyond dispute, that the petitioner's counsel in their opening took it for granted, and alleged that there was some decree or act of Chapter to restrain students from marrying ; but no such act is to be found in the books. Consider then how a student appears to be an instance of the like sort with a chaplain.

By the decrees of the Chapter, and in ancient entries, which have been read on both sides, they are generally named together and put under the same regulations ; and as to the distinction, that the students are to be considered as members of the house of learning, and the chaplains of the cathedral church only, it is very remarkable, that in some few instances the students are called students of the church, and the chaplains, chaplains of the house.

[213] There is an order, dated 2d August 1637, that there shall be thirty servitors, who shall wait upon the students, chaplains, and under commoners of the church. There is another order of the 6th of May 1650, for the alteration of the prayers, and that this service be performed by the chaplains of the house. And there is an act of Chapter of 30th November 1660, that all students and chaplains belonging to this church, now absent without leave, do return by such a day.

It is objected that if any person is admitted of the college, and well proved to enjoy the advantages of it, by taking degrees in the University, he must be subject to the rules and discipline of the house, and yet that he is not restrained from marriage, as in the case of gentlemen commoners, &c.

The answer to this objection is, that such persons are not on the foundation, nor partake of the bounty of the founder ; but the chaplains of *Christ Church* are as much upon the foundation, and eat the bread of the founder equally with the students.

Consider in the next place what evidence there is from general reputation, and the opinion of ancient persons long resident and conversant in *Christ Church*.

His Grace the Archbishop of *York* was admitted a student in 1676, now above three score years ago. Dr. *Friend* was admitted a student in 1686, now fifty-one years ago. Dr. *Foulkes* was admitted a student forty-three years ago. And Mr. *Brooks* has executed the office of chapter clerk for fifty-seven years.

All these persons concur, that during all their knowledge, marriage hath always been deemed a sufficient cause for the removal of a chaplain. And my Lord Archbishop adds, that it was the general apprehension of all the members of that society, with whom he conversed during his time, and he never heard it doubted during that time, that a chaplain of *Christ Church*, according to the rules and usages of that society, forfeited his office by marrying.

It cannot be denied but that this would be evidence, and a very considerable evidence to be left to a jury on the trial of a strict custom at law ; but this becomes much stronger when it is considered, that here is no evidence on the other side of any reputation or opinion to the contrary.

Mr. *Lamprey* himself does not swear any such thing. Mr. *Baker* and Mr. *Reyner* who come nearest to it, only swear that they never knew or heard of any law or constitution [214]-tion of the said church to that purpose ; and that may be very true, for it is admitted that there is no formal law or constitution about it.

This general reputation, therefore, stands unimpeached.

But it has been insisted that this general reputation is contrary to usage in fact, for that chaplains have been married, and known to be so. and have not been removed.

This is of great weight, and deserves to be well considered.

On the side of the petitioner four instances have been cited of *Harrison, Ryman, Hutchin, and Baker*.

The most material circumstance is, that they were publicly known, even to the governors of the college, to be married, and yet were not removed.

As to Mr. *Baker*, a particular fact is sworn to, relating to Dr. *Ambridge* and the Dean, but as to the other three, it is only sworn that they lived openly with their wives, which is an analogous expression.

On the other side it is sworn that *Ryman* and *Harrison*, two of the three did not publicly own their wives, and the witnesses swear they believe that the only reason for their not doing so was the fear of being turned out of their chaplainship.

Mr. *Brooks* swears in general, that some of the chaplains have, during his time, been suspected of being married; but that every one of those so suspected, except Mr. *Lamprey*, endeavoured to conceal the same for fear of losing their chaplainships as he verily believes.

This evidence of endeavouring to conceal such marriages, doth, upon consideration, turn the weight of these instances the other way; for it proves that the persons who did it were at the same time conscious that they did wrong, and avowed that they were liable to suffer for it. It amounts in effect to their own confession against themselves.

Connect this with what is sworn by the archbishop of *York* as to the case of *Maurice Wheeler*, and it amounts to a very strong proof. It is true the archbishop does not swear to the fact of removal of his own knowledge, but as he was then informed, and verily believes; but hearsay and belief from ancient persons who are dead (these indeed are not sworn to be so) is good evidence in the case of usage, especially as such removals must be by the act of the dean, and therefore need not be registered any where.

Some deans may have connived at such marriage, but that [215] is not material, for some persons may lay less weight on such an irregularity than others.

If the chaplain was a man of merit, or an object of compassion, the dean may have been induced not to enquire into the fact.

It would therefore be very dangerous to admit such instances as a ground of right. It is difficult to say how far that might extend even in the case of fellowships, for I am much afraid that proof as strong, perhaps stronger, might be produced in many colleges.

Sitting as a visitor, I shall be very cautious how I permit such connivances or tenderness to grow up into an evidence of right.

I will take notice in this place of what was said by the counsel for the petitioner, that the argument amounted to a dilemma. Either the chaplains may marry, or the canons cannot; but the canons claim and exercise that right, and therefore the chaplains may do the same.

I think that no consequence can be drawn from the one case to the other.

There seems to me great weight in the argument that the canons are in this house a kind of joint governors with the dean. The dean indeed alone acts with the other heads of houses in the government of the University; for *Christ Church* can there have only a single voice; but the interior domestic government of the society is exercised in Chapter. But the irrefragable answer to this objection is, that the usage is plain and uniform in favour of the Canons, and the Crown, both founder and visitor, of this college, hath from time to time appointed married men to be Canons.

I come now in the last place to consider the general customs and usages of the Universities of *England* in like cases, which, as I said before, have been received as a kind of *jus commune* of those learned bodies.

The two Universities, though distinct in their foundations, and in their rights, have some things common to them both; amongst which that of restraining members upon the foundation of the different colleges (except the governors) from marrying is one.

The fact is certain, and it may have more of curiosity than of use in the present case to enquire into its original.

Probably it may have taken its first rise from the opinion which prevailed before the Reformation, that colleges were ecclesiastical foundations, and therefore fell within the general prohibition of marriage which affected all ecclesiastical persons, though there is a fact which may make some think that it had an original more extensive than this, which is, that the faculty fellowships were then subject to the restraint

against marriage. Since the Reformation, colleges have been more rightly held to be lay foundations ; besides which the churchmen have been restored to their natural liberty of marrying.

But notwithstanding this, the evident utility, nay, almost necessity of the thing has still, by common consent and usage, preserved the restraint as to members of colleges.

It was found necessary, from their being seminaries for the education of youth, the strictness of their maintenance, and the method of a collegiate life.

Upon this foundation it depends in almost all the colleges in *Oxford*, where it is not pretended that there is either any general statute of the University, or any particular statute in the greater part of the colleges against it.

And in *Cambridge*, although they have a statute which says, *nolumus socios esse maritos*, yet it was rather declaratory, than introductive of any new law.

To doubt of this, therefore, because there is no statute or written law against it, would be to unsettle and overturn these foundations.

If this would be the case as to fellows and scholars of a college, how do these chaplains differ. They are equally on the foundation of the college, and in all respects within the same reason, and they are considered on the same foot in the statutes of the University which have been cited, *statutum est quod non graduati quotquot alicujus collegii socii, scholares, capellani, clerici, denique quotquot de fundatione collegii alicujus fuerint studentes insuper ædis Christi*, shall wear such and such habits.

In the statutes of King *Charles* the 1st, there is a declaration who shall be considered as residents, so as to be capable of voting in the election of proctors, *residentes vero interpretamur omnes collegiorum socios, scholares, clericos, capellanos, seu quocunque alio vocabulo in Charta fundationis ejusdem nominati et dotati fuerint*.

This function of chaplains is not peculiar to *Christ Church*, but is found in several other colleges, and appears by those statutes to be considered in the same light with other denominations of persons upon the foundation.

Great might be the inconvenience to allow them any [217] distinction upon the point now in question ; but as it is not my business here to make laws, but only to judge of them, I will not enlarge upon that topic.

But I cannot conclude without making one observation upon the general point whereon so much stress has been laid in this appeal. I mean, that some difference is to be made between several of the members of *Christ Church* and those of the other colleges, in respect of its being a Cathedral Church, as well as a house of learning.

Christ Church has now, for two centuries, under the protection of many successive princes, eminently flourished as a house of learning, and has sent forth many learned and illustrious persons for the service both of church and state ; But I am firmly persuaded nothing would tend more to stop this happy progress, and to disturb and unsettle the good government of this society, than to admit of any distinction in point of discipline arising from the mixture of a Cathedral Church in their constitution.

It is impossible to foresee into how many instances the consequences of that reasoning may extend. It is therefore safer to adhere to the ancient foundations and principles which have hitherto prevailed.

Upon the whole I am of opinion that the marriage of the petitioner was a lawful cause of expulsion.

Let his complaint therefore be dismissed.

(1) The whole of this judgment is copied from a paper in the hand-writing of Lord *Hardwicke*.

GREEN, and ROSAMOND his Wife, *Plaintiffs* ; (1) and BELCHIER and Others, *Defendants*

[See *Metcalf v. Hutchinson*, 1875, 1 Ch. D. 598.]

January 28th, 1737. 1 Atk. 505.

By marriage settlement it is provided, that if husband and wife shall die, leaving issue besides an eldest son unprovided for, then it should be lawful for the trustees to enter upon the estate, and receive all the rents and profits thereof, until they had received £200 ; and the estate was afterwards declared to be charged with raising this sum for the use, maintenance and support of such children so unprovided for, in such manner and such proportions as the survivor of the husband and wife should

appoint. The wife survived, and appointed the £200 for a daughter, the plaintiff's wife, being a child unprovided for. Sir *Joseph Jekyll* decreed the £200, and interest by way of maintenance from the death of the mother. Defendant appealed from that part of the decree which allows interest, and decree affirmed.

Upon the marriage of *Henry Payne*, the Castle Inn at *Kingston* was vested in trustees, upon trust for *Elizabeth* [218] *Stint* for life, remainder to *Ann Payne*, the mother of *Henry Payne* for life, remainder to *Henry Payne* for life, remainder to *Ann* his intended wife for life, remainder to his first and other sons in tail, "Provided always and upon this condition, That if *Henry Payne* and *Ann* his intended wife shall die, leaving issue besides their eldest son unprovided for, then it shall and may be lawful for the trustees and their heirs, from and after the decease of the said *Henry*, and *Ann* his wife, into and upon the premises to enter and to receive and take all the rents, issues, and profits thereof, so long and until they shall have had and received thereof, and by such means, the sum of £200 for the uses and purposes hereinafter declared," and the premises were afterwards declared to be chargeable, and to stand charged with the raising this sum for the use, maintenance, and support of such children so unprovided for, in such manner and in such proportion as the survivor of the husband or wife should appoint.

The wife having survived her husband, appointed the £200 to be paid to her daughter, the wife of the plaintiff, and the only surviving child of the marriage, who was unprovided for.

The bill was brought by the plaintiff and his wife against the defendant who had purchased the premises for a valuable consideration, but with notice of the plaintiff's claim for payment of the sum of £200, and interest from the death of the mother, who died in 1735. The estate was of the annual value of £50.

The *Master of the Rolls* decreed the principal sum of £200 to be raised, and likewise interest by way of maintenance for the plaintiff's wife from the time of the death of the mother.

From this part of the decree which directed the allowance of interest, the defendant appealed.

Mr. *Chute* and Mr. *Fazakerley* were counsel for the plaintiffs, and the *Attorney General*, Mr. *Browne*, and Mr. *Clarke* for the defendants.

Jan. 28, 1737.—*Lord Chancellor*. The defendant in this case being a purchaser, with notice of the charge upon the estate, is to be considered in the same light as if the bill had been brought against the person under whom he claims.

The question in this case will be, whether the £200 is to be considered as a sum to be raised by receipt of the annual rents and profits, or as a sum in gross by a determinate time.

It is plain by the settlement, that this £200 was intended [219] for the children's portions, and what is material too, for such as were otherwise unprovided for; and therefore if no maintenance was allowable in the mean time, the estate not being above £50 *per annum*, the £200 must necessarily be exhausted greatly in bare subsistence for such children, before the whole sum could be raised.

Such a construction, therefore, ought not to be made, unless the words are extremely plain, which is not the present case: That part of the proviso, empowering the trustees to enter and receive the rents, &c., seems to mean the annual rents and profits, though in general, where money is directed to be raised by rents and profits, unless there are other words to restrain the meaning, and to confine them to the receipts of the rents and profits as they accrue, the Court, in order to obtain the end which the party intended by raising the money, has, by the liberal construction of these words, taken them to amount to a direction to sell; (2) and as a devise of the rents and profits, will at law, pass the lands, the raising by rents and profits is the same as raising by sale.

The subsequent words, by which the premises are declared to be charged with this £200, if they stood alone, would certainly warrant a sale or mortgage, and they ought certainly to have their proper force, and ought not to be controuled by the preceding words, supposing them to mean annual rents only.

The words of the appointment of the £200 being in such manner, and in such proportions, as the survivor of the father and mother shall direct, are very material,

for these words not only include a power of raising by mortgage or sale, but a certain determinate time for raising it, and as there is no time limited by the settlement for payment of the money, the father or mother might, no doubt, have made the £200 payable at any time, as at the age of twenty-one, or marriage, and in such case interest by way of maintenance would certainly be allowable in the mean time; it [220] being a constant rule in equity, that wherever a legacy is given by a father to a child, as a provision for such child, though the legacy be payable at a future day, yet the child has an immediate right to the interest of the money; (3) if the legatee was a stranger to the testator, it would be otherwise. In the case of *Ivy v. Gilbert*, there were no words declaring the premises to be charged with, &c., as in the present, and yet it was held even there, that the words, rents and profits, would in general warrant a sale, though it did not in that particular case, by reason of the subsequent words restraining the manner of raising the money, by leases for one, two, or three lives, or for any number of years determinable thereon, or for twenty-one years absolutely at the old rent. (Reg. Lib. A. 1736, fol. 379. Reg. Lib. A. 1737, fol. 283.)

The decree affirmed.

(1) The statement of this case is taken from Lord *Hardwicke's* Note-book. The judgment from *Atkyns*, which corresponds with two Manuscript Reports which have been found, which do not differ in any material respect from that of Mr. *Atkyns*.

(2) Especially in favour of debts and portions, *Trafford v. Ashton*, 1 P. Wms. 415. *Lingen v. Foley*, 2 Ch. Ca. 205. *Mills v. Banks*, 3 P. Wms. 7 & 8. *Gibson v. Rogers*, Ambl. 93. *Baines v. Dixon*, 1 Ves. 41. *Allan v. Backhouse*, 2 V. & B. 72, unless there be words to restrain the meaning to annual rents and profits, *Ivy v. Gilbert*, 2 P. Wms. 13. *Evelyn v. Evelyn*, 2 P. Wms. 673. *Lord Rivers v. Lord Derby*, 2 Vern. 72. *Anon.*, 1 Salk. 367, pl. 2. *Small v. Wing*, 3 Bro. P. C. 503 [2nd ed. 5 Bro. P. C. 66]. *Lady Shrewsbury v. Lord Shrewsbury*, 1 Ves. jun. 234; and see *Okeden v. Walter*, post.

(3) So *Glide v. Wright*, 1 Ch. Rep. 265. *Harvey v. Harvey*, 2 P. Wms. 21. *Inledon v. Northcote*, 3 Atk. 438. *Hearle v. Greenbank*, ib. 716. *Coleman v. Seymour*, 1 Ves. 211. *Beckford v. Tobin*, 1 Ves. 308. *Carey v. Brown*, 2 Ch. Ca. 58. But interest is given to children upon the principle that a father shall be presumed to have intended to provide maintenance for his children, until the legacy become payable, *Hearle v. Greenbank*, 3 Atk. 716. *Tyrrell v. Tyrrell*, 4 Ves. 1. *Chambers v. Goldwin*, 11 Ves. 1. *Ellis v. Ellis*, 1 Sch. & Lef. 5. This presumption is rebutted where maintenance is given, *Hearle v. Greenbank*, 3 Atk. 716. *Ellis v. Ellis*, 1 Sch. & Lef. 5. *Long v. Long*, cited in 3 Ves. 286. *Mitchell v. Bower*, 3 Ves. 283. *Wynch v. Wynch*, 1 Cox. 433; but see *Bourne v. Tynte*, cited 1 P. Wms. 786, which was disapproved of by Lord *Hardwicke* in *Heath v. Perry*, 3 Atk. 103, and see *Stretch v. Watkins*, 1 Madd. 253. And all the cases decided are cases of infants; it has not been extended by any case to a legacy in favour of an adult, per Sir *Thomas Plumer*, *Raven v. Waite*, 1 Swan. 558. *Stent v. Robinson*, 12 Ves. 461; or in favour of grandchildren, though Lord *Alvanley* in *Crickett v. Dolby*, 3 Ves. 12, was of a different opinion, *Haughton v. Harrison*, 2 Atk. 329. *Butler v. Butler*, 3 Atk. 59. *Elton v. Elton*, 3 Atk. 508. *Perry v. Whitehead*, 6 Ves. 546. *Errington v. Chapman*, 12 Ves. 24; or of natural children, *Beckford v. Tobin*, D. 1 Ves. 310. *Perry v. Whitehead*, D. 6 Ves. 547. D. per Lord *Alvanley*, contra, 3 Ves. 12. *Lowndes v. Lowndes*, 15 Ves. 304, unless it can be inferred that the testator intended to place himself *loco parentis*, *De Mazar v. Pybus*, 4 Ves. 647. *Perry v. Whitehead*, D. 6 Ves. 547. *Hill v. Hill*, 3 Ve. & Bea. 183.

[221] ELIZABETH CASBURNE and MARY CASBURNE, Infants, *Plaintiffs*; (1) and ALEXANDER INGLIS, and ELIZABETH SCARFE, *Defendants*.

January 25th, 1737. 1 Atk. 603.

A. seised in fee of a freehold estate, mortgages it, and afterwards intermarries with B., A. dies, and the mortgage is not redeemed during the coverture; this is notwithstanding, such a seisin in the wife, as entitled the husband to be tenant by the curtesy of the mortgaged premises, for in this Court the land is considered only as a pledge or security for the money, and does not alter the possession of the mortgagor.

Thomas Casburne having issue three daughters, *Ann*, the late wife of the defendant *Inglis*, and the two plaintiffs: by indenture bearing date the 4th of February 1725,
C. v.—29*

conveyed sixty acres of land lying in *Cowling*, in *Suffolk*, to the use of himself for life, remainder to his daughter *Ann* in fee.

Thomas Casburne died in April 1726, leaving his said three daughters, his only issue, him surviving.

Ann Casburne, by lease and release of the 24th and 25th days of June 1728, in consideration of £900 conveyed to the defendant, *Elizabeth Scarfe*, and her heirs, all the said freehold lands in *Cowling*, subject to a proviso for redemption upon payment of the said sum of £900 and interest.

In August 1729, *Ann Casburne* intermarried with the defendant, *Alexander Inglis*, and died in November 1731, leaving issue by her said husband only one child, a son, who died soon afterwards, without issue.

In 1733, the plaintiffs filed their bill, insisting that they were entitled as heirs at law both to the infant and their sister, to the said premises of sixty acres in *Cowling*, and to certain other premises which had belonged to their father, in part of which their late sister *Ann* had been tenant in tail, and in other part tenant in fee.

The defendant *Inglis*, insisted that having had issue born by his late wife, he was entitled to an estate for life as tenant by the curtesy in all the said premises, and amongst the [222] rest in the said sixty acres in *Cowling*, subject to the mortgage thereon.

On the 8th of May 1735, this cause came on to be heard before the *Master of the Rolls*, Sir *Joseph Jekyll*, when his Honor was of opinion, that the defendant, *Alexander Inglis*, was not entitled to the tenancy by the curtesy in the mortgaged premises in question; and decreed him to account for the rents and profits thereof, from the death of his son.

From this decree the defendant, *Alexander Inglis*, appealed, and the cause now came on to be heard before the *Lord Chancellor*, upon the single question, whether the husband was intitled to be tenant by the curtesy of mortgaged lands.

Mr. *Attorney-General*, and Mr. *Browne*, for the plaintiff.

A man cannot be tenant by the curtesy, unless his wife was actually seised, where such seisin can be obtained; a seisin in law is not sufficient. Lord *Coke* says, that there is no tenancy by the curtesy of a bare right, title, use, reversion, or remainder, Co. Litt. s. 35. The statute of Uses recites, that by the invention of uses, men were defeated of their tenancies by the curtesy, and women of their dower. A feme covert is not dowable of a trust. It is true, indeed, that the husband has been held to be tenant by the curtesy of a trust estate; but in that case the *cestui que trust* has the absolute beneficial ownership of the estate, and may limit and entail it as he pleases. In *Penville v. Luscombe*, (2) at the Rolls, 4th February 1728, his Honor thought that there was no *possessio fratris* of an equity of redemption. In *Reynolds v. Messing*, (3) at the Rolls, 20th February 1732, and *Robinson v. Tonge* (4) before Lord *King*, in Mich. Term 1730, it was held that a wife was not dowable of the [223] equity of redemption of a mortgage in fee, *a fortiori* a husband shall not be tenant by the curtesy, for a seisin in law is sufficient to give a woman dower, because without her husband she cannot reduce it into actual possession; but if the husband omits to obtain seisin in fact, he loses the curtesy by his own laches. So in this case, the husband might, by paying off the money, have obtained actual seisin, or have made the mortgagee a bare trustee for himself; till that is done, the mortgagee is not merely a trustee. The law requires not only seisin in law, but seisin in fact, where it is possible; but a mortgagor has not even seisin in law, no actual estate or interest, but merely a right of action, by which upon certain terms, and by certain means, he may recover the estate; but which in the present case the husband has neglected to do. If a feme whilst sole aliens, with a proviso for re-entry on condition broken, and the condition be broken, and the husband enters not during the coverture, he cannot be tenant by the curtesy, and yet a right of re-entry after condition broken is a higher title than a right of redemption, as it requires nothing but actual entry to complete it; a mortgagor has no other title than a right of repurchasing upon certain terms, an election which he may or may not exercise. If the husband should be permitted to enjoy this estate, he might by permitting the interest to accumulate exhaust the inheritance.

Mr. *Fazakerley*, and Mr. *Murray*, for the defendant, the husband and.

The mortgagor is considered as the owner of the land, subject to a primary charge thereon; subject to that charge, the mortgagee is only a trustee for the mortgagor. 1 Vent. 141. 1 Vern. 329. *Burnet v. Kynaston*, 2 Vern. 401. *Strode v. Falkland*, ib. 625. *Tabor v. Grover*, ib. 367. *Manning's case*, 8 Co. 96.

An equity of redemption is an estate devisable, descendible, and subject to all legal consequences ; at law a mortgage in fee is a revocation of a will, but in equity no further so than is necessary to make good the mortgage ; a judgment creditor has an equitable lien on an equity of redemption, although no *elegit* can be taken out. Since the statute of Uses equitable estates have been governed by different rules from what they were before. That statute reciting the inconveniences which had arisen, attempts to remedy them by annexing the possession to the use. This Court has framed trusts upon the same principle, but has [224] avoided the inconveniences by adhering to the maxim *æquitas sequitur legem*, it therefore considers a trustee as a mere instrument ; upon this ground there is no doubt but that a husband is entitled to the tenancy by the curtesy of a trust estate, 2 Vern. 525, 583, 680. In *Sweetapple v. Bindon*, 2 Vern. 536, it was held that he was entitled to the curtesy in money directed to be laid out in land. The only exception is, the case of a wife who is not entitled to dower out of a trust, *Lady Radnor v. Vendebendy*, Show. P. C. 69 ; but that case was so decided to avoid the inconveniences which would have arisen from subjecting estates to dower which had been purchased under the impression that they were not subject thereto ; and it is clear, that if a husband was seised in fee, subject to a term in trustees to raise portions, the wife would be dowable if the portions were raised not subject thereto. If the law be so clear as to trust estates, the case of an equity of redemption is stronger. It is a trust, and something more. Chief Baron *Hale*, Hard. 457, 462, says, I conceive that a mortgage is not merely a trust, it is a title in equity, besides there are many things of which the husband shall have the curtesy though the wife cannot be endowed, Co. Litt. 30. It has been said, that the husband ought to have obtained actual seisin by redeeming the mortgage, but that is begging the question, for that could only be necessary in the event of his not being entitled to the curtesy of the equity of redemption. This is compared to a seisin in law, but of an equity of redemption there is no difference between a seisin in law and a seisin in fact. The reason of law on account of which a husband, who by his own laches omits to obtain actual seisin, loses his curtesy, does not apply to this case, Dr. and Student, 172. Co. Litt. 30. In Litt. sect. 52, 40 a, and *Payne's* case, 8 Co. 36, it is laid down that in all cases in which the issue is to make himself heir to the wife, the husband shall be tenant by the curtesy. In *Penville v. Luscombe*, there was no decision about the *possessio fratris*, and in a note of a case in 1716, it is stated that Lord *Cowper* thought that there might be a *possessio fratris* of an equity of redemption. The supposed injury to the inheritance from the husband's permitting the interest to accumulate, could never happen, because the Court would compel him to keep down the interest.

Mr. Attorney-General, in reply. I ask no more than that the rule of *æquitas sequitur legem* should be adhered to. If [225] the wife had died before the day of payment mentioned in the proviso had arrived, and the heir had paid the money at the day and entered, the husband would not have been tenant by the curtesy. Why then is he to be so of the equity of redemption, which is nothing more than a postponement of the day of payment, and an additional time for the performance of the condition allowed by courts of equity. If a woman purchases an estate and dies before entry, her issue must make himself heir to her, and recover the estate by virtue of that heirship, and yet the husband cannot be tenant by the curtesy.

On the 25th of March 1738, his Lordship delivered the following judgment.

Lord Chancellor. The general question in this case is, whether the husband can be tenant by the curtesy of an equity of redemption on a mortgage in fee. This depends upon two considerations : First, *What kind of interest an equity of redemption is in the eye of this court.* Secondly, *What is requisite to entitle a husband to be tenant by the curtesy of an equitable interest in land where the wife had not the legal estate.*

First, *As to the nature of the interest.* An equity of redemption is considered as an estate in the land. It will descend, may be granted, devised, entailed, and that equitable entail may be barred by a common recovery.

This proves that it is not considered as a mere right, but as such an estate whereof in the consideration of this court there may be a seisin, for without such a seisin a devise could not be good.

The person having the equity of redemption is considered as owner of the land, and the mortgagee is entitled only to retain it as a security or a pledge for a debt. For this reason a mortgage, though in fee, is considered in this court, as personal assets, and shall go to the executor, notwithstanding that the legal estate vests in the heir

in point of law. The husband of a feme mortgagee shall not be tenant by the curtesy of the mortgage, unless the mortgage be foreclosed, by which it ceases to be a pledge. It shall not pass by a devise of all his lands, tenements, and hereditaments.(5) [226] This was unanimously resolved by Lord *Cowper*, assisted by Lord C. J. *Trevor* and Mr. J. *Tracey*, in the case of *Litton v. Falkland*, 2 Vern. 625.

The words are, it was unanimously agreed, 1st, That mortgages in fee, although forfeited when the will was made, did not pass by the general words; although he afterwards foreclosed those mortgages, or obtained a release of the equity of redemption, they should not pass by the will, but go to the heir at law. This shews that the release of the [227] equity of redemption or foreclosure is considered in equity as a new purchase or acquisition of the real estate in the land.

On the like reason in the case of *Burnett v. Kinnaston*, 2 Vern. 401, a mortgage in fee of the wife, was held to be only a chose in action.

Now if this be the nature of the mortgagee's interest, in the eye of this court, it will follow necessarily from hence that the nature of the interest of the person who has the equity of redemption, must, in the eye of this court, be a real estate; for otherwise, the ownership of the land, the real property in equity, will be sunk and vested nowhere, which is not to be admitted; and therefore, if it be not in the mortgagee it must remain in the mortgagor.

This will be further proved by considering the common case of a mortgage in fee made after a devise of the land. It is in law a total revocation of the devise; but in the consideration of equity it is only a revocation *pro tanto*, it amounts to the same as letting in a charge upon it.(6)

The true ground of this is, that the ownership of the land doth in equity remain in the mortgagor; and therefore, it shall pass by his devise, though made precedent to the mortgage.

It has been objected, on the part of the plaintiff, that an equity of redemption, is only a right of action in equity to be recovered on certain terms; but what I have already said proves this not to be well founded. It is no otherwise a right of action in equity than any interest is, which a man cannot come at but by suing a *subpena*, as the law books term it; and that is the case of every mere trust of land which is admitted to be considered always as a real estate in this court. To say that this is a mere right of action in equity will be to fall under the difficulty which I just now [228] took notice of, that then the estate in the land will be in nobody, for it has been determined in this Court that the mortgage is only in the nature of a chose in action; and the objection which I am now considering affirms the equity of redemption to be a chose in action also.

It has also been objected that a mortgagee is not a bare trustee for the mortgagor. It is true that a mortgagee is not barely a trustee; but it is sufficient for this purpose that he is in part a trustee. He is owner of the charge or incumbrance upon the mortgaged premises, and is entitled in his own right to hold the same as a pledge for his debt; but as to the inheritance descendible, the real estate in the land, he is a trustee for the mortgagor till the equity of redemption is foreclosed either by decree or by such a length of time as courts of equity allow to bar a redemption. (See Hard. 467. 2 Vern. 104, and *Cholmondeley v. Clinton*, 2 Jac. & Walk. Rep. 184, and the judgment in that case in the House of Lords, ib. 190.)

The next consideration is, what is requisite to entitle the husband to be tenant by the curtesy of an equitable estate in land, where the wife had not the legal estate during the coverture. At common law four things are necessary to make a tenancy by the curtesy:—Marriage;—the having issue which by possibility may inherit the land;—death of the wife;—seisin of the wife in fact during the coverture. So it is laid down in Co Litt. 30 a.

It is admitted that the three first of these requisites concur in the present case; but the objection relied upon is, that there was no actual seisin of the wife during the coverture, which as it has been contended is necessary as well in the case of an equitable estate as of a legal one.

That no actual seisin of the freehold was in the wife must be admitted; nay it must be admitted that she had no seisin whatsoever of the legal estate, either in fact or in law; but that is beside the question, for it proceeds upon a supposition that there can be no such thing as a tenancy by the curtesy of an equitable estate. This argument

therefore, proves too much, and will contradict and overthrow many cases which have been determined and settled, for which reason it is not to be admitted.

The true question upon this point is, whether there was such a seisin or possession in the wife, of the equitable estate in the land as in the consideration of this court is equivalent to an actual seisin of the freehold at the com-[229]-mon law. And upon the best consideration which I have been able to give this case, attended with the greatest deference for the decree already pronounced, I am of opinion that there was such a seisin.

By the reasoning which I have already offered under the first head, I think I have shewn that an equity of redemption even upon a mortgage in fee unenclosed, is *the ownership of the land or the real estate in equity*. Then there must be such a thing as a seisin of it in the notion of equity, and what other seisin could there be besides that which the defendant *Inglis* and his wife had in this case.

The mortgage was made but in the year 1728. In 1729, *Ann Casburne* married the defendant *Inglis*. In 1731 she died, leaving issue a son, inheritable; and as there was no foreclosure, so the wife all along continued in possession of the estate, and though *that possession was at law but as tenant at will to the mortgagee, yet in equity it was as owner of the estate, subject to the pecuniary charge or incumbrance*; so that here was an equity of redemption, clothed with an *actual possession* and receipt of the profits, which had never been interrupted. From hence it follows that there cannot be a *higher instance of an actual seisin of an equitable estate*. The question then will be reduced to this, whether there can be a tenancy by the curtesy of an equitable estate of the wife? But that has been so often determined, that I take it to be the settled law of this Court (So *Watts v. Ball*, 1 P. Wms. 108. *Chaplin v. Chaplin*, 3 P. Wms. 234. Harg. Butl. Co. Litt. 29 a, note 6); it is founded on the maxim, that equity follows the law, which is a safe as well as a fixed principle, because it makes a *substantial rule of property, certain and uniform, let the form or mode of that property be what it will*. In the case of *Lady Williams and Sir Bouchier Wray*, 2 Vern. 680, it was taken as settled, and two cases are there cited, wherein it was determined that the husband should be tenant by the curtesy of a trust-estate; *Balls' case*, and the case of *Worthington v. Fletcher*. This is so clear and known, that it was admitted by the counsel for the plaintiff, and yet the case of a trust estate subject to debts, differs very little from a mortgage in fee; nay, if the trustees are in possession, it seems to me much stronger against the claim of the husband than the present case. The case of *Sweetapple v. Bindon*, 2 Vern. 536, went a great deal further.

[230] In that case Mrs. *Bindon* gave a sum of money to be laid out by her executors in the purchase of lands to be settled on *Mary* her daughter in tail, with remainder over. The mother died, and *Mary*, the daughter, married the plaintiff *Sweetapple*, and had issue by him. The issue died, and *Mary* the wife died. The surviving husband brought this bill to have the money laid out in land and settled on him for life as tenant by the curtesy.

On the hearing of the cause, my Lord *Cowper* adjudged, that the husband was entitled to be tenant by the curtesy, and decreed the money to be laid out in land, and the land when purchased to be settled on the husband for life accordingly.

In the present case, the principal objections relied upon were two.

First, That here was a laches in the husband, for that he might have paid off the mortgage-money, or brought his bill to redeem, and thereby have gained the legal estate, and that it was his neglect not to do it.

Secondly, That it has been determined, that a wife shall not be endowed of an equity of redemption, and the rule ought to be equal between husband and wife. As to the first, it was compared to the laches which the law imputes to a husband in not making an entry. One answer to this objection is, that the comparison will not hold, for it is by no means to be presumed to be so easy to pay off the mortgage-money, as to make an entry.

The mortgagee is, by the rules of this Court, entitled to six months' notice before he is obliged to take the mortgage-money.

If a bill is to be brought, a much greater delay and more difficulties will occur.

But the clear answer to this objection is, that it equally holds in the case of a trust estate or of a sum of money to be laid out in the purchase of lands. If it had been a mere trust estate, the husband might, with more ease have obtained a decree for a conveyance, than in the case of a mortgage for a redemption; and in the case

of *Sweetapple v. Bindon*, the husband might undoubtedly have brought his bill to have the money laid out in a purchase of land. But this was not allowed to be a sufficient objection in either of those cases.

This objection, however, was endeavoured to be strengthened in the case now in judgment, by alleging, that the husband might be encouraged to suffer the interest to run on upon the mortgage without redeeming, so as to load the estate.

I own I do not quite take the force of that reasoning. If it means the interest accruing due during the life of the wife, I apprehend that it is not to be regarded; for the husband and wife being owners of the estate, may do what they will with their own. The heir of the wife is in herself, and has no right to object that his ancestor has left too great a burthen of interest upon him. If it means the interest to incur after the wife's death, and during the subsistence of the tenancy by the curtesy, the heir will have the same remedy in this Court against the tenant by the curtesy as against any other tenant for life, to compel him to keep down the interest.

Secondly, As to the other objection, that it has been determined that a wife shall not be endowed of an equity of redemption of a mortgage in fee, and that the rule ought to be equal.

This proves abundantly too much, for it has been also determined that a wife shall not be endowed of a mere trust estate, of which it is admitted that the husband shall be tenant by the curtesy. This shews that the argument drawn from the case of dower to the case of tenancy by the curtesy of an equitable estate entirely fails upon the precedents of this Court. How it came to be so settled at first is of a different consideration, and perhaps it may be hard to find out a sound reason for it; but it is safest to follow and adhere to that which has been settled and established.

When any dissatisfaction has been expressed concerning any of the determinations, it has generally been at the denying of dower to the wife, not at the allowing an estate by the curtesy to the husband; and if any alteration was to be introduced, the nearest way, in my humble apprehension, to attain the mere right, would be to allow the wife to have dower of a trust estate, not to disallow the tenancy by the curtesy of the husband. But as things now stand, I take the ground of those cases wherein the wife has been refused the aid of this Court to have dower of an equity of redemption of a mortgage in fee to have been, that she could not have it of a trust estate, which was still building on the same principles; and if that were so, the consequence in the case of tenant by the curtesy holds just the contrary way, for the husband is [232] allowed to be tenant by the curtesy of a mere trust estate, nay, of money to be laid out in land; and therefore by parity of reason, by analogy to that case, he ought to be so of an equity of redemption, especially where the wife continued in possession all her lifetime. As to the case of *Penville v. Luscombe*, which was mentioned to have been heard at the Rolls on the 4th Feb. 1728, it was a pauper cause, and one question there was, whether there might be a *possessio fratris* of an equity of redemption. I have read over the decretal order in the Register's Book, and it concludes that his Honour declared he would take time to consider of that point before he delivered his opinion, and I cannot find that it was determined, or ever came on again.

In the argument of the cause on the part of the plaintiff, this case was put: Suppose a feme-sole conveyed land to *J. S.* in fee, subject to a condition of re-entry on payment of a sum of money by her or her heirs at a certain day, then marries, has issue, and dies before the day, and after her death her heir pays the money at the day and enters, shall the husband be tenant by the curtesy?

If this case was meant of a mortgage, subject to a condition of redemption, then the case is the same with the present, and will fall under the same determination. But if it was intended of a purchase, subject to a bare condition of re-entry at law, most clearly he will not, for in that case the wife, after her conveyance, and before the re-entry, had neither a seisin nor estate in the land. She had neither *jus in re*, nor *jus ad rem*, and it would be to make the husband tenant by the curtesy of a mere right, a condition, a power of revocation, or possibility; that cannot be. This latter case, however, has no kind of resemblance to that now in judgment. For these reasons I am of opinion, that the defendant *Inglis* is entitled to be tenant by the curtesy of the mortgaged premises, and therefore that this part of the decree ought to be reversed. (Reg. Lib. A. 1737, fol. 408.)

N. B.—I decreed the same between *Guillim* and *Holland*, 11th Nov. 1738.

(1) The statement of this case is taken from the pleadings; the arguments of counsel, from the *Lord Chancellor's* Note-book; and the judgment verbatim from a manuscript in his Lordship's handwriting.

(2) Lord *Hardwicke* says, "as to the case of *Penville v. Luscombe*, which was mentioned to have been heard at the Rolls, it was a pauper cause, and one question there was, whether there might be a *possessio fratris* of an equity of redemption. I have read over the decretal order in the Register's book, and it concludes, that his Honor declared he would take time to consider of that point before he delivered his opinion; and I cannot find that it was determined, or ever came on again," p. 232 of this case.

(3) In *Dixon v. Saville*, 1 Bro. Ch. Ca. 327, it is said, that the case of *Reynolds v. Messing*, or *Reynolds v. White* (as it stands in the Register's book), is misrepresented, and does not warrant the point said to be determined by it.

(4) The point here mentioned to have been decided, does not appear in any of the reports of this case, see *Dixon v. Saville*, 1 Bro. Ch. Ca. 326. See 3 Vin. Abr. 145, pl. 28. *Robinson v. Tonge*, 3 P. Wms. 398.

(5) The beneficial interest in a mortgage which is only the money due upon a mortgage will not pass under words which are only applicable to the transfer of real property, unless the testator has no other lands to answer the description in the will than those in mortgage to him, *Clarke v. Abbott*, Barn. 457; and notwithstanding it was said by Lord *Thurlow*, in *Pickering v. Vowles*, 1 Bro. C. C. 197, "that if a man has estates of his own and also has pure trusts and gives the residue by will, only his own estates will pass by the residuary clause;" and in *The Attorney-General v. Buller*, 5 Ves. 340, it was held by Lord *Rosslyn* that by a devise "of all the rest of my real estate, right, property, and interest therein, in law or equity," to his sons, a trust estate did not pass; it seems now to be settled that, by a devise in general terms a trust estate will pass, unless from expressions in the will or from the purposes or objects of the testator a contrary intention can be inferred, *Lord Braybrooke v. Inskip*, 8 Ves. 417. Thus where a testator devised, "all his real estates whatsoever and wheresoever, unto his wife, her heirs and assigns, for ever; and gave her all his personal estate whatsoever and wheresoever," it was held by Lord *Eldon*, in affirming the judgment of the *Master of the Rolls*, that trust estates passed, *ibid.*; and it is stated by Lord *Eldon* that Lord *Kenyon* in *Roe d. Reade v. Reade*, 8 T. R. 122, said that under a dry naked devise of all his estates, a trust estate would pass; and in the same case Lord *Eldon* stated that upon consultation with Lord *Rosslyn*, Lord *R.* said that in *The Attorney-General v. Buller*, he was rather overborne by the observation of *The Attorney-General*, and that his own opinion rather concurred with Lord *Eldon's*, *ib.* But if there be anything in the will which denotes an intention of controuling the general words; then a trust estate will not pass; as where a testator, under a general devise of his estate, subjects it to the payment of his debts, *Roe d. Reade v. Reade*, 8 T. R. 120. *Duke of Leeds v. Munday*, 3 Ves. 349; 5 Ves. 341, note. *Ex parte Morgan*, 10 Ves. 101, and the situation of the devisee may be called in aid of expressions in the will to shew the intention of the testator, per Lord *Eldon* in *Lord Braybrooke v. Inskip*, 8 Ves. 435; as where a testator bequeathed, "all the rest, residue, and remainder of his estate and effects whatsoever and wheresoever, and of what nature or kind soever, to his natural son *George Hall*, now a midshipman belonging to his ship the *Canton*, his heirs, executors, administrators, and assigns for ever, to and for his and their own proper use and behoof." It was held by Lord *Eldon*, that an estate in the testator, as mortgagee in fee, did not pass, *Ex parte Brettell*, 6 Ves. 578; and in that case it was understood that Lord *Eldon* relied upon the expression that it was given "to the use and behoof" of the party; but when that case was afterwards mentioned in *Lord Braybrooke v. Inskip*, Lord *Eldon* said, "that he did not mean to put any thing upon the expression, that it was given to the use and behoof of the party, and that it came on upon petition, and perhaps was not so attentively considered, as the importance of the point required; but it was not his intention to say, that in the naked instance of a dry trust estate with nothing more in the will than a mere devise in general terms, that he understood the general rule to be, that it would not pass."

(6) *York v. Stone*, 1 Salk. 158. *Perkins v. Walker*, 1 Vern. 97. *Hall v. Dunch*, 1 Vern. 329, 342. *Duke of Bridgewater v. Bolton*, 2 Ld. Raym. 968. *Rider v. Wager*, 2 P. Wms. 334. *Parsons v. Freeman*, 3 Atk. 748. *Baxter v. Dyer*, 5 Ves. 656. *Harmood v. Oglander*, 6 Ves. 199, affirmed in 8 Ves. 106. *Charman v. Charman*, 14 Ves. 580. *Innes v. Jackson*, 16 Ves. 356. *Vawser v. Jeffrey*, *ib.* 519. So a conveyance for the

payment of debts is only a revocation *pro tanto*, *Vernon v. Jones*, 2 Vern. 241. *Ogle v. Cook*, cited 2 Bro. C. C. 592. *Brydges v. Duchess of Chandos*, 2 Ves. jun. 428. But if there be uses beyond the mere particular purpose of a charge or incumbrance, then the devise will operate as a revocation both in law and equity, per Lord Eldon in *Harmood v. Oglander*, 8 Ves. 202. *Cave v. Holford*, 3 Ves. 650. *Rawlins v. Burgis*, 2 Ves. & Bea. 382.

[233] MICHAELMAS TERM, 1737.

ANONYMOUS.(1)

Lord Chancellor. I remember the case of *Austin v. Wills*, where the three subscribing witnesses to the will swore positively that the will was not duly executed: yet they went into circumstantial evidence that it was, and the will was established by verdict on three trials; the last of which was at *Wells* before Chief Justice *Eyre*, and I was counsel in it.

(1) This case is taken from Mr. *Forrester's* Manuscript.

ANONYMOUS.(1)

Jan. 28th, 1737. 2 Atk. 14.

Though no demand, or rent paid in thirty years, yet the defendant must pay costs at law to the person recovering there, but none in equity.

There had been no demand, or any rent paid in thirty years; the person who was entitled recovered it upon a [234] verdict. Lord *Hardwicke* said the defendant must pay the costs at law; but as the laches arose on the part of the plaintiff, and the obscurity of the title to the rent, from the want of a demand for such a length of time, he shall not be allowed costs against the defendant in equity.

(1) This anonymous case is taken from *Atkyns*. It appears in Lord *Hardwicke's* Note-book under the names of *Bishop v. Creed*, under the following circumstances:—

Sir *Cecil Bishop* and his ancestors had been seised of the manor of *Drayton*, in the county of *Sussex*, and entitled to a chief or quit rent of 11s. 11d. issuing and payable out of *Elbridge* farm, belonging to the defendants as tenants in common, part of the farm being in the manor of *Drayton*. The chief rent was paid to Sir *C. Bishop's* father, but since the year 1707, the rent had not been paid. The plaintiff distrained upon the farm at *Elbridge* for the arrears of the rent, whereupon a replevin was brought, but a verdict was given against the plaintiff, on account of his not being able to make out a title to the rent. Sir *C. Bishop* brought his bill for payment of the arrears of the rent, and for establishing the rent for the future, alleging by his bill, that not being able to prove out of what part of the said farm the rent issued, or where the same was payable, he was unable at law to maintain his distress. The defendants by their answer stated, that they did not know, or had they ever heard of any such quit rent issuing out of the said farm at *Elbridge*.

On the 10th of March 1736, the cause came on to be heard.

Mr. *Fazakerley* for the plaintiff, Mr. *Verney* for the defendant.

It was proved on the part of the plaintiff, that a former owner of *Elbridge* farm, who had sold it about thirty years since, had paid to the plaintiff's father a rent of 11s. 11d. And a rental of 1701, of yearly quit rents, due to Sir *C. Bishop* for his manor of *Drayton*, was produced, wherein the rent of 11s. 11d. payable in respect of *Elbridge* farm, was mentioned.

His Lordship directed an issue to try whether the plaintiff was entitled to a rent of 11s. 11d. issuing out of the said lands called *Elbridge* farm, or any part thereof, and if it appeared out of which part of the farm the said rent issued, the jury were to indorse the same on the *postea*. Reg. Lib. A. 1736. On the 28th January 1737, the cause came on again to be heard upon further directions, when it appeared that the plaintiff

obtained a verdict, that he was entitled to the rent of 11s. 11d. issuing out of *Giddycroft* part of the said *Elbridge* farm. Whereupon his Lordship ordered and decreed that the same be established, and that the defendants do pay unto the plaintiffs the arrears of the said rent, to be computed from the time of filing the said plaintiff's bill to Michaelmas last; and that the defendants do continue the growing payments thereof yearly to the plaintiff and his heirs; and that the defendants do pay unto the plaintiff his costs at law, to be taxed by one of the masters of this Court. But as to the costs in equity, his Lordship doth not think fit to award any to be paid on either side. (See *Clifton v. Orchard*, next case.) (Reg. Lib. A. 1737, fo. 212.)

CLIFTON v. ORCHARD, Clerk.(1)

Jan. 28th, 1737. 1 Atk. 610.

Issues directed by this Court, to try a *modus*, though established in favour of the plaintiff by two verdicts, the plaintiff entitled to his costs at law only, and not in equity. (So *Saunders v. White and Balliol College*, cited in *Anderdon v. Davies*, 4 Gwill. 1268.)

There having been two verdicts in this case in favour of the plaintiff in equity, the *modus* was now established with the costs at law, but none were given with regard to the proceedings in equity; for the *Lord Chancellor* said, the suit in this Court was merely for the security of the plaintiff, and to prevent any further impeachment of his right to an exemption from the payment of tithes in specie; and that this was like the case of a bill brought to perpetuate testimony of [235] witnesses, wherein costs are never given against the defendant: that the plaintiff might have applied for a prohibition, and if he had succeeded therein at law, he would have had his costs, and he ought to have the same advantage with regard to the proceedings at law directed by this Court, but that there was no pretence for any other costs.

His Lordship decreed, that the *modus* found by the said verdicts be established; and upon the plaintiff's paying the arrears thereof, and continuing the growing payments thereof to the defendant, the defendant be enjoined from proceeding against the plaintiff for the tythes in kind of those things for which the said moduses are payable, and ordered the defendant to pay costs to the plaintiff, in respect to the proceedings at law, to be taxed; but as to the costs in equity, relating to the moduses, his Lordship did not think fit to award any to be paid by either of the said parties. (Reg. Lib. A. 1737, fo. 207.)

(1) This case is taken from *Atkyns*. It corresponds with the same case in Lord *Hardwicke's* Note-book.

ELIZABETH GIBSON, *Plaintiff*; (1) and THOMAS PATTINSON, JOHN LIDDLE, Executor of JAMES LIDDLE, and JOSEPH LIDDLE, *Defendants*.

Jan. 31st, 1737. 1 Atk. 12.

Though a vendor of an estate does not produce his deeds, or tender a conveyance within the time limited by the articles, the Court does not regard this neglect, but will decree a sale notwithstanding.

A bill brought for a specific performance of articles of agreement for sale of an estate, and decreed in favour of the [236] plaintiff, the vendor, without any regard had to the plaintiff's negligence in not producing his title-deeds, &c., and not tendering a conveyance within the time limited for that purpose by the articles.(2) The *Lord Chancellor* saying, most of the [237] cases which were brought in this Court relating to the execution of articles for sale of an estate were of the same kind, and liable to this objection, but thought there was nothing in the objection.

His Lordship decreed the articles to be performed, and referred it to the Master to see if a good title could be made by the plaintiff of the premises in question, and in case a good title could be made, then upon payment of the purchase-money, part thereof in reduction of the mortgage, and the residue to the plaintiff, the plaintiff

and the defendants, the *Liddells*, were to convey to the defendant *Pattinson*, who was to pay plaintiff's costs, to be taxed. Reg. Lib. A. 1737, fo. 322,

(1) This case is taken from *Atkyns*. Mr. *Atkyns* makes Lord *Hardwicke* say, "that time is not at all material"; and it is observed by Lord *Rosslyn*, that the circumstances of the case did not call for any such opinion, see *Harrington v. Wheeler*, 4 Ves. 690. It appears in the Register's Book, that by the articles of agreement stated in the bill, and which are admitted by *Pattinson's* answer, that by articles of agreement of the 30th of November 1734, the plaintiff, in consideration of £260 to be paid as thereafter mentioned, covenanted with *Pattinson* that she would, on or before the 2d February then next, at the costs of the defendant *Pattinson*, and by such conveyances as his counsel should advise, convey to him and his heirs the premises in question, and that *Pattinson* was to pay to the plaintiff £155, part of the consideration, on executing such conveyances, and £45 on or before the 31st August then next, and £60, the residue, on or before the 2d February 1735; and the bill alleged that *Pattinson* had let part of the premises to the plaintiff, at a rent of £4, 10s.

The defendant *Pattinson*, by his answer stated, that he had requested the plaintiff to produce her title deeds, and that she would either leave them or copies thereof with him, that he might advise with his counsel upon her title, and have proper conveyances drawn for her to execute; but she then only thought fit to produce an old deed, in which there was no description of the boundaries or quantities, and refused to leave the same with him, or produce any deeds or other writings. That he the defendant, in case the plaintiff had produced the deeds, and made him a good title, was willing, and had prepared the purchase-money; but the plaintiff not producing the deeds before the 2d February 1734, he apprehended the plaintiff was unwilling to perform the articles, and that he was not any longer bound thereby, and had disposed of the purchase-money elsewhere; and he hoped he should not be compelled to perform the articles. It appeared that the premises were in mortgage; and those interested in the mortgaged premises stated, by their answer, that they had always been, and then were ready to join in the conveyance.

It appears by Lord *Hardwicke's* Note-book, that evidence at the hearing of the cause was produced on the part of the plaintiff, by which it was proved that instructions had been given by *Pattinson* for a conveyance to be prepared, but which he afterwards countermanded, and then said he would not stand to his bargain. There was evidence, likewise, that *Pattinson* had demised part of the premises in question to plaintiff for a year, at £4 per annum; and it was proved that on the 11th of March 1734, the plaintiff acquainted *Pattinson* that she was ready to convey the premises, whereupon *Pattinson* told the plaintiff that he would not stand to his bargain, for he had no money, and if she pressed him he would fly into *Scotland*.

(2) It is said by Lord *Alvanley* that a party cannot call upon a court of equity for a specific performance, unless he has shewn himself ready, desirous, prompt, and eager, *Milward v. Thanet*, cited in Lord *Hertford v. Boore*, 5 Ves. 720. And where a purchaser frequently applied to the vendor for an abstract, and none was delivered previous to the time agreed upon for the completion of the purchase, and the purchaser then insisted upon his deposit, the Court refused to give relief, *Lloyd v. Collett*, 4 Bro. Ch. Ca. 470. So where there was a delay of seven years, the parties differing upon the construction of the agreement, *Milward v. Earl of Thanet*, in note to 5 Ves. 720; and see *Harrington v. Wheeler*, 4 Ves. 686. *Spurrier v. Hancock*, 4 Ves. 667. Lord *Hertford v. Boore*, 5 Ves. 719. *Alley v. Deschamps*, 13 Ves. 228. And time is more essential in the sale of reversionary estates, *Newman and Rogers*, 4 Bro. C. C. 391. Or where they are sold for the purpose of disencumbering, *Popham v. Eyre*, Loft, 786. *Crofton v. Ormsby*, 2 Sch. & Lef. 603.

It was formerly said by Lord *Thurlow*, that by the terms of an agreement, time could not be made of the essence of the contract, *Gregson v. Riddle*, cited in 7 Ves. 268. But it may now be considered as the settled doctrine of the Court, that by the terms of the agreement, time may be made of the essence of the agreement. *Per Sir John Leach*, *Reynolds v. Nelson*, 6 Mad. Rep. 26; and see *Seton v. Slade*, 7 Ves. 270. *Morgan v. Shaw*, 2 Mer. Rep. 140. *Levy v. Lindo*, 3 Mer. Rep. 84. *Hudson v. Bartram*, 3 Mad. Rep. 446. *Boshm v. Wood*, 1 Jac. & W. 419. But where a time is fixed for the completion of an agreement, yet a purchaser by his conduct may waive it; as where a purchaser being aware of the difficulties of the title does not call for

his deposit at the end of the time limited for the completion of the purchase, and does not declare his dissent from going on with the purchase, *Pincke v. Curteis*, 4 Bro. C. C. 329. Or where a purchaser accepts an abstract without objecting a few days previous to the time limited for the completion of the purchase, and keeps it without objection until the time has expired, *Seton v. Slade*, 265. *Levy v. Lindo*, 3 Mer. 81.

RICHARD RICHARDSON, Executor of GRACE RAMSDEN, who was Heir and Executrix of SUSANNAH RAMSDEN, *Plaintiff*; (1) and WILLIAM JACKSON, & JOHN NORTH and SARAH his Wife, *Defendants*.

Feb. 1st, 1737. 1 Atk. 292.

If an executor, to an action brought against him on a bond, pleads *non est factum*, and there is a verdict against him. This Court, upon a bill brought by the executor to injoin the action on the bond, and to be relieved, will only relieve against the penalty in the bond, upon payment by the executor of principal and interest due in respect of the bond, and the costs incurred both in law and equity, without regard to whether the executor had assets or not to pay the principal and interest on the bonds. (See *Erving v. Peters*, 3 T. R. 685.)

On the 22d of April 1733, *Susannah Ramsden* executed a bond to defendant *William Jackson* of that date in the [238] penalty of £700, with a condition that her heirs, executors, or administrators, should pay him £350, with interest, from the date of the bond. On the 31st March 1734, *Grace Ramsden* executed a bond to the defendant *Sarah North*, of that date, in the penalty of £1400, conditioned for the payment to defendant, *Sarah North*, within one month after her decease, of £300, with interest, at 5 per cent., and also £10 a-year for her life, and also £100 to the defendant *Jackson*, and £60 to *Joshua, Rachel, and William Jackson*, children of the defendant *Jackson*, and £40 to be equally divided among the other children of the defendant *William Jackson*, with interest from the date thereof. The plaintiff brought his bill, alleging that *North* and his wife had brought an action on their bond against the plaintiff, who had pleaded *non est factum*, and the cause was tried, and a verdict found for the defendants *John North* and his wife, and that though the defendants were well satisfied that the plaintiff had not assets to pay their demands, yet they threatened to sign judgment. The bill further alleged, that the defendant *Jackson* had brought an action against the plaintiff upon his bond, and threatened to proceed therein. The plaintiff by his bill alleged, that the bonds were obtained by fraud, and upon false suggestions, and prayed that they might be delivered up to be cancelled, and for an injunction to restrain the defendants from proceeding on the said bonds, and to be relieved in the premises.

Lord Chancellor. I am of opinion against the plaintiff on the merits that the bonds are good; and, therefore, the only question will be, on what terms the plaintiff should be relieved against the recovery at law, and some relief he is clearly entitled to, the judgment being for the whole penalty of the bond.

For the plaintiff it was insisted, that he had a right to be relieved, not only against the penalty, but likewise against the principal sum in the condition of the bond, or part of it at least, it being suggested that there is a deficiency of personal assets, and the plaintiff chargeable no further than he had assets.

The fact as to this was, that the plaintiff here pleaded *non est factum* to the bond at law, and had a verdict against him, and judgment in the usual form, *de bonis testatoris, sed non de bonis propriis*. And it was admitted the plaintiff in this respect stands exactly in the same light as he would at law; and the question is, whether, when an executor [239] pleads *non est factum, non assumpsit, &c.*, and verdict against him, that will not amount to an admission of assets, or if after such verdict, he may still defend himself by denying assets, and that matter be controverted on the sheriff's return to a *scire fieri* inquiry or otherwise.

Mr. *Fazakerley* for the defendant, insisted that the verdict was an admission of assets, and that this case was the same with a judgment confessed by an executor, or had against him by default, and upon his memory referred to a case in *Salkeld's Reports*, where it had been so ruled: He admitted the executor was not chargeable *de bonis propriis*, in respect of his false plea, which he said, and it was agreed by the

Lord Chancellor, held only in the case of *ne unques executor* pleaded. But that the executor in this case having thought fit to put his defence on the denial of the execution of the bond, and not having pleaded *plene administravit*, or by plea admitted assets to such sum, and *riens ultra*, &c., or made use of any defence of that kind, he cannot now resort to any such matter, or have the benefit thereof by any subsequent proceeding; that executors were in this respect only upon the same foot with all other persons; nothing is better established than this rule, that no advantage can ever afterwards be taken of what might have been insisted on by way of defence, and pleaded to the action. Nothing pleadable *puis darrein continuance*, which was *in esse* at the time of the plea pleaded. He observed likewise, that the disability a defendant at law was under, of making a double defence, gave occasion to that provision in the statute for the amendment of the law, the 4th of Anne, c. 16, s. 4, with regard to pleading several matters; there was no occasion otherwise for any such law in the case of executors, nor any reason for pursuing it now in those cases, though it is every day's practice. For if an executor, after a verdict against him on such a plea as this, or any of the like kind, may afterwards say he has no assets, that method of proceeding will be equally beneficial to him, and there would be no occasion ever to apply to the Court for leave to plead *plene administravit*, and any other plea. That the executor here might have applied to the Court for leave to plead double, but not having done so, the case stands upon the same foot it would have done before the act.

Lord Chancellor. I agree with Mr. *Fazakerley*: The statute for the amendment of the law is quite out of the question. The name of the case hinted at by Mr. *Fazakerley* [240] is *Rock v. Leighton*, 1 Salk. 310, but on looking into that case, I find the resolution there goes only to a judgment had against executors, either by confession or default, but no further; that the rule is in general as has been laid down, that advantage cannot be taken afterwards of what might have been pleaded to the action; as for instance in the case of a *scire facias* on a judgment, nothing can be pleaded thereto, which might have been pleaded to the action; but though I am inclined to think the verdict was an admission of assets, yet I will not give an absolute opinion, because the cause must be postponed at present, in order that the will may be produced, and the state of the assets laid before the Court, and the disposition of the testatrix of her real and personal estate; the fact, whether there were assets or not, being disputed by the parties. (Cro. Jac. 294, *Legate v. Pinchion*.)

N.B.—The bond against which the relief is prayed being a voluntary one, it was admitted clearly it must be postponed in equity to debts by simple contract; (2) and also, that where a bond is claimed in consideration of money lent, and the person fails in proving his consideration, he shall not be allowed afterwards to set it up as a voluntary bond. Prec. in Chan. 17.

This point coming on again, whether the plea of *non est factum* admitted assets, the *Lord Chancellor* held it did, and said he had seen Lord Chief Justice *Holt's* report of the case *Rock v. Leighton*, where the very case now in question was put by *Holt*, Chief Justice, who said the law was the same as in the case of a judgment by default against an executor, though that is not mentioned in the report of the case by *Salkeld*.

Decree, that the plaintiff should be relieved against the penalty of the bond, on payment of principal and interest, &c., without any regard had at all to the question, whether the executor had assets or not to pay such principal and interest. (3)

(1) The statement of this case, which is reported by Mr. *Atkyns* under the name of *Ramsden and Jackson*, is taken from Lord *Hardwicke's* Note-book, the arguments of counsel and the judgment from Mr. *Atkyns's* Report. Lord *Hardwicke's* note respecting this case is likewise added.

(2) But will be preferred to legacies, *Cray v. Roche*, Ca. Temp. Talb. 155. and see *Fairbeard v. Bowers*, 2 Vern. 202, S. C.; 1 Eq. Ab. 143. pl. 15, S. C.; *ibid.* 152. pl. 4, S. C. *Blount v. Doughty*, 3 Atk. 483.

(3) The following Note respecting this Case appears in Lord *Hardwicke's* Note-book:—

[241] *Richardson v. North.*

February 1st, 1737.

I gave my opinion, that there was no ground to relieve the plaintiff on the merits, but only against the penalties of the bonds, on payment of principal and interest, and

costs ; but reserved to consider whether the judgment on a verdict on a *non est factum* at law, which is *de bonis testatoris*, was an admission of assets for the whole debts, according to the case of judgment by confession or default, *Rock v. Leighton*, 1 Salk. 310, or whether on a *sci. fa.* or *inquir.* the executors might controvert assets at law ; and consequently, whether an account of assets ought to be directed here.

Plus De Richardson and North.

February 2nd, 1737.

Ex. MS. Holt, C. J., de son Resolution in Rock v. Leighton.

2dly, The case of an executor doth not in this case differ from that of an heir ; for if the heir lets judgment go by *nihil dicit*, or confession, he admits assets. It is true, the judgment is different, for the heir is chargeable on account of assets that he hath in his own right, but the executor is chargeable in respect of assets that he hath in right of the testator ; but still the admission of assets is as much by a *nihil dicit*, or confession, in one case as in another.

The like, if an heir pleads *non est factum*, or conditions performed, a general judgment shall be entered, if the matter pleaded be found against him. So in the case of an executor, if the matter pleaded be found against him, he admits assets ; for if he hath none, why doth he plead that matter, it would be enough to deny assets.

Decree relief on the usual terms of payment of principal, interest, and costs.

By the decree in the Register's book, his Lordship ordered, that so much of the plaintiff's bill as seeks to be relieved against the bonds in question, and against the judgment obtained on the bond given to the defendant *Sarah*, on account of imposition, or the want of consideration, be dismissed ; and an account of what was due in respect of the bond given by *Grace Ramsden* to *Sarah*, the wife of *John North*, was directed, and also the arrears of an annuity secured thereby, and also a taxation of their costs in law and equity, and upon the plaintiff's payment of what was due on such accounts, and the costs, and the arrears of the annuity and the growing payments, that the injunction was to be continued, but in default, the bill was to be dismissed, and injunction dissolved.—The same order was made in respect of the bond given by *Susanna Ramsden* to the defendant, *Wm. Jackson*, except that his bond was to be delivered up to be cancelled upon payment of principal, interest, and costs, no annuity being secured thereby. Reg. Lib. B. 1737, fol. 228.

[242] SAMUEL MORRIS and ELIZABETH his Wife, *Plaintiffs* ; (1) and GILES BURROWS, Executor of JOHN BURROWS, SAMUEL WOLLASTON and MARY his Wife, JOHN BURROWS, EDWARD ROSS and ANN his Wife, and Others, *Defendants*.

February 3rd, 1737. 1 Atk. 399.

A father having five children, three of age, and two infants, enters into an agreement with three of them, who were of age, that he should have full power and authority to dispose of his personal estate in such manner as if he was not a freeman of the city of *London*, and they release all right under the custom, and agree not to sue for any part of his personal estate which he may dispose of by his will, and to execute releases to his executors. The father soon after the agreement becomes a freeman, and marries a second wife, upon whom he settles part of his personal estate, in bar of what she might claim under the custom ; (2) held that this agreement could not operate as a release, the children having neither *jus in re* or *jus ad rem*, nor as an agreement, there being no consideration moving from the parent to the children, and the agreement, as far as regarded the father being nugatory, by two children not being parties to it, whereby the father did not retain an absolute power over his personal estate ; and held that the husband did not become a purchaser of his wife's share of the personal estate ; but that the same accrued to the whole estate.

And the father upon the marriage of one of his daughters having purchased an estate, which he settled (reserving to himself an annuity) upon herself and her issue, the husband by his receipt acknowledging the purchase-money to be advanced in part of his wife's fortune ; held that it could not be considered as a settlement of real estate, but must be considered as money advanced by the father, and that the purchase-money without regard to the annuity, must be brought into *hotch-pot*.

John Burrows, a tradesman at *Thame*, in *Oxfordshire*, having five children by his first wife, who was dead, and intending to remove to, and to become a freeman

of *London*; but being desirous of reserving to himself a power of disposing of his personal estate, three of his children (the others being under age) entered into the following agreement with him, which bore date the 11th September 1718, and was executed by these three children, and their father.

Whereas *John Burrows*, of *Thame*, is of opinion that he may greatly improve his estate by following some trade of buying and selling in the city of *London*, and for better performing the same, apprehends it necessary to purchase a [243] freedom of the said city; and whereas, in case he becomes a freeman, he shall thereby disable himself from absolutely giving or disposing of his personal estate, by will or otherwise, amongst his children, as he can now do; and whereas, we whose names are hereunto subscribed, are desirous he should become a freeman of the said city, in order to improve his estate, and are contented, and agreed that our said father should retain to himself full power and authority to give and dispose of his personal estate, in such manner as if he was not a freeman of the said city. Now we, *Giles Burrows*, *John Burrows*, and *Elizabeth Burrows*, children of the said *John Burrows*, do hereby for ourselves, our executors, administrators, and assigns, severally and respectively discharge, release, and disclaim, any right, title, interest, claim, and demand whatsoever, of in and to all and every part of the personal estate, which our said father shall die possessed of, other than such parts as he shall by his last will or otherwise, legally give unto us, or in case he shall die intestate we shall then be intitled unto by the laws of the land, and the custom of *London*; And we do severally covenant, promise, and agree that in case our said father shall make, and leave a will behind him, at the time of his death, we will not sue for or claim any part of his estate, other than such as shall be respectively given to us, by such last will, and will at the request of the executor of such will, duly execute good and sufficient releases of all claims and demands to any part or share of the personal estate of the said *John Burrows*, whereof he shall be possessed at the time of his death.

Soon after this agreement, *John Burrows* came to *London*, became a freeman, and married a second wife, upon whom he settled part of his personal estate, in bar of what she might claim by the custom. He from time to time advanced several sums of money to his children. To *Giles* £1800; to *John* £1500; besides £100 given to his wife, and some presents to his children.

Upon the marriage of his daughter, the defendant, *Mary Wollaston*, he laid out the sum of £630 in the purchase of an estate, which was settled in trustees to the intent that *John Burrows* might receive thereout an annuity of £31, 10s. during his life, then to the use of *Samuel Wollaston* for life, remainder to *Mary* for her life, remainder to such of her children as she should appoint, and for want of such appointment, to her children and their heirs; he also gave her [244] and her children some small sums: upon which *Samuel Wollaston* gave a receipt, acknowledging that he had received £778. 15s. advanced in part of his wife's fortune.

The plaintiff, *Elizabeth*, received only £900 upon her marriage.

John Burrows, the father, by his will, dated in October 1732, reciting the agreement, and that he had power to dispose of his personal estate, gives several unequal legacies to his children and grandchildren, and the residue to be equally divided amongst his children, and declares that in case any of his children, their husbands or representatives, should not abide by his will, but should endeavour to have his estate divided according to the custom of *London*, and should not execute to his executors within six months after his decease, releases of all claims to any part of his personal estate under the custom of *London*, that then the legacies thereby given for the benefit of such children, and to their husbands, child or children, should be void, and sink into the residuum of his personal estate.

The bill prayed that the agreement might be set aside, that the plaintiff might be paid the customary share of the testator's personal estate, and that the other children might bring their advancements into hotch-pot, or if the Court should think the agreement valid, then that the plaintiffs might be paid their legacies under the will.

On behalf of the defendants, it was insisted that if the agreement was not valid, yet only one-third of the personal estate was subject to the custom, the husband having a right to dispose of that which would have belonged to the widow if she had not been barred. *John Burrows* insisted that the money given to his wife and children, and *Samuel* and *Mary Wollaston* insisted, that the estate settled upon them, ought not to be considered as advancements.

Mr. Browne, Mr. Clarke, and Mr. Talbot, for the plaintiffs.

This instrument cannot operate as a release, there was no vested interest in the children upon which it could operate, the father was not even a freeman at the time ; there have indeed been cases founded on marriage contracts, in which such releases have had effect, *Metcalf v. Ives* (see *Metcalf v. Ives*, ante, p. 82) ; but that was after the freedom had been taken up, and in consideration of a portion given ; the child therefore gained a cer-[245]-tainty for an uncertainty. As an agreement, it cannot be supported ; it was obtained by the force of parental authority, and without consideration ; the advantage was entirely on the father's side. As between the children, the agreement was wholly unequal ; those who signed it were to be deprived of their share, and those who did not, might have engrossed the whole. The Court has been very cautious and strict against frauds on the custom, *Kemp v. Kelsey*, Pre. Ch. 545, 594. *Blunden v. Barker*, 1 P. Wms. 634. *Fairebeard v. Bowers*, 2 Vern. 202. If an action was brought on the covenant, what was recovered would be assets. As to the composition with the wife, that will not accrue to the dead man's part, but to the whole estate. In *Townsend v. Townsend*, it was held by Lord King, that a wife compounded with, was to be considered as dead. As to the £630 laid out in land, it was paid out of the personal estate of the father, and must therefore be brought into *hotch-pot* ; there is no pretence for contending that any forfeiture is incurred by raising these questions, *Powell v. Morgan*, 2 Vern. 90.

Mr. Attorney-General, and Mr. Duval, for all the defendants, except John Burrows.

We do not contend that this instrument operates as a release, but insist that it is binding as an agreement ; we are not asking the assistance of a court of equity to carry this agreement into effect, but wish only to be left to our legal remedy for the breach of covenant.

The Court will not relieve against an agreement, unless they can put the parties into the same condition they were in before it was entered into. That is impossible in the present case, the Court cannot restore to the father the power of disposing of his personal estate, which power he gave up in consequence of this agreement, by taking up his freedom, and thereby performed his part of the contract. As to the consideration, it was for the benefit of the children that the father should improve his estate by becoming a freeman, and the children gave up nothing, because the father, at the time of making the agreement, had the power of disposing of his whole estate. It is true, that some of the children are not bound ; but those who signed the agreement were aware of that circumstance at the time. If the father had expected that this agreement would be disputed, he would have barred the plaintiff's claim at the time of the marriage. As to the question of *hotch-pot*, the real estate purchased with the £630 settled as it is, cannot be considered as an advancement so [246] as to be brought into *hotch-pot*. In *Whitcombe v. Whitcombe*, before the Master of the Rolls, May 3, 1718, it was held that small sums given by a father to a child, were not to be considered as an advancement, but such only as were given by way of portion.

Mr. Owen for the defendant John Burrows, joined with the plaintiffs as to the question of bringing the £630 into *hotch-pot*.

Feb. 3, 1737.—Lord Chancellor. I do not recollect any instance of such an agreement as this, so that this point must be determined from the reason of the thing, and from the resolutions in cases bearing some analogy to it ; but before I come to that, it is necessary to remove an objection which has been made, which is, that though this should be deemed a voluntary agreement, yet that the plaintiffs will not be entitled to be relieved against it, because there was no fraud in obtaining it, and that though the Court would not decree the performance of such an agreement, yet that it will not interpose to set it aside, but will leave the parties to law. Now this is certainly true, where a bill is brought merely to set aside an agreement, and that agreement is the only matter before the Court ; but that is not the present case, because the plaintiff is entitled to a decree for her share of the testator's estate, either upon the foot of the custom, or upon that of the will, which necessarily brings in question the validity of the agreement. This Court must distribute the personal estate, and for that purpose must incidentally decide the present question. In this respect this case may be resembled to cases of redemptions and trusts, in which questions merely legal are determined in this Court, because here and no where else can the directions necessary for the redemptions, or for the execution of the trusts be given. The sons are executors and also residuary legatees, but they are not sole residuary legatees, consequently

they are in the nature of trustees for the rest, and before any agreement can be decreed against them, the validity of the agreement itself must be considered.

As a release this agreement certainly cannot be good, since it hath been often determined, that a release of his customary share from a child to his father, then actually a freeman, is void ; because the whole is in the father during his life, and the child hath neither *jus in re* nor *ad rem*, which is a much stronger case than the present ; for there, though no right be actually vested, yet there is something of a right commenced ; but here there is not so much as a right *inchoate*. [247] Neither do I think that it can be supported as an agreement, there being nothing moving from the father as a consideration. It has been contended that the consideration consisted in the father's taking up his freedom ; but that argument totally fails, for there is no covenant on his part to take up his freedom, it rested still with his discretion whether he would or would not become a freeman. The agreement only recites, that it might be advantageous to him to become one. Nor can this act of his, if certain of taking place, be considered as a benefit to the children, for supposing the agreement to be binding, the increase of his estate would still be in his power. He might spend it, or lay it out in land, so that the children might or might not be benefited by it, just as he pleased.

But I do not lay so much stress upon this, as I do upon the circumstance of the agreement itself being nugatory, and the end of it impossible ever to be obtained on either side. The object was to reserve to the father a power of disposing of his property in the same manner as if he had not become a freeman ; but that was impossible, two of the children being infants, and not parties to, and not bound by the agreement. This affects the consideration, both with regard to the children and the father. The children who signed this agreement must have intended some benefit to themselves, by the increase of that property which their father might have the power of disposing of amongst them ; but if this agreement were to be held to be binding, the consequence would be, not any increase of property for their advantage, but that those children who executed it would be deprived of their whole orphanage share, which their father would have no power to dispose, but which would go to those children who were not parties to it. So with regard to the father, his object was, that notwithstanding his becoming a freeman, he might retain the power of disposing of his personal estate ; but this object for the same reason he wholly failed of attaining. As to any subsequent agreement by the two children, who were not parties to the first, that will signify nothing ; for if the agreement was void at the time it was made, matter *ex post facto* cannot make it good. This agreement, therefore, has proceeded on a plain mistake on both sides ; at least the end of it could never be attained. Besides which, agreements of this kind are discountenanced, they are derogatory from the custom which allows nothing to bar the child but an actual advancement from the father. [248] Wherever such agreements have been held good, there has been a just and valuable consideration moving from the parent to the child, as a sum of money upon preferment in marriage or in trade, which tends to the child's present advantage. It was so in *Blunden v. Barker*, 1 P. Wms. 635, before Lord *Macclesfield*, but which was never finally determined ; and in *Metcalf v. Ives* (see *Metcalf v. Ives*, ante, page 82), lately determined. The only end of those agreements was, to exclude the child from claiming a further share of the father's estate, and not to give the father a power of disposing of the whole, which was the object here, but which could not be effected by this agreement. The effect of parental authority has always been considered as great. The Court, therefore, to remove the presumption of such influence, expects to find in these agreements a valuable consideration and benefit moving from the father to the child, and not only the means provided by which the father may improve his own estate for his own benefit ; but at the same time I give no opinion how far such an agreement as the present would have been good, if all the children had been of full age, and had been parties to it.

As to the question of what is to become of the widow's share, it has been several times determined, that where a wife is compounded with, the husband is not to be considered as a purchaser of her third, but that her part accrues to the whole estate, and that the orphanage part becomes a moiety of the whole. (So in *Metcalf v. Ives* [ante, p. 82], and the cases cited in note 2.)

As to the question, whether the advancement to the defendant *Wollaston* shall be brought into *hotch-pot*, I think that he has concluded himself by the note acknowledging the several sums advanced by the testator to be in part of his wife's fortune. The case of *Whitcombe v. Whitcombe*, at the Rolls, 3d May 1718, is an express authority

that only such sums as are given by way of portion, and not petty small sums, are to be considered as an advancement. (See *Hume v. Edwards*, 3 Atk. 452; 3 P. Wms. 317, note (O) [(1)]. *Elliot v. Collier*, 1 Ves. 16; 3 Atk. 527, S. C. *Smith v. Smith*, 5 Ves. 721.) But here the defendant has himself acknowledged the sums mentioned in his note to be in part of advancement, and therefore they must all be brought into *hotch-pot*. Nor do I think that the investing the money in land will make any difference. Had it been a real estate moving originally from the father, that might have been another consideration; but being given in [249] money originally, and to be settled in such manner as his daughter should think fit, I do not think that it will make any difference.

It has been objected that as there is an annuity reserved to the testator for his life out of the estate purchased, the whole purchase-money ought not to be brought into *hotch-pot*; but the *collatio bonorum* does not take place till the testator's death, at which time the annuity had ceased; and it was determined in the case of *Edwards v. Freeman*, 1 Eq. Abr. 249, pl. 10 (2 P. Wms. 435, S. C.), the fund is to be considered as it stands at the father's death. This objection therefore is not material, and the whole must be brought into *hotch-pot*.

His Lordship declared the agreement of the 11th of September 1718, was voluntary, and under the circumstances of the present case ought not to be considered as binding; and that the plaintiffs are entitled to their customary share of the orphanage part of the testator's estate, which, in this case is a moiety of the clear personal estate; but that they electing to take by the custom are not to have any benefit by the testator's will (so *Pugh v. Smith*, 2 Atk. 43), and that £630 paid by the testator for the farm at *Brill*, in *Buckinghamshire*, for the defendant *Mary Wollaston*, is to be considered as so much money paid towards her advancement; and therefore ordered an account to be taken of the personal estate of the testator come to the hands of the executors; and after such account shall be taken, the defendants, *Giles* and *John Burrows*, *Mary Wollaston*, and *Ann Rose*, the children of the testator, are to be at liberty to make their election as between themselves, Whether they will take by the will of the father or by the custom of *London*. (Reg. Lib. B. 1737, fo. 506.)

(1) The statement of this case, and the arguments of counsel, are taken from Lord *Hardwicke's* Note-book. The judgment from two other manuscript reports, which correspond with some short heads of it in his Lordship's handwriting.

(2) By 11 G. 1, c. 11, s. 1, it shall be lawful for such persons who after the 1st of June 1725. shall become free of the city, being unmarried, and not having issue, to dispose of their personal estate.

[250] MINSHULL v. MINSHULL.(1)

February 4th, 1737. 1 Atk. 411.

R. L. devises to *R. M.* eldest son of his nephew *R. M.* and the first heirs male of his body, and the heirs male of his body, and in default of such issue, to the second son of the said *R. M.*, and the heirs male of his body, and their issues, remainder over, &c. These words, "the second son of the said *R. M.*," do not mean the second son of the devisee, but *John*, the second son of the testator's nephew, *R. M.*

Richard Lester, the testator, uncle of *Randal Minshull*, who had *Randal*, his eldest son, *John*, his second son, and several other children, devises his house *in hæc verba*; viz.—"I give and devise the house, &c., to *Randal Minshull*, eldest son of my nephew, "*Randal Minshull*, and the first heirs male of his body lawfully begotten, and the heirs male of his body, and in default of such issue, I give, &c., to the second son of the said "*Randal Minshull*, and the heirs male of his body and their issues; remainder over, &c." There is a provision made in the will, "that to whomsoever the estate shall come, he shall pay, on his entry upon the estate, to each of his brothers and sisters £20 a-piece, and to *John*, and the several children of his nephew, naming them particularly, £20 a-piece likewise?"

The devise in the present case was of a reversion, which did not take effect till many years after the testator's death.

Randal, the first devisee, dies without issue; *John* enters and dies, having devised

the premises to the defendant his younger son, in prejudice of the plaintiff his eldest son.

The bill was brought for an account of the rents, &c., and at the hearing at the *Rolls* the question was, whether in the devising words, "To the second son of the said *Randal Minshull*," the second son of the nephew, or the second son of the nephew's eldest son was meant; for supposing the latter, the particular limitations in the will extending only to the issue of *Randal*, the devisee, who was dead, without issue, the reversion on his death taking effect in possession in *John*, as heir at law of the testator, the disposition of *John* by will was good; but supposing the will to mean the son of *Randal* the nephew, that *John* being tenant in tail, under the will, and not having done [251] any act to bar the entail, the plaintiff has a good title, as being the eldest son of *John*.

The *Master of the Rolls* (Sir *Joseph Jekyl*) decreed in favour of the plaintiff.

On appeal to the *Lord Chancellor*, he directed an issue to try the matter of fact, which of the two persons was meant by the testator, and said, it was a matter that lay properly in averment, and was determinable by circumstances, proving the intention of the testator, one way or other. The will was made in 1658, and the parties not being able on either side to furnish themselves with any evidence, tending to clear up this point; it was agreed between them to bring the matter on, for the opinion of the court, upon the legal construction of the words as they appeared on the face of the will.

Mr. Attorney-General and *Mr. Fazakerley* for the plaintiff.

We insist that the second son of the testator's nephew is meant, and not the second son of such nephew's eldest son. To shew that this is the true construction, it is only necessary to consider what estate the first devisee, the eldest son of the nephew, took. We insist that he took an estate-tail, and if so, it is clear that the limitation over which is to take effect only upon failure of issue of such eldest son cannot be to the second son of such eldest son. It is reasonable to suppose that the testator intended to extend the limitations to all the sons of his nephew. If the word first had been omitted, and the devise had been to the eldest son of my nephew and the heirs-male of his body, there could have been no question of their being words of limitation; but it is said that the words being to the first heirs male make them words of purchase, and that they mean first son, and that this construction is strengthened by the words of limitation, "and the heirs-male of his body," which follow. But that the word first shall not have this effect has been decided in the case of *Dubber v. Trollop* (8 Vin. Abr. 233; Rob. Gavelkind, 96), "*Sir Thomas Trollop* devised lands to his son *Thomas* for life, and from and after his decease to the first heir-male of his body. It was held in the Common Pleas, that *Thomas* was tenant in tail, Chief Justice *Eyre* saying, that the words heir male of his body made an estate-tail, and that the word first would not alter the case, and on a writ of error this judgment was affirmed in B. R." In the [252] present case the words are first heirs-male in the plural number, which shews that the testator intended that the estate should go in succession; neither shall the words of limitation which follow have the effect of making the first words of purchase, *Goodright v. Pullin*. B. R. 13 Geo. 1 [1726] (2 Strange, 729, and 2 Lord Raymond, 1437; 2 Eq. Ca. Ab. 315, pl. 26). "*Nicholas Lisle* devised the premises to his wife for life, remainder to *Nicholas Lisle* for the term of his natural life, and after his decease to the heirs-male of the body of the said *Nicholas*, lawfully to be begotten, and his heirs for ever; but in case the said *Nicholas* should die without such issue-male, then he devises to his kinsman *Edward Lisle* for life, and after his decease to the heirs-male of his body lawfully begotten, and his heirs for ever; and in default of such heir-male, remainder over. It was held, that *Nicholas*, the first devisee, was tenant in tail." In the present case, the argument arising from the subsequent words of limitation is defeated by the testator's having used similar words of limitation; in the second clause of his will he devises to the second son of the said *Randal Minshull* and the heirs-male of his body and their issues; but supposing these to be words of purchase, if the eldest son of the testator's nephew had had a son at the time, must not he and his son have taken a joint estate? It is clear, therefore, that the first devisee took an estate-tail, and that the limitation over cannot therefore be to his second son, but to the second son of his father, and that the plaintiff is therefore entitled.

Mr. Chute and *Mr. Floyer*, for the defendant.

The *Randal Minshull*, of whom the testator is speaking, is the son of his nephew: the said *Randal Minshull* mentioned in the second clause, must therefore mean the same person. As to the argument that the word heirs is in the plural number, the

words heir and heirs are convertible terms. As to the cases ; in *Goodright v. Pullin*, there was not the word first ; and in *Dubber v. Trollop*, there were no subsequent words of limitation added to the words heir-male of his body. According to the plaintiff's construction, these subsequent words of limitation must be rejected, which is not to be done where a reasonable sense can be given to them. If *John*, the second son of the nephew was intended by these words, the testator has, by the last clause, directed that he should pay £20 to himself. If this be not the true construction the devise must be void for uncertainty.

[253] *Lord Chancellor* (Feb. 4, 1737). This case will depend on the words of the will with regard to the person intended by the testator, by the name of *Randal*, and the legal operation of the words made use of ; and a Court never construes a devise void, unless it is so absolutely dark, that they cannot find out the testator's meaning.

The provision for the payment of the legacies (by the person to whom the estate should come) to his brothers and sisters, and to *John*, &c., is, as has been insisted on for the plaintiff, a very strong expression of the intent of the party ; for as here is a specification of the children, it must mean the brothers and sisters of *Randal Minshull*, the eldest son of *Randal Minshull* the nephew, and could never intend to mean every taker. For, supposing the words to mean the second son of the devisee, as there is plainly an estate-tail created prior to any interest he can claim (whether the words first heirs-male are construed words of limitation or purchase), an estate which may continue for a great number of years, in all probability, without any failure of issue, it would be a most absurd thing to charge a person, at so great a distance from the estate, with the payment of money to persons then in being, whom the testator could hardly suppose would be living at the time of the title accruing to such second son. On the other hand there is nothing extraordinary in charging *Randal* the first devisee, or upon a supposition of his death without issue, in the life-time of *John*, in charging *John* with the payment of those sums, which raises a very strong presumption, that *John* was the person intended to take under the limitation to the second son of *Randal*.

It has been objected against this construction, that *John* will then be devisee of the estate, and entitled to the £20 likewise, which the testator could never intend ; but the words must be taken *reddendo singula singulis*, and *John* to have the £20 only in case of the first devisee's right taking effect in possession, and the determination of the preceding estates then in being at the time of making the will. It is much more natural likewise that the testator, when he was making a disposition of his whole estate, having a nephew who had two sons, should settle it successively on both the sons, than stop at the first, without extending the entail, or disposing of the reversion.

Whether the first devisee was tenant for life, or in tail, is a question proper to be considered, and the determination of [254] that point will certainly give great light into this matter, and clear the way towards the construction of the will on the other point, in the manner it has been insisted on.

I am of opinion that the words of limitation superadded here to the preceding words of limitation, will certainly not of themselves, make the first words of purchase, but the subsequent ought to be rejected as redundant and superfluous.

In *Archer's* case (1 Co. 66 b), an estate was limited to *Robert Archer*, the first taker, expressly for life, to which great regard is always had in determining whether an estate for life, or in tail, passes. 2dly, In that case it was to the next heir male of *Robert* only, not heirs as here ; nor will the subsequent words of limitation affect the legal operation of the preceding words in any case of this kind, unless the word heir is made use of in the singular number, or there is an express estate for life limited to the first taker. It is true, in *Shelley's* case (1 Co. 93 b, and 95 b), *Anderson*, Chief Justice, puts this case. " If there be a limitation to the use of a man for life, and after his decease to the use of his heirs, and of their heirs-female of their bodies " ; in this case, these words (his heirs) are words of purchase and not of limitation, for then the subsequent words (and of their heirs-female of their bodies) would be void. That appears to be a case only put by *Anderson*, and no resolution of that kind ; but besides these the subsequent words vary essentially the preceding limitations, and alter the course of succession and enjoyment of the estate.

There are subsequent words of limitation annexed likewise to the devise to the second son, which shews the testator had no intention they should operate in destruction of the former words. No stress at all is to be laid on the word first ; there are many authorities for that purpose, and the case of *Dubber v. Trollop* is a very strong

one ; there the word heir too was used, not heirs. The word first means only that they should take in succession, according to priority of birth and seniority of age, and is unnecessarily providing for what the law itself does.

Decreed for the plaintiff. (Decreed that the premises were devised in remainder to *John Minshull*, the second son of *Randal Minshull* the father, which *John* was father of the now plaintiff. Reg. Lib. B. 1737, fo. 144).

(1) The arguments of counsel in this case are taken from the *Lord Chancellor's* Note-book, the statement of the case and the judgment, from *Atkyns*.

[255] BARTHOLOMEW v. MAY.(1)

February 7th, 1737. 1 Atk. 486.

A. having mortgaged certain lands, devises them to *R. M.* in tail, and devised other lands to *T. M.*, subject to the payment of his debts, in case his personal estate should not prove sufficient. The mortgage must be paid as a debt out of the testator's personal estate,(2) and, if deficient, out of the real estate so devised to *T. M.* Where a mortgage is made by a person who is owner of the estate, that mortgage is looked upon as a general debt, and the land only as a security ; and therefore personal estate shall be applied in discharge, but if the contest lay between *R. M.* and creditors of the testator, it would have been otherwise.

The testator *Thomas May*, having by indenture of mortgage, dated the 24th June 1723, mortgaged an estate at *Hadlow* [256] for £1300, did by his will of the 10th of April 1724, devise the same estate at *Hadlow* to *Richard May* in tail, remainder over, &c., and devised other lands to *Thomas May*, subject however to the payment of his debts, in case his personal estate, and other estates devised for that purpose, should not prove sufficient to satisfy all the debts, and he made *Richard May* the executor of his will, and towards payment of his debts and legacies he gave all his ready money, goods, and corn, and chattels, not thereinbefore otherwise disposed of.

Feb. 7th, 1737.—*Lord Chancellor*. I am of opinion that the £100 must be paid as a debt of the testator out of the personal estate ; or, if that proves deficient, out of the real estate so devised ; for whenever there is a mortgage made by a person who is owner of the estate, that mortgage is looked upon as a general debt, and the land only as a security, and therefore the personal estate shall be applied in discharge of the £1300, though there may be younger children of the mortgagor who may be not otherwise provided for : but I think clearly the case would be otherwise, if the contest was between *Richard May* and any creditors of the testator, who would lose their debts, if the mortgage was so paid off out of the personal assets, or the money arising from the sale of lands devised for that purpose.

In the case of *Lovel v. Lancaster*, 2 Vern. 183, it is laid down otherwise, that the devisee of the mortgaged estate shall take it *cum onere* ; but I do not pay any great regard to it, because it does not appear whether there was a sufficiency of assets or not to satisfy the rest of the creditors.

N. B.—His Lordship said in this case, that where a testator devises expressly that the timber upon a particular estate shall be cut down for payment of debts, it is a hardship upon the first taker of the estate ; but he must submit, for here the timber is devised one way, and the estate another ; for the timber is devised to *Richard May* and his heirs upon trust, to cut down and sell for discharge of debts, &c. ; and this is the strongest case that can be of the kind, but the devisee of the estate may buy, and so prevent the defacing of the estate.

His Lordship declared that the mortgage for £1300 on the testator's estate at *Hadlow*, and interest thereof, is a debt of the testator's to be satisfied out of his personal estate and trust estate, in case the same shall be sufficient to satisfy all the debts ; but in case they should not be sufficient to pay [257] his debts, funeral expences, and legacies, then his Lordship reserved the consideration of all further directions. (Reg. Lib. A. 1737, fo. 411.)

(1) This case, with some additions to the statement from *Lord Hardwicke's* Note-book, is taken from *Atkyns*.

(2) So *Howel v. Price*, 1 P. Wms. 294. *Cope v. Cope*, 2 Salk. 449. *Pockley v.*

Pockley, 1 Vern. 36. *King v. King*, 3 P. Wms. 358. *Galton v. Hancock*, 2 Atk. 438. *Robinson v. Gee*, 1 Ves. 251. *Astley v. Tankerville*, 3 Bro. Ch. Ca. 545. And the personal estate shall be applied in exoneration of a mortgage, made by the owner of the estate as against executors or residuary legatees, *Cutler v. Coxeter*, 2 Vern. 302. *Rider v. Wager*, 2 P. Wms. 334. *Philips v. Philips*, 2 Bro. Ch. Ca. 273 ; but not against creditors, specific or pecuniary legatees, *Cope v. Cope*, 2 Salk. 449. *Robinson v. Gee*, 1 Ves. 251. *O'Neal v. Mead*, 1 P. Wms. 693. *Tipping v. Tipping*, ib. 730. *Lutkins v. Leigh*, Cases temp. Talbot, 53. *Scott v. Beecher*, 5 Madd. 96. But if the estate comes to another person (either by descent or purchase) subject to the mortgage or charge, then his personal estate shall not be applied in exoneration of the real estate, although upon the transfer of the mortgage, or for the purpose of securing the charges, he covenants to pay the mortgage or the charge, *Forrester v. Leigh*, Amb. Rep. 174. *Evelyn v. Evelyn*, 2 P. Wms. 664 ; and see the cases cited in Mr. Cox's note to that case, *Bagot v. Oughton*, 1 P. Wms. 347. *Leman v. Newnham*, 1 Ves. 51. *Lacam v. Mertins*, 1 Ves. 312. *Robinson v. Gee*, 1 Ves. 251. *Tweddell v. Tweddell*, 2 Bro. Ch. Ca. 101. *Billinghurst v. Walker*, ib. 604. *Hamilton v. Worley*, 2 Ves. jun. 62. *Waring v. Ward*, 7 Ves. 336 ; unless by his acts it can be inferred that he intended to make the debt his own personal debt, as where a purchaser agreed with the vendor for the purchase of an estate at £90, which was then mortgaged at £86, and covenanted to pay £86 to the mortgagee, and £4 to the vendor, *Parsons v. Freeman*, Amb. Rep. 116. *Lord Oxford v. Lady Rodney*, 14 Ves. 417. Or where father and son, being entitled to an estate, join in raising money by mortgage of the estate, for the benefit of the son, and jointly covenant to pay the mortgage money ; the son afterwards sells his interest in the estate to the father, in consideration of the father's taking upon himself the payment of the mortgage and the arrears, and the father subsequently borrows a further sum, and makes a new mortgage of the estate for the original and further sum, *Woods v. Huntingford*, 3 Ves. 130. If the owner of the estate however creates a charge in its nature real, and intends the covenant only as an additional security, in such case the land shall be applied in discharge of the incumbrance as the primary fund ; as where a party by marriage articles covenants to settle lands for raising portions for younger children, and gives a bond for performance of the articles, *Edwards v. Freeman*, 2 P. Wms. 438. *Lady Coventry v. Lord Coventry*, 2 P. Wms. 222, and 9 Mod. 12. *Lechmere v. Charlton*, 15 Ves. 193.

HUTCHINS v. LEE.(1)

February 8th, 1737. 1 Atk. 447.

Bill brought to set aside an assignment of a leasehold estate, &c., upon suggestion that it was not intended as an absolute assignment, but subject to a trust for the plaintiff's benefit.

Though no express trust in the deed, yet as it might be collected from circumstances arising out of the assignment itself inconsistent with an absolute disposition ; the Lord Chancellor admitted parol evidence to explain this transaction.

Bill brought to set aside an assignment of a leasehold estate, and all other the estate and effects of the plaintiff, upon a suggestion that the same was never intended as an absolute assignment for the benefit of the defendant, but made only to ease the plaintiff of the trouble and care of managing his own concerns at that time (being then under great infirmities of body and mind), and subject to a trust for the benefit of the plaintiff, if he should afterwards be in a capacity of taking care of his own affairs.

The deed of assignment recited that the plaintiff by reason of a long sickness and infirmity of body, found himself incapable of managing his estate without great disadvantage, and that the defendant was very serviceable to him in purchasing the estate, and had undertaken to pay off all such debts as he should owe to the amount of £160. The plaintiff assigned to the defendant two leasehold tenements, except the malt-house and some rooms in one of the houses, to hold to the defendant for the residue of the term ; defendant performing and paying all covenants and high rents, and paying the clear rent of £40 *per annum*, free of all rates, taxes, &c. The plaintiff also assigned all his live and dead stock to the defendant for his own use. There was a general covenant in the deed from the defendant, to indemnify the plaintiff against any breach

of covenant in the original lease, and a special reservation to the plaintiff of all the timber, &c., and [258] he to set out, and allow timber for the repair of the estate (*Note*.—These covenants do not appear either in Lord *Hardwicke's* Note-book, or the Register's Book) (a circumstance principally relied on by the *Lord Chancellor*, as not at all reconcilable with an absolute disposition of the whole interest to the defendant), and other circumstances raising a strong presumption of a trust intended.

March 4, 1737. *Lord Chancellor* admitted parol evidence to explain this transaction, viz. declarations by the defendant at the time the deed of assignment was executed, and afterwards amounting to an acknowledgment of such a trust as the plaintiff now insisted on; and his Lordship said, such evidence was consistent with the deed, as there was all the appearance of an intended trust upon the face of it; but however, though there can be no parol declaration of a trust, since the statute of the 29th Car. 2; yet this evidence is proper in avoidance of fraud, which was here intended to be put on the plaintiff; for the defendant's design was absolutely to deprive the plaintiff of all the benefit of his estate.(2)

(1) This case has been taken from *Atkyns*, with the addition of the substance of the deed of assignment from Lord *Hardwicke's* Note-book. It appears that evidence of conversations and declarations by the defendant were admitted; that there was also evidence of the plaintiff's insanity; but no mention is made of any reservation of timber, as stated in *Atkyns*; and it will be observed that the assignment was of leasehold premises.

(2) The *Lord Chancellor* adds the following note. I was of opinion, that it was not intended, that the conveyance should be an absolute conveyance, but that the plaintiff should have a re-assignment of his estate, if he should become capable of managing, and should demand it. Decree re-conveyance and account, but to stand over for judgment till some day between the seals, and parties to answer whether they would set the personal estate against the debts, and the £40 *per annum* against the profits, and take the account of the profits only from the time of the last payment of the £40 *per annum*, 4th March 1737. Decree pronounced by consent, according to these proposals. (It appears from the Register's Book, that the decree was made by consent, in conformity with these proposals. Reg. Lib. A. 1737, fol. 406.)

[259] DUNCALF v. BLAKE.(1)

February 8th, 1737. 1 Atk. 52.

An insurer by his bill suggests the ship was lost fraudulently, and in the charging part mentioned that, instead of proper goods, there was only wool on board; and, in the interrogating part prays defendant may set out what kind of goods he had on board. The defendant pleads several statutes making it penal to export wool in bar to a discovery of all kind of goods on board; and the plea is allowed.(2) and it was agreed that a plea may be had in part, and yet not so in the whole. (So *Earl of Derby v. Duke of Athol*, 1 Ves. 205. *Bishop of Sodor and Man v. Earl of Derby*, 2 Ves. 357. *Mayor and Corporation of London v. Levy*, 8 Ves. 402. *Baker v. Mellish*, 11 Ves. 70.)

The plaintiff subscribed a policy of insurance for a considerable sum of money; the ship was lost, and, as suggested, fraudulently, and with a view of charging the plaintiff with the policy.

The bill sets forth, that the ship, instead of having proper mercantile goods on board, being bound from one of the ports of *Ireland*, to one of the ports in *France*, had only wool on board. By the interrogatory part of the bill it was prayed, that the defendant might set out what kind of goods he had on board, what the invoices were, in what manner the ship was cleared, and whether she had not arms on board her.

The defendant, as to so much of the bill as sought a discovery of the particular nature and quality of the goods mentioned to be shipped on board the said ship to be sent to *France*, and insured by the said plaintiff, as in the bill mentioned, or which seeks to discover what kind of goods were loaded, or whether the goods on board were wool, or any other particulars relating to the same, or when and where she cleared out after taking in her said loading, or as to any letters, bills of lading, or invoices,

relating to the said cargo, or the management, sale, or disposal thereof ; [260] pleaded an act of parliament of the 1st of Will. and Mary, that no wool shall be shipped from *Ireland*, or imported from thence to any port but *Liverpool*, and some others in *England* ; which was afterwards made perpetual by the 7th of Will. and Mary, and by another act of the 10th and 11th of Will. 3, it was enacted, that none shall directly or indirectly export from *Ireland* into any foreign dominion any wool, and all offenders against this act are made liable to the forfeiture of the said wool, and also to a forfeiture of £500 for every offence. The value of the cargo on board the said ship, and insured by the plaintiffs, is by the policy ascertained at £3500 by the sum insured thereon, and therefore it can no ways concern the plaintiffs to know the particulars of the goods ; but the discovery thereof may occasion several forfeitures, and the bill charging that the goods shipped on board, &c., by the defendant, were to be sent to *Pontraffe*, in *France*, which by the laws and statutes of this realm is prohibited, and highly penal, and the discovery manifestly tending to draw in the defendant to accuse himself ; he submitted, whether he should be compelled to make any other answer.

The *Attorney-General*, for the plaintiff admitted, that, in the charging part of the bill, nothing was mentioned to be on board but wool ; but, by the interrogatory part, defendant is asked in general, what kind of goods he had on board ? and defendant's plea goes in bar to a discovery of all kinds of goods which were on board.

The *Lord Chancellor* allowed the plea ; but agreed, if other kind of goods had been mentioned in the charging part, the defendant might have been obliged perhaps, to have given some answer to it, but as there was not, defendant was not obliged to answer that interrogatory part. The only doubt he had was as to the clearing of the ship, and having arms on board, and that part of the bill he thought afterwards might be covered with the plea.

Agreed in this case, that a plea may be bad in part, and yet not so in the whole. (Reg. Lib. A. 1737, fol. 211.)

(1) This case is taken from *Atkyns*, it does not appear in Lord *Hardwicke's* Note-book.

(2) It is a rule of law, that a man shall not be obliged to discover what may subject him to a forfeiture, *Harrison v. Southcote*, 1 Atk. 539. *Honeywood v. Selwin*, 3 Atk. 276. *Bird v. Hardwicke*, 1 Vern. 109. *Sharp v. Carter*, 3 P. Wms. 375. *Boteler v. Allington*, 3 Atk. 457. *East India Company v. Campbell*, 1 Ves. 247. *Brownword v. Edwards*, 2 Ves. 243. *Chetwynd v. Lindon*, 2 Ves. 451. *Smith v. Read*, ante, p. 16. *Earl of Suffolk v. Green*, post. *Chauncey v. Tahourden*, 2 Atk. 392. *Bishop of London v. Fytche*, 1 Bro. Ch. Ca. 96. *Cartwright v. Green*, 8 Ves. 405. *Ex parte Symes*, 11 Ves. 525. *Clarridge v. Hoare*, 14 Ves. 59.

[261] HERRING v. YOE.(1)

February 8th, 1737. 1 Atk. 290.

A husband tenant for life, remainder to his wife for life, he brings a bill alone for the opinion of the Court upon the settlement ; objection for want of making the wife a party allowed.

A marriage settlement having been made of certain lands on the husband for life, remainder to the wife for life, with divers remainders over ; the present bill was brought by the husband in order to have the opinion of the Court, whether a certain parcel of land was not intended to be included in that settlement.

There was an objection taken at the hearing of the cause, that the wife was not made a party.

Lord Chancellor allowed the objection, for he said if the Court should be of opinion against the husband, such decree would not bind the wife ; his Lordship therefore ordered the cause to stand over, that the wife might be made a party. (Reg. Lib. A. 1737, fol. 198.)

(1) This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book.

CLERK v. WRIGHT.(1)

[See *Gibson v. Holland*, 1865, L. R. 1 C. P. 6 ; *Maddison v. Alderson*, 1883, 8 App. Cas. 480.]

February 8th, 1737. 1 Atk. 12.

A. agrees for the purchase of an estate, but the agreement not reduced into writing ; though A. in confidence thereof gave orders for conveyances to be drawn, and went several times to view the estate, this Court will not carry such agreement into execution, and the statute of Frauds may be pleaded to a bill brought for that purpose. A letter is not a sufficient evidence of the agreement, unless the terms of the agreement are mentioned therein, but where a man takes possession in pursuance of an agreement, the Court will decree an execution of it.

The plaintiff had agreed for the purchase of an estate of the defendant, but the agreement was not reduced into writing ; however, in confidence of the agreement, plaintiff had given orders for conveyances to be drawn and engrossed, and went several times to view the estate : some time after the defendant sent a letter to the plaintiff, informing him, that at [262] the time he contracted for the sale of the estate, the value of the timber was not known to him, and that the plaintiff should not have the estate, unless he would give him a larger price.

The bill was brought to carry the agreement into execution, to which the statute of Frauds afterwards was pleaded.

Lord Chancellor allowed the plea, and observed the letter could not be sufficient evidence of the agreement, the terms of the agreement not being therein mentioned.(2) As to the objection that this agreement was in part performed, he allowed, that when a man takes possession in pursuance of an agreement,(3) or does any act of the like nature, the Court will decree an execution of it, but the circumstances only of giving directions for conveyances, and going to take a view of the estate, he thought not sufficient.(4) (Reg. Lib. A. 1737, fol. 188.)

(1) This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book.

(2) *Seagood v. Meale*, Prec. Ch. 56 ; 11 Str. 426. But if a letter contains the terms of an agreement, or refers to a paper which contains the terms, it is a sufficient written agreement to take it out of the statute of Frauds. See Prec. Ch. 374 ; Gilb. Eq. 35. *Moore v. Hart*, 1 Vern. 110, 201 ; 2 Cha. Rep. 284. *Wankford v. Fotherly*, 2 Vern. 322. *Finch v. Earl of Winchelsea*, 1 P. Wms. 277. *Welford v. Beazley*, 3 Atk. 503 ; 1 Ves. 8. *Allan v. Bower*, 3 Bro. Cha. Ca. 149. *Tawney v. Crouther*, *ibid.* 161, and 318. And see *Clinan v. Cooke*, 1 Sch. & Lef. 22.

(3) Payment of a considerable part of the purchase-money has been considered as an act of part performance, *Lacon v. Mertins*, 3 Atk. 4. *Main v. Melbourn*, 4 Ves. 720. *Buckmaster v. Harrop*, 7 Ves. 341, but in *Clinan v. Cooke*, 1 Sch. & Lef. 40, Lord *Redesdale* denies that payment of the purchase-money is an act of part performance ; and see *ex parte Hooper* in the matter of *Hewett*, 1 Mer. Rep. 9.

(4) See *Hawkins v. Holmes*, 1 P. Wms. 771, and *Stokes v. Moore*, 1 Cox, 219. *Whaley v. Bagnall*, 6 Bro. P. C. 45 [2nd ed. 1 Bro. P. C. 345]. *Redding v. Wilkes*, 3 Bro. C. C. 400.

[263] PHIPPS v. STEWARD.(1)

February 9th, 1737. 1 Atk. 285.

While a suit is depending in the Ecclesiastical Court for an administration, a bill may be brought here for an account of the personal estate. The reason why a bill is allowed to be brought before probate, is that the Ecclesiastical Court have no way of securing the effects in the mean time.

A devise of personal estate to A., and the heirs of her body, it has never been solemnly determined, that where money is so entailed, the whole shall go to the first taker.

Sir *Robert Cowan*, intending to leave *Bombay*, declared to the plaintiff he had made his will, and that after giving [264] his personal estate to his daughter, and the heirs of her body, he had limited the same to the plaintiff.

Some time after Sir *Robert Cowan* died, the daughter married the defendant, and upon a supposition that there was no will, administration was applied for by the daughter in the Spiritual Court; pending a suit there, the present bill was brought by the plaintiff to have an account of the personal estate.

To this bill the defendant demurred, for that there was a suit now depending in the Spiritual Court for administration to the personal estate of Sir *Robert Cowan*.

Lord Chancellor over-ruled the demurrer; and said, in the case of *Powis v. Andrews*, a bill of this nature was allowed before probate, and that determination was founded on a former case of *Japhet v. Crooke*, in the time of Lord *Harcourt*, relating to the will of Mr. *Hawkins*. (So *Dulwich College v. Johnson*, 2 Vern. 49.)

The reason for these cases is, that the Ecclesiastical Court have no way of securing the effects in the mean time, (2) nor did he know there was any solemn resolution, where money is entailed in the manner the testator has done here, that the whole of it shall go to the first taker. (3) The case of *Colwal v. Shadwell*, in the time of Lord *Cowper*, is to the contrary, 1 P. Wms. 470, 485.

[265] His Lordship restrained the defendants from receiving any more of Sir *Robert Cowan's* personal estate till further order.

(1) This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Notebook. It appears from the Register's Book, that the plaintiffs brought their bill against the defendants, alleging by their bill, that Sir *R. Cowan*, for many years, resided at *Bombay*, and being about to sail for *England*, made his will, dated the 4th of Jan. 1734, and after giving some legacies thereby, bequeathed the residue of his estate, after payment of his debts and legacies, to be laid out in the purchase of lands to be settled to the use of his brother, *Wm. Cowan*, in tail, remainder to his sister in tail, remainder to the plaintiffs in fee; and appointed the said *Wm. Cowan* executor, and directed in case of his brother's death, that his personal estate should be remitted to the plaintiffs for the purposes aforesaid. That Sir *R. Cowan* soon afterwards sailed for *England*, but for fear of accident, left his will with his secretary, and only brought over a copy to *England*, but directed his secretary to send over the original as soon as he had notice of Sir *R. Cowan's* arrival. That Sir *R. Cowan* died in Feb. 1736, without revoking his will, and without having received the original. That the said defendant, *Alexander Steward* had been informed by Sir *R. Cowan*, of his having left his will at *Bombay*, and that only a copy would be found in *England*; and on searching among the papers of Sir *R. Cowan* after his death, a copy being only found, no further search was made for the original. That all the said Sir *R. Cowan's* papers were thereupon sealed up with the consent of the plaintiffs, and the said defendant *Alexander Steward*, and it was agreed between them, that the same should not be further inspected or meddled with by any persons until the will should be brought into *England*, or there should be a proper representative of Sir *R. Cowan* appointed. That advice was soon after the death of Sir *R. Cowan* received of the death of *Wm. Cowan* in the lifetime of the said Sir *R. Cowan*; and the said defendant, *Alexander Steward*, afterwards married the sister, and applied for letters of administration for her, as if Sir *R. Cowan* had died intestate. That a suit is now depending in the Ecclesiastical Court touching the same; and pending the proceedings there, the defendants had contrary to the said agreement, broke open the seals and possessed themselves of all the personal estate, books, papers, and writings, of Sir *R. Cowan*, and applied the same to their own uses, and had squandered away part thereof, and threatened to carry over the rest thereof to *Ireland*, and to secrete themselves, or dispose thereof there for their own uses. That the said original will was not likely to be got from *Bombay* till the ensuing August, and they prayed by their bill, that Sir *R. Cowan's* personal estate might be brought into Court, and laid out in the South Sea Annuities, until a convenient purchase could be found in which to invest the same according to his will, and that until the said will could be got from *Bombay*, that the defendants might be restrained from proceeding in the Ecclesiastical Court to get administration to Sir *R. Cowan* as dying intestate. To this bill the defendants put in a demurrer, which was over-ruled, and the defendants were restrained from receiving and alienating any part of the said testator's personal estate, till further order. Reg. Lib. B. 1737, fol. 135.

(2) Pending a litigation, the property is often in danger of being lost or injured; in such cases a court of equity will interpose to preserve it, if the powers of the court where the litigation is pending are not sufficient for that purpose, *Milford's Pleadings*,

p. 122. *Andrews v. Powys*, 2 Bro. P. C. 476. *Morgan v. Harris*, 2 Bro. C. C. 121. *Montgomery v. Clarke*, 2 Atk. 378. *Smith v. Aykwell*, 3 Atk. 566. *King v. King*, 6 Ves. 172. *Richards v. Chave*, 12 Ves. 462. *Edmunds v. Bird*, 1 Ves. & Bea. 542.

(3) Where money is directed to be laid out in land to be settled in such way as to make it necessary that a recovery should be suffered; in order to give the remainderman his chance, the Court has always directed it to be laid out in land. See *Benson v. Benson*, *Short v. Wood*, *Chaplin v. Horner*, 1 P. Wms. 131, 471, 483. *Eyre's case*, and *Onslow's case*, 3 P. Wms. 13. *Collet v. Collet*, 1 Atk. 11. *Cunningham v. Moody*, D. 1 Ves. 176, and even where under Lord Eldon's act, or under the 7th Geo. 4, c. 45, which has repealed Lord Eldon's act, the money may be paid over to the persons entitled without being invested in lands; yet where a recovery is necessary, the money will not be paid to the party until such time as he might have suffered a recovery, *Fletcher v. Tollet*, 5 Ves. 12, see note to that case. *Ex parte Bennett*, 6 Ves. 116, and see *ex parte Sterne*, ib. 156. *Ex parte Rees*, 3 Ves. & Bea. 11.

MORGAN versus MORGAN.(1)

[See *Hicks v. Sallit*, 1854, 3 De G. M. & G. 815; *Howard v. Earl of Shrewsbury*, 1874, L. R. 17 Eq. 399; *Wall v. Stanwick*, 1887, 34 Ch. D. 768.]

February 10th, 1737. 1 Atk. 489.

Where any person enters upon an infant's estate and continues the possession, this Court considers him as a guardian and will decree an account, and to be carried on after the infancy is determined, unless the infant after being of age waived such account.

Lord Chancellor. Where any person, whether a father or a stranger, enters upon the estate of an infant, and continues the possession, this Court will consider such person entering as a guardian to the infant, and will decree an account against him, and will carry on such account after the infancy is determined; but from the inconvenience of such long accounts, whenever it comes in proof, that the infant, after being of age, has waived such account, this Court will lay hold of any such thing to put an end to it; though, indeed, in the case of a father, the Court is not so strict, as imagining the parental authority might hinder the bringing any bill or ejectment to recover the possession.

(1) The above note of the *Chancellor's* opinion is taken from Mr. *Atkyns's* Report.

It appears that the bill in this case was by an eldest son against the representatives of his father for an account of the rents and profits of an estate of which the plaintiff's mother under a settlement of 1690, was tenant for life, remainder to her first and other sons in tail. The mother died in 1707, upon which the father entered and occupied the premises till his death, in 1729, insisting that he was entitled to them for his life. It appeared that the plaintiff had been apprised of the settlement of 1690; and that it had been in his possession for eight years before his father's death; and that his father had maintained him and his family for some time after his marriage. He was forty-six years of age, and had been married ever since 1720. The bill was dismissed without costs.

[266] LONDON ASSURANCE COMPANY, *Plaintiffs*; (1) and JOHN JOHNSON, PETER CARDON, CHARLES GHYSWHICK, JAMES MELCAMP and THE EAST INDIA COMPANY, *Defendants*.

Feb. 10th, 20th, and 21st, 1737.

An insurance having been effected by the defendant *Johnson* with the plaintiffs on a ship and cargo from *Ostend* to *Canton*, was seized by the *East India Company* at *Bencoolen*, as an illicit trader; *Johnson* recovered in an action on the policy against the insurers and obtained judgment; upon a bill by the insurers against the defendants to be relieved against the verdict and judgment, or that the insurers might stand in the place of *Johnson* to receive satisfaction against the *East India Company* for any unlawful capture made by them; held, that they could not be relieved against

the verdict and judgment ; for if the seizure were lawful that would have been a good defence to the action ; and that the insurers could not stand in the place of *Johnson* to receive satisfaction against the *East India Company*, as there was no proof in the cause against the Company that *Johnson* had any interest or property in the ship or goods.

On the 15th of December 1720, the defendant, *Johnson*, effected an insurance with the plaintiffs, on a certain ship and cargo, from *Ostend*, in *Flanders*, to *Canton*, in *China*.

The ship having come into the road at *Bencoolen*, was seized, on the 20th of August 1721, by the Governor and Council as an illicit trader, and sold for £3600, which the *East India Company* admitted they had received.

Johnson brought an action, on the policy, against the *Insurance Company*, and in Easter Term, 1730, recovered £3600 and £170 costs.

The bill prayed relief against the verdict and judgment obtained by *Johnson*, or that the plaintiffs might stand in the place of *Johnson* to receive satisfaction against the *East India Company* for any unlawful capture made by them.

It was not proved that *Johnson* had any property in the ship or cargo, nor did it distinctly appear in whom the property was vested. Some evidence was offered on the part of the *East India Company*, that the captain and mate were *Englishmen*, and that some of the cargo came from *England*.

[267] Mr. Attorney-General, Mr. Clarke, and Mr. Murray, for the plaintiffs.

If the capture was lawful the risk was not within the policy, Molloy, 244 ; 2 Vern. 176, and the plaintiffs are entitled to relief against the judgment at law ; and if the capture was unlawful the plaintiffs have a right to stand in the place of *Johnson* to receive satisfaction from the *East India Company*.

This resembles the case of *Morrice v. The Bank of England*, Cas. temp. Talbot, 217 ; the real parties ought to interplead. At the time of this insurance there was no law here against the *Ostend* trade, and the act of Geo. 1st does not prohibit the insuring on those ships.

Mr. Hamilton and Mr. Clarke, for *Johnson* and *Cardon*.

The seizure was without colour of right ; but if the insurers had any defence they might have availed themselves of it at law.

There is no more ground to relieve in this case than in a case of mispleading, *Anon.* 1 Vern. 119. *Curtis v. Smalridge*, 1 Ch. Ca. 43. This is not an interpleading bill.

Mr. Browne, Mr. Fazakerley, and Mr. Weldon, for the *East India Company*.

The plaintiffs pray relief against the *East India Company* upon a supposition, that the seizure was unlawful. By the 9 & 10 W. & M. c. 44, s. 81. 6 Anne, and 7 Geo. 1, the exclusive benefit of trading is secured to the Company, and all persons intruding into the limits of their exclusive trade, are considered as traders ; and the power is given to seize ships, &c., for unlawful trading. *Johnson* is alleged in the bill to be a merchant of *London*. It was not before pretended that he was only a trustee for foreigners. It is not, indeed, proved that *Johnson* or *Cardon* have any interest or in whom the legal interest is vested. Great mischief would arise from permitting *Englishmen* to insure foreign ships trading within the Company's limits ; but it is proved that the master and mate were *English*, and that the cargo came from *England*. The seizure was therefore perfectly legal, 2 Ch. Ca. 95, case on the charter of the *African Company* ; but if it was not so, the plaintiffs might have had a defence at law. The object of this bill is to compel one man to bring an action of trespass against another. This sort of relief is not ordinarily granted in cases of tort ; but if granted the Company will be entitled to every defence [268] which the original trespassers might have availed themselves of as against the original proprietor. We have insisted upon the statute of Limitations by the answer.

Pyke, the governor by whom the seizure was made, pleaded it to a former suit ; and the plea was allowed. The Company are equally entitled to have the benefit of this defence.

Mr. Attorney-General, in reply.

Cases upon policies of insurance differ from all others as to the relief this Court will grant against verdicts. *Bonham v. Barber*, the plaintiff could not prove his case at the trial, but upon a bill being brought a trial was directed by this Court. It is said that this trading was contrary to treaties ; but this Court cannot judicially take

notice of treaties. The act 9 & 10 W. 3, c. 44, cannot affect foreigners ; and the insurance of foreign ships is not within the act. The plaintiffs are entitled to relief, and have no remedy but in this Court. As to the statute of Limitations our right did not commence till the recovery against us.

Feb. 22, 1737.—*Lord Chancellor*. The plaintiffs pray, by their bill, relief in the alternative, either 1st, That they may be relieved against the verdict and judgment which has been obtained against them, at law, by the defendant *Johnson*, or 2dly. If they do not prevail in that, then that they may stand in the place of *Johnson* to have satisfaction against the *East India Company* for their interest in the ship and goods.

It is taken to be clear on the part of the plaintiffs that they are entitled to the one or the other of these kinds of relief ; but that is not so clear to me.

1st. As to the first, it originally depends upon the question, whether the trading the act of the assured, which occasioned the seizure, was lawful or not. Whether it was a breach of the policy is a question proper to be tried at law, and which in fact has been already tried there, between the defendant *Johnson* and the plaintiffs.

Suppose that this was a question which could be re-examined in a Court of Equity, there is no colour of proof made by the plaintiffs against *Johnson* or any of the defendants but the *East India Company*, that the seizure was unlawful, for the only proof attempted rests upon the answer of the *East India Company*, and the evidence of witnesses examined for them, which cannot affect a co-defendant. This is nothing like an interpleading bill, for the de-[269]-fendants do not all claim the same debt or demand against the plaintiffs.

There is no ground then to give any relief in this Court against these defendants on the merits.

The only question as to them is, whether there is a sufficient foundation to direct that the plaintiffs may make use of their names to bring an action at law. I think that there is not, because, 1st. It does not appear in whom the legal interest is, and indeed it is agreed that it is not in *Johnson*. It is said to be either in *Cardon* or *Melcamp*, but that does not distinctly appear ; and if entitled to part, it is clear that they are not entitled to the whole.

It appears by the assignments, that this ship and cargo were divided out into shares like stock ; but one partner cannot bring the action, all must join, and all should have been brought before this Court. It would, therefore, be a vain direction.

Secondly, Because the action is bound by the statute of Limitations. The seizure was in 1721 ; the action on the policy was not till 1729. It is said that the plaintiffs had no right till that action had been brought ; but the defendants, the *East India Company*, are entitled to the same defence as if the action had been brought against them by the original proprietors. There is no ground arising from any delay of theirs to take away the benefit of any defence from them.

As to the other alternative in the prayer of the bill, that the plaintiffs may stand in the place of *Johnson*, to have satisfaction against the *East India Company* for their interest in the ship and goods ; I am of opinion that there is no sufficient foundation for that relief.

The case at best is a very suspicious one. The insurance is by an English subject in his own name. If the trade was really such as there is reason to suppose it was, it is a direct infraction of the Act of Parliament. The words are "all subjects of his majesty, his heirs and successors." It does not, indeed, extend to lawful East India Companies, such as the Dutch ; but the trade from *Ostend* is unlawful, contrary to treaties, and condemned by the legislature and the voice of the whole nation as greatly to the prejudice of the public. In the present case the master and mate have English names ; and it is sworn that the witnesses have heard and believe that they were English born. If this be the real case, this method of insuring in *England*, if the insurers can come round on the Company, will be a way to make the [270] Company pay for a breach of their own charter and privileges. Vide *Lord Nottingham's case*, *Brook v. Bradley*. 2 Ch. Ca. 95.

But this is matter only of strong or rather violent suspicion, and I shall not found my decree upon it, but on the want of that which the plaintiffs must have proved if the trade had been the most lawful in the world.

The relief prayed is by way of satisfaction for a trespass or tort in a Court of equity.

There is no proof against the Company that either *Johnson*, *Cardon*, or *Melcamp*, had any interest or property in the ship or goods.

There is no proof against the *East India Company* that *Johnson* was a trustee for any foreigner. He is alleged by the bill to be a merchant of *London*, and for any thing that appears to the Court, he might be an English subject residing here, insuring a share of his own in a ship from *Ostend* to the *East Indies*.

There is no ground, therefore, to make any decree for satisfaction to the plaintiffs against the Company, and the bill must be dismissed.

The only question which remains is as to costs to the *East India Company*.

It is plain that they have had this ship and cargo, which was of very considerable value, and so far they have profited; and as there are several defects on the plaintiffs' part, so there are some on theirs.

The treaties are not proved whereby to shew the trade to be clearly unlawful; and it is not fully proved that the master and mate were English born subjects.

If that had been shewn I should have given them their costs; but as that has not been done, and they have profited so greatly by the seizure, I shall give no costs.

(1) The statement of this case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book. The judgment from the *heads* of it in his Lordship's handwriting.

[271] PRINCE v. HEYLIN.(1)

February 10th, 1737. 1 Atk. 492.

A testatrix devises two houses to *J. P.* and *J. H.* generally, and then says, my meaning is, that the rents of my two houses should be equally shared between *J. P.* and *J. H.*; the devisees shall take as tenants in common, and not as joint tenants.

The testatrix in this case being a lessee for a term of years, of two houses in *London*, devised the same to her nephew, *John Prince*, Pewterer, and *John Heylin*, Clerk, generally; and the will goes on thus, "and my will and meaning is, that the rents of my said two houses shall be equally shared and divided between them, the said *John Prince*, and *John Heylin*, Clerk, as aforesaid." The testatrix soon after dies.

John Prince survived the testatrix, and died in 1721; ever since, the premises have been enjoyed by the defendant as the survivor.

The bill is now brought by the administrator of *John Prince*, to have an account of the rents and profits.

The question was, whether, by the words in the will, a joint-tenancy, or a tenancy in common, was created.

It was agreed clearly, that if the words "equally shared" (2) had been annexed to the thing itself, they would have created a tenancy in common, but insisted upon at the same time, that the former are plainly words of joint-tenancy, and the subsequent amount only to a direction in what manner the profits should be received during the lives of the devisees, viz., to each of them an equal share, which is saying no more than what otherwise the law would direct.

Lord Chancellor. I am clearly of opinion the devisees [272] were tenants in common; that had the testatrix expressly directed the rents to be shared during the joint lives of the devisees, it might admit of some doubt; but with regard to the time, the latter part of the devise was as general as the former, and the word "rents" will as properly pass the interest in the houses, as any other word whatever. This is therefore a plain tenancy in common.

With regard to the time the defendant is to account for the rents and profits, there having been no entry made, or demand of the rents, &c., it has been insisted on for the defendant, he ought to account only from the time of the bill filed; now in the case of joint-tenants or parceners, there is a mutual trust between them, and they are accountable to each other, without regard to the length of time; it is otherwise in the case of tenants in common, and this is an adversary possession maintained by the defendant against the plaintiff ever since the death of the intestate: however the Statute of Limitations is a bar to any demand further back than six years; and by the 4 Ann. c. 16, s. 27, an action of account lies for one tenant in common against another, and such action is expressly mentioned in the Statute of Limitations, and as there is no remedy at law, there can be no reason for any equity.

I am of opinion the defendant must account for rents and profits from the death of the intestate, the nature of the estate devised not admitting of an adversary possession, in regard of the privity that is between tenants in common. An ejectment is not maintainable by one tenant in common against another, without an actual ouster (*Reading v. Royston*, 2 Salk. 423. *Fairclarm* on the demise of *Empson v. Shackleton*, 5 Burr. 2604. *Doe ex dem. Fishar v. Prosser*, Cowp. 217. See *Doe* on demise of *Hellings v. Bird*, 11 East, 49). No advantage can be now taken of the Statute of Limitations, it not being pleaded by the defendant, or insisted on by his answer, which in all cases is necessary, in order to have the benefit of such bar to the plaintiff's demand (Note, but advantage may now be taken of the Statute of Limitations by demurrer, *Foster v. Hodgson*, 19 Ves. 186); though, indeed, the Court sometimes, when there is a very stale demand, notwithstanding the statute is not pleaded, will in its discretion reduce that demand to a reasonable time, and makes use of the Statute of Limitations as a proper rule to go by in the exercise of that discretion.

(1) This case is taken from *Atkyns*. The only Note of this case in Lord *Hardwicke's* Note-book is "Decree, Tenancy in Common and Account."

(2) So the words, "equally divided" in a will create a tenancy in common, *Owen v. Owen*, post. *Heathe v. Heathe*, 2 Atk. 122. *Haws v. Haws*, 3 Atk. 525; and in the surrender of a copyhold estate, *Fisher v. Wigg*, per *Gould* and *Turton*, *Holt*, dissentient, 1 P. Wms. 18. And in deeds taking effect under the statute of uses, *Rigden v. Vallier*, 2 Ves. 252. Whether they would have effect in conveyances at common law seems doubtful, see *Stones v. Heurtly*, 1 Ves. 165. *Idle v. Cook*, 1 P. Wms. 71; and see the cases collected upon this subject in Mr. *Coventry's* note to *Watkins* on Copyholds, vol. 1, p. 138. So the words "to and amongst," *Campbell v. Campbell*, 4 Bro. Ch. Ca. 15, or "between," *Lashbrook v. Cock*, 2 Mer. 70, create a tenancy in common; and see *Cox v. Chamberlain*, 4 Ves. 631. *Reade v. Reade*, 5 Ves. 744. *Casterton v. Sutherland*, 9 Ves. 446.

[273] WILLIAM BELLASIS, Administrator of his late Wife BRIDGET, and Administrator *cum testamento annexo* of MARY BILLINGSLEY, his late Wife's Mother, and BRIDGET BELLASIS, his Daughter, *Plaintiffs*; (1) and THOMAS UTHWATT and Others Trustees of MARY BILLINGSLEY's Will, the Sisters of the Whole and of the Half Blood of MARY BILLINGSLEY, the Executor of the surviving Trustee of the Marriage Settlement of MARY BILLINGSLEY and her Husband, and the ATTORNEY-GENERAL, *Defendants*.

[See Lord *Chichester v. Coventry*, 1867, L. R. 2 H. L. 96.]

February 11th. 1737. 1 Atk. 426.

R. B. by marriage settlement, after reciting that he was entitled to certain Exchequer annuities, that it was agreed that they should be settled upon himself and his wife for their lives, and then in trust for such child or children as he should have by his wife, to be disposed of amongst them in such shares and proportions as he should direct and appoint; and after the decease of himself and his wife without issue, in trust for his executors, administrators, and assigns; Assigns the annuities to trustees upon trust, to permit himself and his wife to receive the produce during their lives, and after their decease upon trust, to transfer the said annuities to such child or children of the marriage as he should by deed or will appoint, and in default of such child or children, then to his executors or administrators; *R. B.* by will gives his real and personal estate to his wife, subject to the payment of £200 *per annum* for his daughter's maintenance, until she attains the age of eighteen, and then to the payment of £10,000 for her portion; By will the wife gives the residue of her real and personal estate to her daughter in fee; but in case she should die before she should be of an age to dispose thereof, she gave the same to trustees and their heirs, to lay out £6000 for founding a hospital at *Drayton*; but in case her daughter should die unmarried, her desire was that her daughter should be buried there, and the residue above the £6000 to be divided amongst her own sisters and their representatives; Held that the daughter, being the only child of the marriage, was under the marriage settlement entitled to the Exchequer annuities, no appointment having been made by

her father. That the legacy of £10,000, given by the father's will to his daughter, could not be taken to be in satisfaction for the Exchequer annuities.(2)
That the daughter having attained the age of eighteen was entitled to the residue of the personal estate bequeathed to her by the will of her mother; but having died before she attained twenty-one, the contingency had happened upon which the charge of £6000 for founding a hospital was to take effect; and that the daughter having married, the residue of the real estate, under her mother's will, after payment of the £6000, was held to belong to the daughter, as heir at law to her mother.

By a settlement made previous to the marriage of *Rupert Billingsley* with *Mary* his wife, dated the 13th August 1713, [274] after reciting that he was entitled to certain Exchequer annuities of £300 *per annum* for ninety-nine years, and that it was agreed that they should be settled in trust for himself [275] for life, then for his wife for life, and then in trust for such child or children as he should have by his said wife, to be disposed of to or amongst such children, in such shares and [276] proportions as he should direct and appoint, and after the decease of the said *Rupert* and his wife, without issue, in trust for his executors, administrators, or assigns; the said Exchequer annuities were assigned to trustees upon trust, to permit the husband to receive the produce for his life, and if his wife should survive him, in trust for her for life, and after the decease of them both, upon trust to transfer the annuities to such child or children of the said *Rupert* and his wife, as he should by deed or will appoint, and in default of such child or children, then to his executors or administrators.

Bridget, the plaintiff's late wife, was the only issue of the marriage, and *Rupert Billingsley* the father, by his will dated the 28th of October 1720, devised all his real and personal estate to his wife, her heirs and assigns, subject to the payment of his debts, and to £200 *per annum* for his daughter's maintenance, until she should attain the age of eighteen years, and then to the payment of £10,000 to his daughter for her portion; and in case his wife should marry again, he charged his estate with the further sum of £5000 for his daughter.

Rupert Billingsley died without making any appointment under the power reserved to him in the marriage settlement.

[277] *Mary Billingsley*, the widow, by her will, dated the 22d of July 1727, after giving several legacies, gave and devised all the rest and residue of her real and personal estate unto her beloved daughter *Bridget*, her heirs and assigns; but in case she should die before she should be of an age to dispose thereof, then she gave and devised the same to her trustees and their heirs in trust to lay out £6000 to build a hospital at *Drayton*, for the maintenance of so many seamen's widows as the trustees should think proper, and in case her daughter should die unmarried, her desire was, that she might be buried there, and the residue above the £6000 to be divided amongst her own sisters and their representatives.

At the time of making this will. *Bridget*, the daughter, was about twelve years old. The mother soon afterwards died, and the daughter married the plaintiff, by whom she had one daughter, the other plaintiff, and died about the age of twenty.

The bill was filed by the husband and only child of *Bridget*, the daughter of *Mary Billingsley*, for an account of her personal estate, and of the rents and profits of her real estate, and for an assignment of the Exchequer Annuities mentioned in her marriage settlement.

The questions made were,

First, Whether, under the marriage settlement between *Rupert* and *Mary Billingsley*, *Bridget*, the only child, was entitled to the Exchequer annuities, no appointment having been made by the father.

Secondly, Whether, if she was so entitled, the legacy given to her by her father's will was to be considered as a satisfaction.

Thirdly, Whether having died under the age of twenty-one, she was entitled under her mother's will, to the residue of her real and personal estate.

Fourthly, Whether the contingency had happened upon which the devise over was to take effect.

Mr. Browne, *Mr. Murray*, and *Mr. Fazakerley* for the plaintiffs.

As to the first question, the only child of the marriage is clearly entitled to the Exchequer Annuities under the marriage settlement. The power reserved to the father was only to enable him to divide and apportion the annuities amongst his

children, if he should have more than one. The annui[278]-ties are reserved to his executors, not in default of appointment, but in default of children. *Davy v. Hooper*. 2 Vern. 665.

It is equally clear that the legacy given by the father cannot be considered as a satisfaction. There is no reason to suppose that such was the testator's intention. The annuities were a vested interest in the daughter. The legacy was not payable till the age of eighteen, which she might never have attained; and in the meantime she was entitled under the will only to an inferior annuity. Besides which the annuities and the legacy are things of a totally different species. *Saville v. Saville*, Sel. Cas. in Ch. 32; and 2 Atk. 458. *Atkinson v. Webb*, 2 Vern. 478. *Duffield v. Smith*, 2 Vern. 258. *Crompton v. Sale*, 2 P. Wms. 553; and 1 Eq. Ca. Abr. 205, pl. 9. *Eastwood v. Vinke*, 2 P. Wms. 614.

But the principal question is that which arises from the words used by *Mary Billingsley* in her will, and upon which the title to the residue of her real and personal estate depends. The residue of both these estates is given in the same clause, and by the same words; but as they are of different natures, the same words may receive different constructions, as was said by Lord *Macclesfield* in *Forth v. Chapman*, 1 P. Wms. 664. As to the residue of the personal estate, there can be no doubt. The daughter married and lived till she was twenty years of age. She might have given it by will at fourteen years, and her husband might have aliened it.

The only difficulty is as to the real estate. The intention of the testatrix is plain. She could not have intended to disinherit her granddaughter. Her object was to give to her daughter the estate in fee; but as her daughter was at that time only between eleven and twelve years old, and might possibly die before any person could derive any title from her, she in that case gave it over to the charity and to her sisters. The words used in the will do not require that the daughter should be of an age to give by deed or will. The word is dispose, and not give, *cujus est dare ejus est disponere*; *disponere* there means something different from *dare*. Marriage is the period at which a power of disposing of property is most requisite. Portions are always made payable at marriage.

In some respects marriage is an actual disposition. By the marriage contract, the daughter communicated to her [279] husband a right to an estate for life as tenant by the curtesy. If the words "of an age to dispose," be considered as meaning the age of twenty-one, with reference to the real estate the devise over to the sisters will be defeated; because, as the daughter clearly attained a sufficient age to dispose of the personal estate, the whole of the £6000 given to the charity must be paid out of the land, which is barely sufficient for that purpose. This, therefore could not have been the intention of the testatrix.

The title of the sisters indeed depends upon another contingency which has not happened, the daughter's dying unmarried. It may, perhaps be contended, that those words refer only to the daughter's being buried at *Drayton*; but the most rational construction is, that the sisters were to become entitled only in that event.

Mr. *Attorney General* for the defendants the sisters.

As to the Exchequer Annuities, nothing is given to the children by the marriage articles, except through the appointment of the father. But, supposing the daughter to have been entitled to those annuities under the settlement, the legacy operated as a satisfaction; for the annuities were clearly intended as a portion; and the rule of the court is against a child's having a double portion. As to the argument that the annuities and the legacy were not of the same species; they were both personal estate, and both convertible into money.

The testator did not conceive that his daughter would be entitled to the annuities; for he provided a maintenance for her out of the legacy.

As to the question upon *Mary Billingsley's* will, the obvious meaning of the words "of an age to dispose," is that age at which, by the rules of law, the daughter would be enabled to dispose of the property given to her. They imply some act to be done by the party, and not a disposition by operation of law, as by marriage or forfeiture. Marriage indeed operates only as a disposition of the profits, and not of the property.

In 1 Inst. 78 b, it is said, that our law takes notice of seven different ages for different purposes, of which the last is twenty-one, and is there stated to be the age for disposing of lands, goods and chattels. In *Forth v. Chapman* [1 P. Wms. 664], the reason for giving a different construction to the same words was, that any other construction

would have militated against the [280] clear intention of the party. In this case the intention of the party requires that the same rule of construction should be applied to the disposition of the real and personal estate, as the only means by which the necessity of raising the whole of the sum of £6000 out of the real estate can be avoided. The argument that the testatrix could not have intended to disinherit her granddaughter, does not apply as to the personal estate, because in no case could the granddaughter take away part of it, as the whole would belong to the husband.

Feb. 11, 1737.—*Lord Chancellor*. As to the first point, I think it is extremely clear that *Bridget Billingsley* the daughter was well entitled to the Exchequer Annuities under the settlement. If, indeed, the question had rested upon that part of the settlement in which the declaration of the trust is made, there might perhaps have been some doubt whether an appointment by the father was not necessary to give a title to the daughter, although, even in that case, the bequest "in default of such child or children," which must mean child or children generally, would have tended much to remove the difficulty; but the agreement which is recited in the settlement puts the present case out of all doubt; for it is there said, that the annuities shall be in trust for such child or children as the father should have by his wife. This vests the interest absolutely in the children; and the subsequent words "to be disposed of, &c.," only give the father a power of apportioning the annuities amongst his children as he might think proper; but as there was only one child, there was no room for this power of distribution to operate, and that only child, therefore, was entitled to the whole, as was decided in the case of *Davy v. Hooper*, 2 Vern. 665.

As to the second point, whether the legacy of £10,000 is to be taken to be in satisfaction of those annuities, I am of opinion that it ought not to be so considered; but that the daughter, *Bridget Billingsley*, is entitled to both. There have, indeed, been many cases in which the Court has inclined against double portions, but that has generally been owing to the particular circumstances of the case, as where, by allowing double portions to younger children, the heir would be nearly disinherited; but this is the case of an only child, in which there is no intention expressed by the father, that the legacy should be taken in satisfaction.

It has always been held that a bequest to be considered [281] as given by way of satisfaction must be of the same nature, and equally certain as the thing in lieu of which it is given; land cannot be considered as given in satisfaction for money, or money for land. In the present case indeed, the annuities and the legacy are, in one sense, of the same nature, for they are both personal estates; but the annuities were to continue only for a term, which the mother or the daughter might have outlived, and the legacy is given absolutely as a certain age. In that respect therefore, they are different in their nature. The legacy also is given upon a contingency, and might never have become payable; for if the daughter had died before she had attained the age of eighteen, the legacy being given out of a real and personal estate would have lapsed, according to the case of *Yates v. Phettiplace*, 2 Vern. 416, and Prec. in Ch. 140. It would be absurd to construe an uncertain contingent interest as a satisfaction for a certain interest absolutely vested, particularly in the case of an only child.

If the Exchequer Annuities had been given away to others by the will, the daughter could not have taken both; that is, the legacy under the will, and the annuities in contradiction to it; but this point is less material, because my opinion is in favour of the plaintiff upon the question relative to the residue of the personal estate.

The question as to the residue of both the real and personal estate depends upon the same words by which such residue is given over if the daughter should die before she should be of an age to dispose thereof. It appears that this will was made in haste, probably by reason of the testatrix's approaching death. No construction which tends to the disinheriting of the heir, or to depriving the daughter of the personal estate ought to prevail, unless the words are very plain for that purpose. As to the personal estate I am very clear that the contingency has not happened upon which the devise over was to take effect. The words used must be taken *reddendo singula singulis*, as if the testatrix had repeated the contingency twice over; and then the several ages which the law prescribes for the disposal of the different kinds of estate will govern the construction in each, as was done in the case of *Forth v. Chapman* [1 P. Wms. 664], where the same words creating an estate tail in the real were restrained as to the personal estate. I cannot construe the word "dispose" in the sense which has been contended at the [282] bar, as meaning an enjoyment of the fruits of the estate or a

disposition by operation of law. At the time of the testatrix's death, the infant was of an age to dispose of the estate in that sense, as by forfeiture for treason, or marriage. Tenancy by the curtesy, indeed, and the other consequences of marriage are not properly dispositions of an estate, but privileges conferred by the law. These modes of disposition would not therefore have been in the contemplation of the testatrix: but the words must be taken in the same sense as in *Thomlinson v. Dighton*, 1 Salk. 239; and must receive the same construction as if the testatrix had said, "If she should die before she may dispose thereof by reason of her age." Applying this rule then to the personal estate, the daughter lived till she was twenty years old; but she might have acted as executrix and have disposed of her personal estate at seventeen, and according to late decisions might have made her will even at fourteen: I think, therefore, that the daughter's representative is clearly entitled to the residue of the personal estate.

As to the real estate, construing the words by the same rule, the age of twenty-one is the fixed period at which the power of disposition over a real estate can be first exercised. The consequence is, that the contingency upon which the real estate was devised over has happened; and the bequest to the charity must therefore take effect. As to what may remain of the real estate after this bequest to the charity is satisfied, it has been contended, that the devise to the sisters is made to depend upon the contingency of *Bridget's* dying unmarried, which has not happened. It is not unlikely that the testatrix intended that the £6000 should go to the charity in one event, and the residue to her sisters in another; and I do not see how the sentence can be divided in construction. The words used are doubtful; and an heir at law cannot be disinherited by obscure and doubtful words. I therefore, am of opinion that the residue of the real estate must be considered as a resulting trust for *Bridget*, as heir at law to her mother.

I decreed that the plaintiff's wife living to such age as she might have disposed of the personal estate by will, the event never happened upon which the bequest over was given, and that therefore, the surplus of the personal estate vested in her, and belonged to her husband as her administrator.

[283] That as to the real estate the dying before the age to dispose of it, the contingency had happened whereon the charge of £6000 for the charity was to take place, and the charity to be established. But I took the surplus (if any) of the real estate to be given over only in case she died unmarried; and that she having married, that contingency did not take place; and that the plaintiff, her daughter, was entitled to such surplus as her heir. (Reg. Lib. B. 1737, fo. 322.)

The next day Lord Chancellor cited the case of *Whitmore v. Weld*, 1 Vern. 326 and 347. 2 Vent. 367. 2 Cha. Rep. 383.

William Whitmore, the father, made his will in these words, *viz.*

"The surplus of my personal estate, my debts, legacies, and funerals, being paid, I give to the Earl of Craven, for the use of my only son, *William Whitmore*, and the heirs lawfully descended of his body; and for the use of the issue-male and issue-female descended from the bodies of my sisters *Elizabeth Weld*, *Margaret Kemish* and *Ann Robinson*, in case my only son *William Whitmore* should decease in his minority, without having issue lawfully descended from his body. I nominate and appoint my only son *William Whitmore*, executor of my last will and testament. I nominate and appoint the Earl of Craven, during the minority of my son *William*, executor of my said will."

Testator died, *William Whitmore* the son, being then of the age of thirteen years. The Earl of Craven proved the will. The son married and died without issue, being above the age of eighteen years and under twenty-one, not having proved his father's will; but the son had made a will and his wife executrix.

A bill was brought by the son's widow and executrix to have the benefit of the surplus of the father's personal estate. And the question at the hearing was, whether she or the children of the father's sisters who claimed by the devise over were entitled.

The cause was first heard by Lord Keeper North, who made a case of it for opinion of the judges of the Common Pleas; but after his death and before any certificate the cause came to be reheard by Lord Jeffreys, who was clear [284] in his opinion for the executrix of the son, and decreed accordingly. And he held, First, That the words *if the son should decease in his minority*, being applied to personal estate should be understood under the age of seventeen, when the minority as to disposing of personal estate determined, and the rather because the son was made executor, and then the

executorship vested in him; and he held, the *minority* in the devise over and the minority to suspend the executorship should be understood in the same sense. Mr. *Vernon* makes him go further and say that the trust was vested in the son, and the remainder over was void. But though that is loosely expressed, it must be understood of the case as the fact had happened; for it cannot be doubted, but the devise over on the contingency of the son's dying without issue in his minority was good in its creation.

Mr. *Vernon* reports Lord *North* (though he made a case) to have said that the question touching the minority was a considerable point.

(1) The statement of this case, the arguments of counsel, the substance of the decree, and the case of *Whitmore v. Weld*, are taken from Lord *Hardwicke's* Note-book. The judgment is compiled from three manuscript reports, compared with that of Mr. *Atkyns*.

(2) A court of equity leans against double portions. A portion to a child, by the will of the parent, if there is any other prior provision, is *prima facie* a satisfaction, per Lord *Alvanley* in *Hinchliffe v. Hinchliffe*, 3 Ves. 527; and the same rule prevails whether the double portion be given by will or by deed, *Thomas v. Kemish*, 2 Vern. 348. *Bruen v. Bruen*, ib. 439. *Blois v. Blois*, 2 Ch. R. 162. *Ackworth v. Ackworth*, cited in 1 Bro. C. C. 307. *Byde v. Byde*, 2 Eden's Rep. 19. *Finch v. Finch*, 4 Bro. C. C. 38. But a bequest, to be considered as given by way of satisfaction, must be of the same nature, per Lord *Hardwicke* in this case, post, page 280. Land cannot be considered as given in satisfaction for money, nor money for land, *Eastwood v. Vinke*, 2 P. Wms. 616. *Chaplin v. Chaplin*, 3 P. Wms. 229. *Goodfellow v. Burchett*, 2 Vern. 298. *Ray v. Stanhope*, 2 Cha. Rep. 159. *Saville v. Saville*, 2 Atk. 458. *Grave v. Lord Salisbury*, 1 Bro. C. C. 425. *Holmes v. Holmes*, ib. 555. *Forsight v. Grant*, 1 Ves. jun. 298; and must be equally certain, a contingent legacy is not a satisfaction for an absolute portion, therefore a legacy payable at twenty-five years of age, but in case of marriage between twenty-two and twenty-five, then to the issue; but in case of the event of dying unmarried, then over, is not a satisfaction for a bond to be paid at twenty-one, *Jeacock v. Falkener*, 1 Cox's Cas. 37, and 1 Bro. C. C. 295. *Hanbury v. Hanbury*, 2 Bro. C. C. 352 and 529. *Bengough v. Walker*, 15 Ves. 514. But with respect to portions, this Court, which always leans against incumbering estates twice over, will overlook little circumstances of time, per Lord *Hardwicke*, *Clark v. Sewell*, 3 Atk. 98; and see *Jesson v. Jesson*, 2 Vern. 255. *Thomas v. Kemish*, ib. 348; and see *Hartopp v. Hartopp*, 17 Ves. 184. *Secus* with respect to debts, *Clark v. Sewell*, 3 Atk. 96, 98. *Richardson v. Greese*, 3 Atk. 67. *Haynes v. Mico*, 1 Bro. C. C. 129. *Adams v. Lavender*, 1 M'Leland & Young, 51. And both portions must come from one and the same person, *Sir Robert Walpole v. Lord Conway*, Barn. Rep. 153; but see *Copley v. Copley*, 1 P. Wms. 147.

And it is a general rule that where a parent, or a person in *loco parentis*, gives a legacy as a portion, and afterwards upon marriage, or on any other occasion, advances a greater or equal sum, that sum shall be deemed a satisfaction of the legacy, see *Trimmer v. Bayne*, 7 Ves. 515. *Irod v. Hurst*, 2 Freeman, 224. *Hale v. Acton*, 2 Ch. Rep. 35. *Hartop v. Whitmore*, 1 P. Wms. 681; Pre. in Ch. 541. *Jenkins v. Powell*, 2 Vern. 115. *Scotton v. Scotton*, 1 Str. 235. *Biggleston v. Grubb*, post. *Monck v. Lord Monck*, 1 Ba. & Be. 298. *Dwyer v. Lysaght*, 2 Ba. & Be. 156. But the sum advanced must be equally certain with the legacy, and not depend upon contingencies, *Spinks v. Robins*, 2 Atk. 491. And where the advancement is made in satisfaction of a different claim, and given absolutely, but the legacy with limitations, the advancement shall not be a satisfaction of the legacy, *Baugh v. Reed*, 3 Bro. C. C. 191. *Roome v. Roome*, 3 Atk. 181. *Robinson v. Whitley*, 9 Ves. 577. But in order to apply these general rules as to double provisions, the donor must be a parent, or a person in *loco parentis*, Per Sir William Grant, *Wetherby v. Dixon*, 19 Ves. 412. And, therefore, no presumption of satisfaction arises between a putative father and illegitimate child, *Pye Ex parte*, *Dubost Ex parte*, 18 Ves. 140. *Wetherby v. Dixon*, 19 Ves. 407. *Richardson v. Elphinstone*, 2 Ves. jun. 464. *Powell v. Cleaver*, 2 Bro. C. C. 500. *Spinks v. Robins*, 2 Atk. 492. *Shudal v. Jekyll*, 2 Atk. 518. And it is the unquestionable doctrine of the Court, that where a parent gives a legacy to a child, not stating the purpose with reference to which he gives it, the Court understands him as giving a portion; and if the father afterwards advances a portion on the marriage of that child, though

of less amount, it is a satisfaction of the whole, or in part, per Lord Eldon, *Pye* Ex parte, *Dubost* Ex parte, 18 Ves. 151. Notwithstanding this authority, it is apprehended that there is no case in which the Court, in the absence of evidence, or intention expressed upon the instruments, whereby the double portions are given, has decided that *simpliciter* an advancement of a less sum by a parent to a child, will be a satisfaction *pro tanto* of a legacy of a larger sum given by the parent to that child ; Or where there has been a prior provision by settlement, a smaller subsequent provision by will has been held to be a satisfaction *pro tanto* of the provision by settlement. It is to be observed that, in *Jesson v. Jesson*, 2 Vern. 255, the settlement was qualified by the terms, " unless preferred in my life." And in *Hoskins v. Hoskins*, Pre. in Ch. 263, evidence was admitted to prove that the latter sum was given in satisfaction. And in *Warren v. Warren*, 1 Bro. G. C. 310, it appeared upon the face of the will that the testator had forgotten the settlement. On the contrary, in *Savile v. Savile*, 16 Vin. Abr. 442, it was insisted, that in the case of double portions, there is no instance where the second provision is less than the first, that ever it was held a satisfaction ; and *Tracy, J.*, held accordingly, and observed that in all the cases cited, the second sum was more, or at least equal to the first provision. And in *Warren v. Warren*, 1 Bro. C. C. 310, *Ashurst, J.*, says, "*Duffield v. Smith*, 2 Vern. 258, was held no satisfaction, because less." And Lord Thurlow, in *Hanbury v. Hanbury*, 2 Bro. C. C. 360, says, " Is there any case where the second portion has been held a satisfaction, that it was not a *plenary* portion, to take effect in all events." And Lord Northington, in *Byde v. Byde*, 2 Eden's Rep. 23, says, " The plaintiffs say, that a double portion must, first, be a legacy equal to the portion " : secondly, equally beneficial ; and, thirdly, *ejusdem nature* and certain ; and it is true that where the question arises upon a simple devise of a legacy of a sum to a child, without the intimation of the amount and intended application of it—these are established rules. And it is stated to have been said by the Court, in *Grimes v. Alleyn*, that they had never gone so far as to deduct the less portion by will from the larger by gift, see *Hanbury v. Hanbury*, 2 Bro. C. C. 360. And in *Rawlins v. Powell*, 1 P. Wms. 297. *Barret v. Beckford*, 1 Ves. 520, the Court says, where a sum of money is given by settlement, and a like or greater sum is given by will, the Court has presumed satisfaction, thereby implying that a less sum would not be a satisfaction. And Mr. Cox, in his note to *Blandy v. Widmore*, 1 P. Wms. 324, states as one of the distinctions between satisfaction and performance, that in cases of satisfaction the presumption will not hold, where the thing substituted is less beneficial in amount, as satisfaction implies doing something equivalent.

A residue given by will cannot be taken as a satisfaction, *Barret v. Beckford*, 1 Ves. 520. *Alleyn v. Alleyn*, 2 Ves. 38. *Devese v. Pontet*, cited in Pre. Cha. 240. *Farnham v. Phillips*, 2 Atk. 215. *Freeman v. Banks*, 5 Ves. 79. Though Lord Thurlow said that a residue should go in satisfaction of a portion, D. per Lord Thurlow, *Rickman v. Morgan*, 1 Bro. C. C. 63, but where a testator says, that he gives so much of his residuary estate as shall be of the value of £2000, whether that would not be a satisfaction of a portion of £2000, *quære* per Sir William Grant in *Bengough v. Walker*, 15 Ves. 515 ?

Distinctions have been established between cases of satisfaction and performance, see *Garthshore v. Chalze*, 10 Ves. 12. *Goldsmid v. Goldsmid*, 1 Swans. 219. *Wathen v. Smith*, 4 Mad. 325. *Adams v. Lavender*, 1 M'Lel. & Young, 51, and though it seems doubtful whether there can be a part satisfaction in the absence of evidence or intention ; yet there may be a part performance ; in a covenant to purchase and settle lands of a given value, a purchase is taken in fee in the name of the covenantor of lands of a less value ; upon his death intestate, the purchase shall be considered as made in part performance of the covenant, *Lechmere v. Earl of Carlisle*, 3 P. Wms. 228. *Sowden v. Sowden*, ib. Mr. Cox's note, ib. *Deacon v. Smith*, 3 Atk. 323. *Attorney-General v. Whorwood*, 1 Ves. 540. *Davies v. Howard*, 5 Bro. Parl. Ca. 552. So where a husband covenants to leave his wife after his decease a sum of money, and dies intestate, her distributive share under the statute shall go, if greater or equal in performance, if less in part performance of the covenant, *Blandy v. Widmore*, 1 P. Wms. 324. *Lee v. D'Aranda*, 1 Ves. 1. And it makes no difference whether the husband covenants to leave, or that the executors shall pay, per Lord Hardwicke, *Lee v. D'Aranda*, 1 Ves. 2 ; or whether the wife takes out administration or not, per Lord Eldon, in *Garthshore v. Chalze*, 10 Ves. 12. So a period of six months has been, in cases of satisfaction considered material, and in cases of performance little regard has been paid to it by the

Court, *Garthshore v. Chalie*, 10 Ves. 8, and see *Sparkes v. Cator*, 3 Ves. 530; but where the husband covenanted to pay a sum within two years after marriage, and if he died his executor should pay; having died after the two years leaving a larger sum, it was held, there having been a breach of the covenant in his lifetime, a distributive share under the statute would not be a performance of the covenant, *Oliver v. Brighthouse*, cited in 1 Ves. 1; and see *Garthshore v. Chalie*, 10 Ves. 12; and see *Adams v. Lavender*, 1 M'Leland & Young, 51.

MARTIN LEAKE, *Plaintiff*; (1) and THOMAS BENNETT and HANNAH his Wife, WIVELL, who married ELIZABETH, Sister to HANNAH, and THOMAS NORTON, *Defendants*.

February 21st, 1737. 1 Atk. 471.

Sir *J. L.* gives by a codicil to his will, to his niece during her life, his house, with the household goods, &c., that shall be found therein at the time of his decease; The word *with* so conjoins the devise of the house and household goods, that the devisee can only have a life estate in both. (See *Richards v. Baker*, 2 Atk. 321.) The word *with* would have the same effect in a grant.

Sir *John Leake*, by his will, dated 18 Feb. 1717, bequeathed as follows:—I give to my nieces *Hannah Martin*, and *Elizabeth*, or which shall be living at the time of my [285] death, all my plate, household goods, &c., which shall be in my house at *Maze Hill*, at the time of my decease.

By a codicil, dated 1st of August 1719, he bequeathed as follows:—I give to *Hannah Martin* £100 *per ann.* for life, over and above what I have given her by my will. I also give to the said *Hannah*, during the term of her natural life, the house at *Maze Hill*, with all the household goods, plate, and furniture, and all the goods that shall be found therein at the time of my decease, except my wearing apparel.

Both the nieces were living at the time of the testator's death, but *Elizabeth* afterwards died.

The bill was for an account of the furniture and goods, and to settle the rights of the parties.

The question was, whether *Hannah Bennett* was entitled to the furniture and goods absolutely, or for her life only.

Mr. *Fazakerley*, Mr. *Hamilton*, and Mr. *Bicknell*, for the plaintiff.

The house is clearly given for life only, and whatever is given under a *una cum* or *simul cum*, is understood to be given for the same interest as the principal matter. It would be so if a grant were made of certain lands, with all and singular other lands, commons, &c.

In 1 Rol. Abr. 844, l. n. pl. 2, it is said, that if a man devise *Blackacre* to one in tail, and also *Whiteacre*, the devisee shall have an estate tail in *Whiteacre* likewise, because it is all one sentence. In *Cole v. Rawlinson*, 1 Salk. 234, the same effect was given to the word *also*, which is now contended for. If it had been intended that as large an interest should pass by the codicil, as had been given by the will, there would have been no necessity for mentioning the goods in that way. If then an interest for life only is given by the codicil, the greater interest given by the will is thereby revoked, *Coke v. Bullock*, Cro. Jac. 49.

Mr. *Chute*, for the defendant *Wivell*, who had married the other niece, *Elizabeth*, contended that by the will, *Elizabeth* and *Hannah* were tenants in common, and that the representative of *Elizabeth*, was therefore entitled to one half of the goods, subject to the life estate of *Hannah*, given by the codicil.

Mr. *Broune* and Mr. *Clarke*, for the defendants *Bennett* and *Hannah*, his wife, contended that the two nieces by the will, would have been entitled as jointenants, and that the codicil must either be construed to give an absolute interest [286] in the goods to *Hannah*, or if the words in the codicil should be held to give only an estate for life, then the bequest by the will must stand good, so far as it is not altered by the codicil. That as the testator's son died between the date of the will and that of the codicil, it would be strange to suppose that the testator intended to give to his niece a less beneficial interest in the goods at the time when he was increasing his bequests to her in respect to the additional £100 *per ann.* and the house.

Feb. 21, 1737.—*Lord Chancellor*. The question is, whether this be an absolute devise to *Hannah*, or for life only.

The first consideration is, what she would have taken under the will.

It is plain the nieces would have taken as joint-tenants, and only the particular goods so bequeathed, for the goods excepted they could not, though in the house at *Greenwich*; and the survivor would have taken the whole.

The codicil has made a total alteration in two respects; instead of a joint interest, it is made a sole interest, instead of an absolute property, an interest for life; and *Hannah* likewise takes the goods excepted, and consequently it is a revocation of the will, and an entire new bequest. If the codicil had stood alone, it would have been plainly a gift of the goods for life only; and the word *with* being made use of, it so conjoins the devise of the house, and household goods, that the devisee can have no larger interest in the household goods, than was expressly limited as to the house. If the words "during her natural life" had been subjoined to the devise of the house, it had not been so clear a case, though I think that would not have varied the law of the case neither; but those words being put before the devise, must operate equally on both parts of the subsequent devise, and the same interest pass in both. The word *with* would have had the same effect, and been construed in the same manner in the case of a grant.

His Lordship took notice of a case in 1 Rol. Abr. 844, letter M. No. 2. If a man devise *Blackacre* to one in tail, and also *Whiteacre*, the devisee shall have an estate tail in *Whiteacre* likewise, for this is all one sentence, and consequently the words that make the limitation of the estate go to both, *Trinity*, 40 Eliz. B. R. He cited too the case of *Cole v. Rawlinson*, Salk. 234, where the word *also* had the like effect, and the same construction put upon it.

Mr. *Fazakerley*, on behalf of the plaintiff, insisted upon [287] the defendant's giving security for the goods, as the Court had determined she had only an interest for life.

Lord Chancellor said he never knew it done, and therefore would not oblige the defendant to do it in this case, but directed an inventory to be made by the defendant *Bennett*, and signed by him and his wife, and to be delivered to the plaintiff. (*So Bill v. Kinaston*, 2 Atk. 82. *Foley v. Burnell*, 1 Bro. C. C. 279.)

(1) The statement of this case, and the arguments of counsel, are taken from *Lord Hardwicke's Note-book*. The judgment from *Atkyns*.

SAMUEL NEWSTEAD, JOHN STOKES, and SUSSANNAH his Wife, JOSEPH ATKINSON and ELIZABETH his Wife, and SAMUEL NEWSTEAD the Elder, a Bond Creditor, *Plaintiffs*; (1) and SAMUEL SEARLE, THOMAS MILLER, a Mortgagee, JAMES BALLS, and Others, *Defendants*.

[See *Doe v. Manning*, 1807, 9 East, 68; *Dickenson v. Wright*, 1860, 5 H. & N. 412; *Clarke v. Wright*, 1861, 6 H. & N. 867, 879. Distinguished, *Smith v. Cherrell*, 1867, L. R. 4 Eq. 396. Commented on, *Price v. Jenkins*, 1876, 4 Ch. D. 483 (reversed on different point, 5 Ch. D. 619). Followed, *Gale v. Gale*, 1877, 6 Ch. D. 144. Approved, *Mackie v. Herbertson*, 1884, 9 App. Cas. 336. Discussed and principle not extended to widower's children, *In re Cameron and Wells*, 1887, 37 Ch. D. 32. See also *Tucker v. Bennett*, 1887, 38 Ch. D. 10. Explained, *De Mestre v. West*, [1891] A. C. 264; *Att.-Gen. v. Jacobs Smith*, [1895] 2 Q. B. 341.]

March 2nd, 1737. 1 Atk. 265.

A widow who had two children by a former husband, and these two children, each of them a child, and being entitled after the death of her mother, to certain freehold, copyhold, and leasehold estates, by articles before her second marriage, to which her husband was a party, and with his consent, covenanted that trustees should stand seised of the freehold, copyhold, and leasehold estates, if no issue of the marriage, in moieties; one to the plaintiff, her grandson, his heirs and assigns, the other to her grand-daughter in fee; provided, if there should be any child or children of the marriage, such child or children, to have an equal share of the said estates with the grandson and grand-daughter; The husband and wife afterwards mortgage the

estates to persons who had notice of the articles ; Declared that the articles are no voluntary agreement, but a binding one, and that it was not fraudulent and void against subsequent purchasers or creditors.(2)

Elizabeth Martin was entitled, under the will of her father, *John Cornwallis*, dated in 1798, to certain freehold, copyhold, and leasehold estates, of the annual value of £150, after the death of her mother, *Grace Cornwallis* ; and by her first husband had issue *Elizabeth*, the mother of the plaintiff, *Samuel Newstead*, and the plaintiff *Susannah Stokes*, the mother of the other plaintiff, *Elizabeth Atkinson*.

[288] After the death of her first husband, *Elizabeth Martin* married the defendant *Samuel Searle*, and by indenture, by way of settlement, made previous to that marriage, and dated the 30th of April 1709, reciting the will of *John Cornwallis*, and that it had been agreed that *Elizabeth Martin* should dispose and settle her estate to the uses and purposes thereafter mentioned ; the said *Elizabeth Martin*, with the consent of the said *Samuel*, for the settlement of her estate upon such children and grandchildren of her the said *Elizabeth*, as she should have living, either by her late husband, *John Martin*, or by *Samuel Searle*, at the time of her death, covenanted that the trustees should, after the death of *Grace*, stand seized of the premises to the uses thereafter mentioned ; that is to say, To apply the rents, during the coverture, in manner therein mentioned, whereby power was reserved to *Elizabeth* to charge the estates with £200, to be paid after her decease, as she should appoint, and for want of such appointment, to be paid to her husband ; and after the deaths of *Grace* and *Elizabeth*, if there should be no issue of the marriage between *Samuel Searle* and *Elizabeth*, living at her decease, to convey one moiety of the premises to the plaintiff, *Samuel Newstead*, his heirs and assigns, and the other moiety to the plaintiff, *Susannah Stokes*, for life ; and after her decease, to her said grand-daughter, the plaintiff, *Elizabeth Atkinson*, in fee, provided that if there should be any children of the marriage between [289] *Samuel Searle* and *Elizabeth*, such children should share equally with the children of the first marriage.

The marriage took effect, and after the death of *Grace* in 1719, the husband, *Samuel Searle*, entered upon the premises, and received the profits, and continued so to do notwithstanding the death of his wife, *Elizabeth*, in Nov. 1733, without leaving any issue by him.

By indenture of 15th of May 1710, between *Searle* and *Elizabeth*, his wife, of the first part, and *Coleman* and others trustees, of the second part, reciting the will of *John Cornwallis*, and the articles of 30 April 1709, and that *Elizabeth*, previous to her marriage with *Searle*, was indebted by a bond to *John Stokes*, in order to indemnify *Searle* against that bond, it was covenanted that *Searle* and *Elizabeth*, his wife, should levy a fine to the use of *Coleman*, &c., for 500 years, in trust to raise £200. The leasehold estates were also assigned to *Coleman* for the separate use of *Elizabeth*, for her life, and afterwards as she should appoint.

By indenture of 4th of March 1719, reciting the above deed, and that a fine had been levied accordingly, and that *Searle* and his wife had occasion to borrow £200, in consideration of £200 paid to defendant *Searle*, *Coleman*, &c., with the consent of *Searle* and his wife, convey the freehold premises to *Thomas Pinder* to hold for the residue of the term of 500 years, redeemable on payment of £200 and interest by *Searle* the husband, and his heir ; and as a further security by the same indenture, assign the leasehold premises to *Thomas Pinder*. This mortgage through divers mesne assignments, had become vested in the defendant *Miller*, who having advanced divers other sums to *Searle* and his wife, claimed £1310 as due upon that security, and insisted that he had no notice of the claim of the plaintiffs.

It was admitted, that all the subsequent deeds by which he claimed, were founded on that of 4th March 1719, and that he must, therefore, be affected by any notice which that deed conveyed.

The object of the bill was to obtain payment of the bond debt out of the estate, and that the other plaintiffs might have a conveyance and assignment of the estates upon the foot of the articles of 30th April 1709, and to set aside incumbrances upon the estates made in prejudice of the articles, and to have satisfaction for breaches of the covenants in the articles, and for accounts of rents since the death of *Elizabeth Searle*.

[290] Mr. Attorney-General, for the plaintiffs, contended that as to the mortgagees, there was clear evidence of notice that *Pinder*, the original mortgagee, took his conveyance from the trustees, and not from the husband and wife ; that the plaintiffs were not

mere volunteers, for that every reciprocal stipulation previous to marriage, imports a consideration. In this case the husband would have been tenant by the curtesy of the freehold, and would have had an absolute power to dispose of the leasehold. In *Osgood v. Strobe*, 2 P. Wms. 245, the question was, as to a remote relation claiming after a previous estate tail. Here the plaintiffs were the primary objects of the settlement; they were to be preferred, or at least, to take equally with the children of the second marriage. In *Lechmere v. Lechmere*, Ca. temp. Talb. 80, and 3 P. Wms. 211, the covenants of a marriage settlement were enforced for the benefit of an heir at law, although he was not one of the immediate objects of its provisions.

Mr. Attorney-General, and Mr. Browne, for the defendant *Miller*, the mortgagee, contended that the plaintiffs were mere volunteers, that no consideration moved from them. That it was the same thing as if the agreement had been made upon any other occasion. That the question was not, whether these articles were fraudulent as against purchasers, but whether the Court would assist the plaintiffs, who were mere volunteers, to carry them into execution. That in *Parry v. Hughes*, 2 Eq. Ca. Abr. 54, the Court refused its aid, one claiming under similar circumstances. In *Osgood v. Strobe*, 2 P. Wms. 255, Lord *Macclesfield* said, that the husband and the wife, and the issue, were the only parties who could be presumed to be stipulated for in marriage articles, and that in *Vernon v. Vernon*, 2 P. Wms. 595, the plaintiffs had a sort of claim which the settlement might have been intended to satisfy. That if plaintiffs were to be considered as mere volunteers, the question of notice was immaterial, but if not, that no sufficient evidence of notice had been given.

Mr. Green, for the defendant *Searle*, contended that he was entitled to the equity of redemption.

Lord Chancellor. The question is, whether the articles of the 30th of April 1709, are for a valuable consideration, and binding, or ought to be considered as voluntary and fraudulent, with respect to subsequent creditors or purchasers.

[291] If I was to lay it down as a rule, that such articles as these are not binding, it would become impossible for a widow, on her second marriage, to make any certain provision for the issue of a former, and the second husband might then contrive to defeat the provision made for those children. (Vide *Cotton v. King*, 2 P. Wms. 358, 674. *Countess of Strathmore v. Bowes*, 2 Bro. C. C. 345; 1 Ves. jun. 22.)

I am of opinion these articles ought not to be considered as a voluntary agreement, and that the plaintiffs are entitled to relief in this Court. This is the case of a widow, who has two children by a former husband, and no provision made for them, and those two children have each of them a child, and the mother being in possession in her own right of freehold estate, leasehold, and copyhold, the second husband, if there had been a child born alive, would have been entitled to be tenant by the curtesy of the freehold, and also to the leasehold and copyhold immediately upon the marriage.

To prevent this, by the articles before the second marriage, £200 is allowed to be raised by the wife out of the estate, and in case there should be no children of the second marriage, then one moiety thereof was to go to the plaintiff *Newstead*, his heirs and assigns, and the other to *Susanna Stokes* for life, remainder to *Elizabeth Atkinson*, her heirs and assigns, the former her grandson by the first marriage, and the latter her daughter and granddaughter; but if there should be any child or children of the second marriage, then they were to have an equal share with the plaintiffs.

Upon the mortgage to *Pinder*, by the contrivance of some country attorney, *Elizabeth Searle* and her husband levied a fine; and in the deed to lead the uses there is a complete recital of the will, under which the wife claimed, and of her marriage settlement, in so ample a manner, that the will and settlement must necessarily have been laid before him, and he must consequently have had full notice of it as agent for the mortgagee.

The children of the first marriage stand in the very same plight and condition as the issue would have done, if there had been any of the second marriage, and even are provided for before them.

Supposing there had been issue of the second marriage, and they had brought their bill to carry these articles into [292] execution, upon a decree in their favour, would not the children of the first marriage have been equally entitled to a benefit from the decree?

Taking the case with all its circumstances, I think the settlement no voluntary agreement, but a binding one; the statute of the 13 & 14 of Eliz. that makes conveyances fraudulent, are voluntary conveyances, made against purchasers for a valu-

able consideration, or *bona fide* creditors : but it would be difficult to shew that such a limitation, as the present case, has been held fraudulent, and void against subsequent purchasers or creditors.(3)(4)

The present is a stronger case, for here are reciprocal considerations both on the part of the husband and wife, by the provision under the articles for the children of the second marriage.

The mortgagees had notice that the lands were liable to these articles, and therefore the plaintiffs are entitled to have the benefit of them against the defendants who are affected by notice ; and his Lordship decreed an account to be taken of what is due for the principal sum of £200 and interest, from the death of *Elizabeth*, the late wife of the defendant *Searle*, deducting what has been received by *Miller* in respect of the rents and profits since the death of *Elizabeth*, and to tax *Miller* his costs, so far as relates to the mortgage of £200, and upon being paid what shall be reported due. [293] ordered the defendants *Miller* and *Searle* to convey the freehold, and to assign the leasehold, and surrender the copyhold free of all incumbrances done by them to the plaintiff *Newstead*, *Susanna* the wife of *Stokes*, and *Elizabeth* the wife of *Atkinson*, according to the several estates and interest therein provided and limited to them by the said marriage articles, subject to the charge of £50 and interest, due on bond to the plaintiff, *Samuel Newstead* the elder. (Reg. Lib. B. 1737, fo. 478.)

(1) The statement of this case is taken from the Register's Book, the arguments of counsel from Lord *Hardwicke's* Note-book, and the judgment from *Atkyns*.

(2) But marriage articles will not be carried into execution against purchasers for valuable consideration, and without notice ; see *Warwick v. Warwick*, 3 Atk. 292. *West v. Errissey*, 2 P. Wms. 355. *Powell v. Price*, ib. 539. *Hart v. Middlehurst*, 3 Atk. 376, and see Mr. *Fearne's* remarks upon these cases in *Fearne's* Contingent Remainders, p. 73. Nor will they be carried into execution in favour of collateral relations against judgment creditors, *Finch and Others v. Earl of Winchelsea*, 1 P. Wms. 277, though they will be supported between relations in a family, per Lord *Hardwicke* in *Goring v. Nash*, 3 Atk. 188, and see *Vernon v. Vernon*, 2 P. Wms. 600, or between parties to the articles and their representatives, and mere volunteers, *West v. Errissey*, 2 P. Wms. 349, and see *Warwick v. Warwick*, 3 Atk. 293. *Kittleby v. Atwood*, 1 Vern. 298, 471. *Lancy v. Fairchild*, 2 Vern. 101. *Stephens v. Trueman*, 1 Ves. 73. *Hart v. Middlehurst*, 3 Atk. 372. *Barstow v. Kilvington*, 5 Ves. 593. *Sutton v. Chetwynd*, 3 Mer. 249 ; and though it has been formerly held that in settlements the consideration of marriage would not only make good against creditors and purchasers the limitations for the husband, wife, and children, but would also make good all the limitations contained in the settlement, though they were not the immediate objects of the settlement, see *Osgood v. Strode*, 2 P. Wms. 252. *Jenkins v. Keymis*, 1 Lev. 150, 237 ; 1 Ch. Rep. 275. *Hamerton v. Milton*, 2 Wils. 356 ; yet by modern determinations, against purchasers, even with notice, limitations to the brothers of the settlor, who were not the immediate objects of the settlement, have been held void, *Johnson v. Legard*, 3 Mad. 289 ; 6 Maul. & Sel. 60, and see *Cormick v. Shepherd*, 6 Dow. 60.

(3) *Jenkins v. Keymis*, 1 Lev. 150 & 237. There Sir *Nicholas Keymis*, being tenant for life, remainder to his son *Charles* in tail, in 1641, in consideration of a marriage to be had between the son and *Blanch Mansell*, and £2500 portion, levied a fine to the use of Sir *Nicholas Keymis* for life, remainder to *Charles* and *Blanch* for their lives, remainder to the heirs of the body of *Charles* of *Blanch* begotten, remainder to the heirs of the body of *Charles*, with power for Sir *Nicholas Keymis* to charge the premises with £2000. Sir *Nicholas* and *Charles*, in 1642, joined in a lease and release to *David Jenkins* and his heirs for £2000, on condition of payment of £2000 with interest some years after, to be void, *Blanch* afterwards dies without issue, *Charles Keymis* marries another wife, by whom he had issue the defendant, and dies ; the mortgagee dies, and his heir brought an ejectment, and adjudged the lease and release was no good execution of the power at common law. He then brought his bill in equity on these grounds : first, that the consideration of the marriage of *Blanch*, and the £2500 paid with her, did not extend to the defendant, being an issue by the second venter, and so the estate in remainder whereby he claimed was voluntary ; (two other grounds not material to this case) but on the first. Lord Keeper *Bridgman* declared that the

consideration of £2500 paid on the first marriage, should extend to the issue by the second venter.

(4) See *Walker v. Burrows*, 1 Atk. 94. Doe ex dem. *Watson v. Roulledge*, Cowp. 705. *Olley v. Manning*, 9 East's Rep. 59. *Pulvertoft v. Pulvertoft*, 18 Ves. 84, and see the note at the commencement of this case.

The MAYOR, &c., of YORK v. PILKINGTON and Others.(1)

[See *Smith v. Earl Brownlow*, 1870, L. R. 9 Eq. 256; *Warrick v. Queen's College, Oxford*, 1870, L. R. 10 Eq. 125; *Betts v. Thomson*, 1871, L. R. 6 Ch. 735 (n.); *Att.-Gen. v. Barker*, 1872, L. R. 7 Ex. 182; *Commissioners of Sewers of City of London v. Gellatly*, 1876, 3 Ch. D. 615; *Mayor of Norwich v. Brown*, 1883, 48 L. T. 901.]

December 17th, 1737, and March 13th, 1737. 1 Atk. 282.

Where there has been a possession of a fishery for a considerable length of time, a person who claims a sole right to it, against five different lords of manors, and between whom and the plaintiffs there is no privity, nor any general right on the part of the defendants, may bring a bill to be quieted in the possession,(2) and to have his right established, though he has not established his right at law; and it is no objection upon a demurrer to such bill that the defendants have distinct rights, for upon an issue to try the general right, they may at law take advantage of their several exemptions and distinct rights.

The bill was brought by the plaintiffs, who claimed several rights of fishery on the river *Ouse* (against the defendants, who were the lords of five several manors, and were alleged to claim several rights, either as lords of the manors, or as occupiers of the adjacent lands), to be quieted in the enjoyment of their right of several fishery, and for an account of the fish taken by the defendants.

To this bill the defendants demurred.

Lord Chancellor. Such a bill against so many several trespassers is improper before a trial at law; a bill may be brought against tenants of a lord of a manor for encroachments, &c., or by tenants against a lord of a manor as a disturber, to be quieted in the enjoyment of their common; and as in these cases there is one general right to be established against all, it is a proper bill, nor is it necessary all the commoners should be parties (see *Brown v. Howard*, 1 Eq. Ca. Ab. pl. 4, p. 163. *Rudge v. Hopkins*, 2 Eq. Ca. Ab. 170, pl. 27. *Poore v. Clark*, 2 Atk. 515. *Cockburn v. Thompson*, 16 Ves. 322); so likewise a bill may be brought by a parson for tithes against parishioners, or by parishioners to establish a modus, for there is a general right and privity between them, and consequently it is proper to institute a suit of this kind. (*Rudge v. Hopkins*, 2 Eq. Ab. pl. 27, p. 170. But a bill of peace will not lie to settle the boundaries of two manors. *Wake v. Conyers*, 1 Eden's Rep. 331; or of two parishes, *Parish of St. Luke's v. Parish of St. Leonards*, 1 Bro. Ch. Ca. 40.)

There is no privity at all in the case, but so many distinct trespasses in this separate fishery; besides, the defendants may claim a right of a different nature, some by prescription, others by particular grants, and an injunction here would not quiet the possession; for other persons not parties to this bill, may likewise claim a right of fishing.

It is more necessary too in this case there should be a trial at law, for it does not clearly appear, whether there is a right even in the plaintiffs, and if it should eventually come out that the Corporation of *York* are lords of this fishery, then would be the proper time to have an injunction to prevent their being disturbed in their possession. His Lordship did not give any judgment upon the demurrer, but ordered it to be adjourned to a future day, and on the 13th March 1737 it came on again to be argued.

Mr. Browne and *Mr. Fazakerley* in support of the demurrer.

The only case in which bills of this nature are permitted in Courts of Equity is where there is one general right extending to several persons, as in questions between a lord of a manor and the tenants, or between a parson and his parishioners. In this case the defendants claim distinct rights of fishery, for though the questions as to all

relate to the same river ; yet different rights may exist in different parts. Each part is like a distinct waste. The plaintiffs claim an ancient prescriptive right in a royal navigable river. The defendants may make the same claim. This bill is attempted to be supported as a bill of peace, and to prevent multiplicity of suits ; but as the defendants claim distinct [295] rights, no issue that can be framed will ascertain or settle the rights of the parties. No determination as to one will bind the others. There is no impediment to the trial of the question at law, and no reason for resorting to this Court.

Mr. Attorney-General and Mr. Idle, for the plaintiffs.

The present will be as effectual as a bill of peace as any bill can be in any other case, for an issue never can finally determine the right of all, since the verdict against one is not pleadable against another. The question and issue to be tried in this case is, whether the plaintiffs have a sole and separate right of fishery, not what rights the defendants may have. In questions between lords of manors and the tenants, the general right of the lord is the only thing established. So in cases of tithes the parson claims one general right ; but each of the tenants may have a separate ground of exemption. In the case of the *City of London v. Perkins*, 4 Bro. P. C. 157 [2nd ed. 3 Bro. P. C. 602], a decree was made against the defendants and in favour of the claim of the city to a duty for the weighage of cheese, without any trial at law the right having been established in former trials between the city and other parties ; and in *Wicker v. Carter*, 1734, a bill was brought by the lord of a manor to establish a right of sixpence for each load of hay brought into the market, and an issue was directed by Lord Talbot to try that right, although of that 6d., 2d. was claimed by the scavenger, and 2d. by the housekeeper against whose house the cart stood ; and the verdict being in favour of the lord, a decree was made accordingly.

March 13, 1737.—Lord Chancellor. When this case was first argued, I was of opinion to allow the demurrer ; but I have now changed my opinion.

Here are two causes of demurrer, one assigned originally and one now at the bar, that this is not a proper bill, as it claims a sole right of fishery against five lords of manors, because they ought to be considered as distinct trespassers, and that there is no general right that can be established against them, nor any privity between the plaintiffs and them.

In this respect it does differ from cases that have been cited of lords and tenants, parsons and parishioners, where there is one general right, and a privity between the parties. But there are cases where bills of peace have been brought, where there has been a general right claimed by the plain-[296]-tiff, and yet no privity between the plaintiffs and defendants, nor any general right on the part of the defendants ; and where many more might be concerned than those brought before the Court. Such are bills for duties, as in the case of the *City of London v. Perkins*, in the House of Lords ; where the *City of London* brought only a few persons before the Court, who dealt in those things whereof the duty was claimed, to establish a right to it, and yet all the king's subjects might be concerned in this right ; but because a great number of actions may be brought, the Court suffers such bills, though the defendants might make distinct defences, and though there was no privity between them and the city.

I think, therefore, this bill is proper ; and the more so because it appears there are no other persons but the defendants who set up any claim against the plaintiffs, and it is no objection that they have separate defences ; but the question is, whether the plaintiffs have a general right to the sole fishery, which extends to all the defendants ; for notwithstanding the general right is tried and established, the defendants may take advantage of their several exemptions, for distinct rights.

Another cause of demurrer is, that the plaintiffs have not established their title at law ; and have therefore brought their bill improperly to be quieted in possession. Now it is a general rule, that a man shall not come into a Court of Equity to establish a legal right, unless he has tried his title at law, if he can ; but this is not so general an objection as always to prevail, for there have been variety of cases both ways.

There are two cases reported together in Prec. in Ch. 530, 531. *Bush v. Western*, and the Duke of Dorset v. Serjeant Girdler,(3) in the former it was held, that a man who has been in possession of a water-course sixty years, may bring a bill to be quieted in possession, although he [297] had not established his right at law ; in the latter, that a man who is in possession of a fishery, may bring a bill to examine his witnesses *in perpetuam rei memoriam*, and establish his right, though he has not recovered in

affirmance of it at law ; otherwise, if he is interrupted and dispossessed, for then he had his remedy at law.

In the present case demurrer was over-ruled. (Reg. Lib. B. 1737, fo. 180.)

(1) The statement of this case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book ; the judgment from *Atkyns*, which has been compared and found substantially to agree with a manuscript report of the same case.

(2) So likewise where many more might be concerned than those brought before the Court, such as bills for duties, *City of London v. Perkins*, 4 Bro. P. C. 157 [2nd ed. 3 Bro. P. C. 602]. But where a question to a fishery is only between two lords of manors, neither of them can come into this Court till the right is first tried at law, per Lord *Hardwicke*, *Tenham v. Herbert*, 2 Atk. 483.

(3) In *Weller v. Smeaton*, 1 Cox's Cases, 102, and 1 Bro. Ch. Ca. 572, Lord *Thurlow* says, " In *Welby v. The Duke of Portland*, in the House of Lords, most of the cases had been looked to, and it was found that, in no instance except that of *Bush v. Western*, this Court had ever interposed in a mere question of right between A. and B., they having an immediate opportunity of trying the right at law ; and see *Anon.* 1 Vern. 172. *East India Company v. Sandys*, ib. 127. *Paulet v. Ingres*, ib. 308. *East India Company v. Interlopers*, 2 Ch. Ca. 165. *Whitchurch v. Hide*, 2 Atk. 391. *Anon.* 2 Ves. 415. *Dilly v. Doig*, 2 Ves. jun. 486. *Devonshere v. Newenham*, 2 Sch. and Lef. 199.

TWISS v. MASSEY.(1)

March 13th, 1737. 1 Atk. 67.

A commission of bankrupt is an action and execution in the first instance. Separate creditors may come under a joint commission, and prove their debts.

A father and son join in trade, and have a commission of bankrupt awarded against them jointly ; the bill was brought by a plaintiff, suggesting that he was a separate creditor for the sum demanded by the bill ; the defendant pleaded his certificate, and that the debt accrued before he became bankrupt.

The question is, how far separate creditors are affected by or can act under a joint commission of bankrupt ; and Mr. *Browne* for the defendant, cited *Ex parte Crowder*, 2 Vern. 706, where separate creditors were allowed to come in under a joint commission ; but the joint effects are first to be applied to pay the partnership debts, and then the separate debts ; and as to the separate effects, first the separate creditors, and afterwards the partnership creditors are to be paid out of the same ; and therefore the plaintiff might have proved his debt under the commission.

Objection, That it was not affirmed in the plea, that the certificate was signed by four-fifths in number and value.

Mr. *Attorney-General* for the plea urged, that such a particular averment was not necessary in this Court, though it might be so at law ; for it is to be presumed here till the [298] contrary is proved, as the plea sets forth, that the certificate had been allowed by the *Lord Chancellor*.

Lord Chancellor. As to the objection of its being a joint commission, that is no objection, for it affects joint and separate estates, because it is never taken out but where both are bankrupts ; a commission of bankrupt is an action and execution in the first instance. Suppose an action against two partners, and judgment ; separate estates are liable to satisfy that judgment ; so in case of bankrupts, separate creditors may come in under that commission, as well as joint-creditors.

As this Court marshals demands and securities, so joint creditors, as they gave credit to the joint estate, have first their demand on the joint estate, and separate creditors as they gave credit to the separate estate, have first their demand on the separate estate : the joint commission therefore discharges them from all their debts expressly by the Act of Parliament, which does not mention joint or separate debts : (2) but if the bankrupt has since the certificate made a new promise, that deserves a consideration and entitles the plaintiff to a discovery ; and therefore his Lordship ordered, that the plea should stand for an answer. (Reg. Lib. B. 1737, fo. 188 b.)

(1) This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Notebook.

(2) So *Horsey's* case, 3 P. Wms. 24. *Ex parte Yale*, note A. *ibid.* *Wickes v. Strahan*, 2 Str. 1157. *Howard v. Poole*, Davies, 431; and by 6 G. 4, c. 16, s. 62, joint creditors may prove under a separate commission for the purpose of voting in the choice of assignees, and of assenting to and dissenting from the certificate; but they are not to receive any dividend until the separate creditors have been paid the full amount of their debts.

[299] AFTER HILARY TERM, 1737.

ANONYMOUS.(1)

2 Atk. 15.

The Statute of Limitations will run, notwithstanding the appointment of a receiver. See *Sharp v. Carter*, 3 P. Wms. 379.

Lord *Hardwicke* said, though a receiver is appointed by this Court, yet that will not alter the possession of the estate in the person who shall be found entitled at the time the receiver was appointed, so as to prevent the Statute of Limitations running on during the right in dispute.

(1) This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Notebook.

DA COSTA VILLA REAL v. MELLISH.(1)

March 16th, 1737. 2 Atk. 14.

A mother being appointed by her husband's will the guardian of her children, by deed agrees to permit her father, being of the Jewish religion, to have the care and education of her children; The mother who had been converted to christianity, and the children, both present petitions that they may be restored to their mother; The petition of the mother is dismissed; but upon the petition of the children, the grandfather is ordered to deliver over the children to the care of their mother.

Catherine Da Costa Villa Real having been appointed guardian of her two children by her husband's will, by a deed of 3rd May 1734, made between her and her father, agreed, that if either of her children should die intestate, one moiety of what she should thereby become entitled to, should go to her father; and further agreed, that she and all other persons who should, in her right, be entitled to the guardianship of the infants, should permit her father to have the care and education of the children.

Mrs. *Da Costa*, and her father, and her late husband, were of the Jewish religion; but Mrs. *Da Costa* was soon [300] afterwards converted to christianity, and married Mr. *Mellish*; who, thereupon by an indorsement upon the deed of 3rd May 1734, ratified all the covenants and agreements contained in that indenture, and undertook to fulfil all the covenants therein entered into by his wife.

The children were accordingly placed under the care of their grandfather; but now two petitions were presented, the one on behalf of the mother, and the other on behalf of the infants, praying that they might be restored to the care of the mother.

Mr. *Broune*, Mr. *Idle*, and Mr. *Clarke*, in support of the petitions, contended, that the guardianship was not assignable, and that the deed was therefore of no effect. That the grandfather was an improper person to have the custody of the persons of the children, because he had an interest in their property in the event of their deaths, and because he still continued of the Jewish religion.

Mr. *Attorney-General* and Mr. *Fazakerley*, for the grandfather, contended, that there was no ground for setting aside the agreement; that although the guardianship itself was not assignable, yet a guardian might agree who should have the actual care of the children. No one is bound to accept the office of guardian; by this deed, the mother has waived it; and by her second marriage, she is no longer *sui juris*. In

Ex parte Hopkins, 3 P. Wms. 152, the Court refused to deliver the infants to their father upon his petition. No objection has been made to the grandfather, except that he is a Jew; but the law does not deprive Jews of the guardianship of their children. The act, 1 Anne, c. 30, ascertains the limits of the law in that respect. The father of these children was a Jew, and no doubt intended that his children should be educated in the same religion. The real question is, whether the Court will interpose to give such a guardian to Jewish children as may change their religion.

The Lord Chancellor dismissed the petition of the mother, but upon the petition of the infants he observed, that although it was probable that that petition proceeded from the same hand, yet that was immaterial, it being the duty of the Court, when any application was made on behalf of infants, to do what was best for their interest. That the Court will not take from Jews the education of their own children, but that the question was not, as had been argued, whether the Court would interpose to give such a guardian to Jewish children as might change their religion, but [301] whether the Court should not take them from out of the hands of a person who had no right to the guardianship, for the purpose of putting them into the custody of a person who has a right, and whose duty it is, both natural and civil to take care of them, and who is of the religion of their country.

His Lordship ordered that the petition of the defendant, Mrs. *Mellish* be dismissed; and upon the petition of the plaintiffs, the infants, it is ordered that the defendant *Joseph Da Costa*, the grandfather, do forthwith deliver over the plaintiffs, the infants, into the hands of the said defendant, *Catherine Mellish*, who is their mother and guardian. This case appears in the Registrar's book under the name of *Villa Real v. Mellish*.

Mr. *Atkyns*, in his Report of this case, states his Lordship to have laid down the following rules:—

That vying and revying in affidavits is intirely discountenanced in the Court of King's Bench, *a fortiori* in a Court of Equity.

That there may be an application to the Court in the case of a guardianship of children, though there be no cause depending. (So *Ex parte Birchell*, 3 Atk. 813, and see likewise *Hargrave's* and *Butler's Co. Litt.* 88 b, note 70. *Ex parte Whitfield*, 2 Atk. 316. *Ex parte Mountfort*, 15 Ves. 448. *Ex parte Myerscough*, 1 J. & W. 151.)

That it is clear in point of law a testamentary guardianship is not assignable.

That the children have a natural right to the care of their mother. (See *Hargrave's* and *Butler's Coke Littleton*, 88 b, note (66).)

(1) The whole of this case is taken from Lord *Hardwicke's* Note-book, except what Mr. *Atkyns* has stated Lord *Hardwicke* to have said, which is not to be found in his Lordship's Note-book.

[302] RIDOUT v. LEWIS.(1)

March 25th, 1738. 1 Atk. 269.

A. had £300 *per annum* pin-money, the husband for several years before his death paid her £200 only, but promised her she should have the whole at last; Held that she was entitled to the arrears of her pin-money out of the estate upon which it was charged. But if the wife accepts less or lets her husband receive what she has a right to receive to her separate use, it implies a consent in her to such a method, where the husband and wife have cohabited together for any time after.(2)

By the settlement made upon the marriage of Mr. and Mrs. *Lewis*, dated 8th of February 1709, a term of 500 years in certain estates was vested in trustees upon trust to raise and pay £300 *per annum*, clear of taxes for the separate and personal use of Mrs. *Lewis*, and subject thereto to Mrs. *Lewis* for life.

Mr. *Lewis* being dead, a bill was filed by his creditors and by the legatees and devisees claiming under his will for the due administration of his real and personal estate.

In this cause Mrs. *Lewis* adduced evidence to shew that for twenty years past she had only received £200 *per annum* instead of the £300 secured to her by the settlement; and that in conversations upon that subject her husband had said to her, You have money when you want it, and you will have it all at last.

[303] Mr. *Browne* for Mrs. *Lewis*, therefore, insisted that she was now entitled to be paid

an arrear of £100 *per annum* for twenty years : and cited *Countess of Warwick v. Edwards*, 1 Eq. Ab. 140.

Mr. Attorney-General, on the other side, insisted that having for so long a time received only £200 *per annum*, she must now be presumed to have given up the remaining £100 *per annum*.

March 25, 1738.—*Lord Chancellor*. I allow that it is a general rule, when a wife accepts a payment short of what she is entitled to, or lets the husband receive what she has a right to receive to her separate use, it implies a consent in the wife to submit to such a method, where the husband and wife have cohabited together for any time after ; but here is no pretence that the pin-money was departed from by the wife. for there is evidence of several payments *eo nomine* ; and though a wife may come to an agreement with her husband in relation to any thing she is entitled to separately ; yet this does not amount to a new agreement ; for here was a promise she should have it at last, which was an undertaking to pay the arrears ; she is therefore entitled to have the arrears of her pin-money raised by the trustees out of the estate, which was by settlement charged with it.

It appearing that the defendant *Lewis* is entitled to a provision of £300 a-year for her separate use during the life of her husband under her marriage settlement ; and that for several years past there hath been a considerable arrear in the payment thereof, which the testator declared his intention should be made good to her ; It is ordered and decreed that the Master take an account of the arrears of the £300 a-year, and what shall be found due on the balance of that account is to be considered as a charge on the term of 500 years created by the marriage settlement for securing the £300 a-year. (Reg. Lib. B. 1740, fo. 35.)

(1) This case is taken from Lord *Hardwicke's* Note-book, excepting the judgment, which is taken from *Atkyns*.

(2) It seems to be a general rule that if the husband receives from the trustees the separate maintenance of his wife, the Court will not charge him with more than one year's income ; upon the notion of the wife's consent to make it a common fund for the expense of the family, per Lord *Eldon*, *D. Brodie v. Barry*, 2 V. & B. 39. *Parkes v. White*, D. per Lord *Eldon*, 11 Ves. 226. *Offley v. Offley*, Prec. Ch. 26. *Aston v. Aston*, 1 Ves. 267. D. per Lord *Hardwicke*, *Lord Townsend v. Windham*, 2 Ves. 7. *Peacock v. Monk*, 2 Ves. 190. *Burdon v. Burdon*, cited in 2 Madd. 286. Though in some cases it has been held, that she shall not have the arrears of her pin-money even for one year, *Powell v. Hankey*, 2 P. Wms. 83. *Thomas v. Bennet*, ib. 342. *Fowler v. Fowler*, 3 P. Wms. 354. *Squire v. Dean*, 4 Browne's Ch. Ca. 325, and *Dalbiac v. Dalbiac*, 16 Ves. 116. But this rule proceeds upon the presumption of the wife's consent to make it a common fund for the support of herself and family ; therefore where part is paid to her and there is a promise to pay the residue of the pin-money as in this case ; and see *Countess of Warwick v. Edwards*, 1 Eq. Ab. 140, pl. 7 ; or where the wife lives separate from the husband and is not maintained by him (*Lady Derby's* case, cited in *Aston v. Aston*, 1 Ves. 267), such presumption is repelled and the wife will be entitled to the whole arrears of her pin-money.

[304] STEPHEN THOMSON and Others, Creditors of JAMES HAMILTON and ROBERT TOLLER, and the said JAMES HAMILTON, Plaintiffs ; (1) and ALEXANDER NOEL and Another, Trustees of the Marriage Settlement of ROBERT TOLLER and his Wife, and the said ROBERT TOLLER and his Wife, Defendants.

April 26th, 1738. See Eq. Ca. Ab. 48 ; 1 Atk. 60.

A. by articles previous to his marriage agrees to vest £1000 in trustees, the interest thereof to be received by A. and his wife, during their lives, and afterwards to be divided between their issue, and gives the trustees a warrant of attorney to confess judgment for that sum, which was entered up accordingly ; A. enters into partnership with B. afterwards, and being indebted to the partnership estate in more than his interest in that estate, they submit the difference between them to arbitration, and part of the stock in trade is awarded to be deposited in the hands of a third person : any part to be delivered to either of the parties on making it appear any bond or other debt due from the partnership had been paid by either, the quantity to be

delivered in proportion to the money paid ; The trustees in the marriage articles having taken a moiety of the stock in trade as the property of A., in execution upon the judgment ; Upon a bill brought by the partnership creditors to set aside the execution and to have the stock appropriated for the payment of their debts ; Held that the plaintiffs being neither parties to the submission or privy to the transaction, were not entitled to the benefit of the award.

The defendant *Toller*, upon his marriage, on the 30th of *December* 1729, entered into articles in consideration of £1100 portion, to vest £1000 in trustees within six months after his marriage, the interest thereof to be received by him and his wife, during their lives ; and afterwards the £1000 was to be equally divided between the issue of that marriage ; and, as a further security for the performance of this agreement, gives a warrant of attorney to the trustees to confess a judgment for that sum, which is entered up in *Hilary Term*, 1729. *Toller* after that entered into partnership in the wine trade with the plaintiff, *Hamilton*, and being indebted to the partnership estate in a larger sum of money than his interest in the partnership effects, or any other property he had, could satisfy, the two partners submitted the difference between them to arbitration, and accordingly a parol award is made on the 25th of *March* 1734, that forty pipes of wine, part of the stock in trade, should be lodged in the hands of a third person, one *Hayward* ; but any part thereof to be delivered to either of the partners on producing any bond, &c., which had been entered into on account of the partnership, paid off by the party producing the same ; the quantity of wine to be delivered, to be in proportion to the money so paid off.

The forty pipes of wine were accordingly deposited, with the consent of *Hamilton* and *Toller*, in the hands of *Hayward* : afterwards a *scire facias* is brought on the judgment so confessed to the trustees in the marriage articles, and on the 28th of *March* 1734, £450, 10s. Od. being one moiety of the value of the wine was taken in execution by a *feri facias* as the property of *Toller*.

The bill is now brought by *Hamilton*, who is likewise a separate creditor of *Toller*, and twelve other creditors, on the account of the partnership, to set aside this execution, and to have £450, 10s. the value of the moiety of the forty pipes of wine appropriated to the payment of the debts of these creditors.

Mr. *Fazakerley* for the plaintiffs, taking it for granted the award, with respect to the deposit of the wine, was intended as a provision for the creditors on the partnership account, and, as a security for the payment of their debts, insisted that every award when made was considered, in point of law, as the very act of the parties submitting to the determination of the arbitrators, and as the agreement of the parties themselves : and it is upon that footing an action of debt lies against the party on the award, for when a submission is made a rule of Court, an attachment lies for non-performance of the award, as a breach of his own agreement, which by rule of Court he had engaged to perform ; and that this case, therefore, must be considered in the same light, as if the parties themselves in the first instance had, without the intervention of any arbitrators, agreed to make a deposit of these pipes of wine for the purpose mentioned in the award ; that in such case the creditors, though there might be no alteration in the property made thereby, would have an equitable lien on these wines specifically in satisfaction of their debts, and as such, would prevail against any execution afterwards at the suit of any other person ; that the judgment creditors here, the trustees, merely as such, had no interest in these wines, but that right must arise, if at all, from the *feri facias*, which could not take place here, as there was a prior equitable lien upon them ; that, indeed, where goods are specifically bound in equity, and a purchaser, without notice, &c., afterwards gains a legal right in [306] them, having advanced his money at the time upon the credit of those very goods, as such purchaser has an equal equitable lien, and the law too on his side, his right will prevail ; but it is otherwise where the creditor, at the time his demand first accrued, relied only on the personal security and general credit of his debtor ; there any legal right which he obtains afterwards in any of the effects of his debtor, must be subject to every such trust or equitable lien which they are liable to in the hands of the debtor himself, and such creditor can only stand in the place of his debtor, as in the case of bankruptcy, the assignees, &c., though perhaps equally creditors with any others (who have before obtained an equitable lien on any of the bankrupt's effects specifically), and have the law on their side too, the property of the bankrupt's effects being vested in the assignees, yet they must only

stand in the place of the bankrupt, and take his effects subject to all those equitable charges which they were liable to in the hands of the bankrupt. Vide *Taylor v. Wheeler*, 2 Salk. 449, and *Burgh v. Francis*, 1 Eq. Ca. Ab. 320.

Mr. Noel, *contra*, insisted that the creditors had no right to bring a bill to have this award carried into execution, not being parties to the submission, nor concerned therein, it being a matter altogether transacted between *Toller* and *Hamilton* only; and, therefore, as the creditors would not at all be concluded by this award, but at liberty still to pursue their remedy as they thought proper, for the recovery of their debts, there was no reason why they should have any benefit from this award, because it happened to be in their favour; he relied likewise on the want of sufficient evidence on the part of the plaintiffs, to prove the acquiescence of *Toller* in the award, or even his knowledge what the award was; and, indeed, the only evidence to that purpose was his applying to the arbitrators before the award was finally made, to let him have part of the wine to carry on his trade with (which the arbitrators would not comply with), and his agreement afterwards with *Hamilton* to have the wines deposited in the hands of *Hayward*, but no evidence that he was present when the award was made, nor any other evidence that he was informed of the contents of it.

April 26, 1738.—*Lord Chancellor*. A bill to carry an award into execution when there is no acquiescence in it by the parties to the submission, or agreement by them afterwards to have it [307] executed, would certainly not lie; (2) but the remedy to enforce performance of the award must be taken at law. It has been said, the evidence here of *Toller's* agreement to the award after it was made, was not sufficient to found a decree on; but what he principally relied on was, that none of the plaintiffs, the creditors, were parties to the submission, nor did it appear that they were so much as privy at all to the transaction; and, therefore, as they were under no obligation of abiding by the award, they ought not to have the benefit of it; and in reading over the award (which at the time of making it was taken down in writing), he observed it was calculated only for the indemnity of *Hamilton* against the failure of *Toller*, without any regard had at all to the creditors, there being no provision made, that the wines should be sold, or otherwise employed for raising money for the payment of debts of the plaintiffs. That though an agreement made between the two partners and particular creditors, to appropriate a particular part of the partnership effects for the payment of those creditors, might create a lien on those goods specifically for the payment of their debts, in preference to the rest of the creditors; yet an agreement of that kind between the partners only, would certainly not disable any of the creditors from pursuing their remedy at law against the effects of the debtor, any more than if no such agreement had been made.

The bill dismissed.

(1) The whole of this case is taken from *Atkyns*, except some trifling alterations which have been made in the statement from Lord *Hardwicke's* Note-book.

(2) So *Bishop v. Webster*, 1 Eq. Ab. 51, but it is now held that a bill will lie for the specific performance of an award; because the award supposes an agreement between the parties, and contains no more than the terms of that agreement ascertained by a third person, per Lord *Eldon*, *Wood v. Griffith*, 1 Swanst. Rep. 54, and see *Norton v. Mascall*, 2 Vern. 24.

[308] JOHN WYLD, Brother and Heir at Law of RICHARD WYLD, Plaintiff; (1) and THOMAS LEWIS and ELIZABETH his Wife, Widow of RICHARD WYLD, Defendants.

[See *Blinston v. Warburton*, 1856, 2 K. & J. 402.]

April 26th, 1738. 1 Atk. 432.

R. W., by his will, gives to his wife *Elizabeth*, all his lands not settled in jointure. And if it shall happen that his wife has no son or daughter by him, and for want of such issue, then the said premises to return to his brother, if he shall be living, and his heirs for ever, paying to A. and B. £150 within one year after her decease. Held an estate tail in *Elizabeth*, and that the subsequent words do not controul the legal operation of the precedent words creating an estate tail.

Richard Wyld, by his will, dated the 15th of April 1718, devised as follows:—“I give to my wife *Elizabeth*, all my lands, &c., not settled in her jointure. And if it

"shall happen that my said wife *Elizabeth*, shall have no son nor daughter, by me begotten on the body of the said *Elizabeth*, and for want of such issue, then the said premises to return to my brother *John Wyld*, if he lives so long, and his heirs for ever, only paying to his brothers (A. and B.) the sum of £150 within one year after the decease of the said *Elizabeth*."

Elizabeth had a daughter born after the death of the testator, and since dead. The bill was now brought by *John Wyld*, the brother of the testator, and who is likewise his heir at law, to restrain the defendants from committing waste, and for an account of timber felled; and the question was, what estate *Elizabeth* took by the will, whether in tail, or for life only.

Mr. *Browne*, for the plaintiff, insisted she took for life only; that the words in the will "if she had no son or daughter" would certainly not raise an estate tail by implication, and the subsequent words "for want of such issue" will not enlarge the estate, the word "such" restraining the word "issue" to mean only such son or daughter; that the word "issue" received such a restrained construction for the same reason, in the case of *Popham v. Bamfield*, 1 Salk. 236, for there the devise was to A. for life, remainder to the first [309] son of A., in tail male, and so on to the tenth son, and if A. die without issue male, remainder over; it was insisted A. had an estate tail; but the Court held otherwise, and construed the words, "dying without issue male," a dying without such issue male.

That it was the intent of the testator, that *Elizabeth* should take for life only, appears farther from the limitation in the will to *John*, if he should be then living; so likewise from the direction for paying the money within a year, and to the two brothers, particularly naming them, which provisions seem to imply plainly an intention in the testator, that the estate of *John* should commence, if at all, on the death of *Elizabeth*, and was not intended to wait till an estate tail should be spent. That the limitation here to *John* was merely contingent, and such contingency never happening, because *Elizabeth* had a daughter, the plaintiff *John* does not claim under this devise, but as heir at law to the testator, is entitled to the reversion in fee expectant on the estate for life, limited to the wife under the will.

Mr. *Fazakerley*, *contra*, to prove this an estate tail, cited *Newton v. Barnardine*, Moore, 127, and *Byfield's* case, Hil. 42 & 43 Eliz. cited by *Hale*, Chief Justice, in *King v. Melling*, 1 Ventr. 231, there the devise was to A., and if he dies, not having a son, then to remain to the heirs of the testator. "Son" was there taken to be used as *nomen collectivum*, and held an entail. He likewise cited 2 Vern. 766, *Pinbury v. Elkin*, it is said there, if he die, not having a son, that these words create an estate tail. To enforce this construction, Mr. *Fazakerley* insisted on the absurdity which would otherwise follow, that supposing *Elizabeth* not tenant in tail, but for life only, with a contingent limitation to any son or daughter of her's, if such son or daughter should die in the lifetime of the mother, though leaving issue, such issue could never take within the words of the will, which can never be presumed to be the intent of the testator.

Mr. *Wilbraham* on the same side, said in the case of *Popham v. Bamfield*, the foundation the Court went on in construing that an estate for life only was the express devise for life to the first devisee, for the words are, "there is a mighty difference between a devise to A., and if he die without issue, to B., and a devise to A. for life, and if he die without issue, then to B."

Mr. *Browne*, in reply said, if the testator by his will had made a certain and absolute disposition of the whole fee, the [310] objection that the grandchildren would by this construction be excluded, would be strong against us, but here a contingent disposition only, is made of the inheritance to *John*, which contingency has not taken effect, and the estate descends as was intended by the testator, if such contingency should not happen, so that no exclusion of the grandchildren could possibly be.

April 26, 1738.—*Lord Chancellor*. It seems clear from the words of the will, "as to all my worldly estate," which introduce the disposing part of the will, that the testator intended to make an absolute disposition of his whole estate by his will, and not suffer any part to descend as undisposed of, in case of any contingency; and as he intended a disposition of the whole by his will, the objection that the grandchildren by this construction are liable to be excluded, is a very strong argument for construing this an estate tail, and the inclination to avoid this absurdity has been the principal reason for construing words of the singular number, and which are properly descriptive of particular persons only, in a collective sense, as including the descendants of the

first taker, and was the governing reason, in the cases of *Dubber v. Trollop*, in B. R., and *Shaw and Weigh*, 28th of April 1729 (3 Danv. Abr. 178. pl. 26; Fortescue's Reports, 58; 2 Stra. 798; Fitzgib. 7; 8 Mod. 253, 382. Barnard. B. R. 54), in Dom. Proc. [1] Eq. Ca. Ab. 185, pl. 28. *Byfield's* case, cited in Vent. 231, is full as strong as the present, here is no difference in the construction of the devise of a real estate, between a provision, that if devisee dies, not having a son, as it is there, or if the devisee has not a son as here.

In *Popham v. Bamfield*, an express estate for life is limited to the devisee, which has always had a great influence in the construction of a will, when the question has been, whether tenant for life or in tail.

Great stress has been laid by the plaintiff's counsel upon the word such, as if it restrained the word issue to mean only such son or daughter, and that the precedent words, "if *Elizabeth* has no son nor daughter," will not raise an estate tail by implication; but in *Wild's* case, 6 Co. 16 b, it was resolved, "that if A. deviseth his lands to B. and his children or issue, and he hath not any issue at the time of the devise, that the same is an estate tail, for the intent of the deviser is manifest and certain, that his children or issue should take, and as immediate devisees they cannot take, because they are not in *rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate; and, therefore, there such words [311] shall be taken as words of limitation, viz. as much as children or issue of his body." And I am of opinion here the words son nor daughter must be taken in the same sense as having no issue, and then the word such will have no weight, but will amount to the same thing as if he had said, for want of issue, and the words, having no issue, or dying without issue, have always been considered in the same light, both in law and equity.

The direction for the payment of the £150 within a year, is a very proper circumstance in general to be made use of, to induce the construction contended for by the plaintiff, and what may seem to imply an intent in the testator, that the interest of *John Wyld* under the will should, if at all, commence on the death of *Elizabeth*, but if the preceding words are proper to create an estate tail, the legal operation of them cannot be controuled by those subsequent provisions. The bill must therefore be dismissed.

The Lord Chancellor to his note of this case has added the following memorandum:—

I am of opinion, that on the construction of this will, the wife took an estate tail, for that otherwise the testator's grandchildren would be disinherited; and therefore dismissed the bill.

(1) The whole of this case is taken from *Atkyns*, which has been compared with, and is found substantially to agree with another manuscript report of the same case.

[312] GEORGE PROWSE, Administrator of THOMAS PROWSE, Plaintiff; (1) and GEORGE ABINGDON and WYNDHAM HARBIN, Trustees of the Real Estate, RUPERT FLOYER and ANN his Wife, and CHARLES ABINGDON, Defendants.

April 28th, 1738. 1 Atk. 482.

Where a testator devises all his lands to trustees upon trust, to sell a certain specified part, and with the money arising from the sale to pay debts, and as to the residue to receive the rents and profits, and by granting leases for three lives, or ninety-nine years, determinable on three lives, to pay all his debts and legacies, and subject thereto, he devises the same to J. A. in tail-male, and gives to his nephew £500, to be paid at twenty-one or marriage, and makes his trustees executors; the nephew having died before twenty-one, and unmarried, and the personal estate, and the money arising from the sale of the estate devised to be sold, being insufficient for the payment of debts; held, that the £500 legacy could not be raised, (2) and that the Court would not marshal the assets by throwing the debts upon the real estate, for the purpose of paying the legacy out of the personal estate, the legatee having died before the time of payment. (So *Pearce v. Loman*, 3 Ves. 135. *Reynish v. Martin*, 3 Atk. 330, *contra*.)

Thomas Compton, by his will dated 13 August 1718, devised all his lands to *John Clement* and *John Prowse*, and [313] their heirs for ever, in trust, that they should

with all convenient speed sell the lands in *Mendford* and *Pinard*, and with the money arising from such sale pay his debts as far as the same would extend, and as to the residue of his lands, that they should receive the rents and profits thereof and thereby, and by granting leases for three lives, or ninety-nine years, determinable upon three lives, to pay and discharge all his debts and legacies, and subject thereto, that they should stand seised thereof, in trust for his sister *Isabella*, the wife of *Charles Abingdon*, for life, and to the heirs male of her body, remainder over in fee; and by the [314] same will he gave to his god-daughter, *Ann Prowse*, £500, and to his godson, *Thomas Prowse*, £500, to be paid to them respectively at twenty-one or marriage, which should first happen; he also gave several other pecuniary legacies, and the rest of his goods and chattels to his trustees, whom he appointed his executors.

Thomas Prowse, the legatee, died under the age of twenty-one, and unmarried. The testator's personal estate amounted only to £680, and the money produced by the sale of the estates at *Mendford* and *Pinard* were not sufficient to pay his debts.

The bill was filed by the personal representative of *Thomas Prowse*, for payment of the legacy: and the principal question was, whether that legacy had been vested in *Thomas Prowse*, or had lapsed by his death under the age of twenty-one and unmarried.

Mr. Chute, *Mr. Fazakerley*, and *Mr. Murray*, for the plaintiff.

By the provisions of the testator's will, the fund which is made applicable to the payment of the legacy is become personal estate; for the testator has devised certain lands for the payment of debts and legacies, and has made the trustees his executors, and thereby has converted the land into personal estate, a devise to executors to sell, held legal assets, 1 Lev. 224; *Dyer*, 264 b, n. 41. If the trustees had strictly followed the directions of the will, and had entered and received the rents and profits to an amount sufficient for the payment of this legacy, before the death of the legatee, that money could never have reverted back to the owner of the inheritance. The fund out of which this legacy was payable, was a personal fund, and the contingency of dying before the age of twenty-one, or marriage, being attached to the time of payment, and not to the bequest itself; the legacy has not lapsed by the event which has happened. This is not the case of a legatee dying before the time for payment of his legacy, and an heir at law, but this is a case between a legatee and devisee: for in the present case, both parties stand in the same degree of equity, and their claims must be decided according to the testator's intention, which in *Carter v. Bletsoe*, 2 Vern. 67, was considered to be the right rule. If this legacy is not payable, for whose benefit has it lapsed; the devise to the trustees is, until all the debts and legacies are paid. The limitation over is not to take place until all the debts and legacies are paid. The trustees took [315] an estate *quousque*, with a power of making leases, &c. The legacy is not charged solely upon the real estate, but the personal estate is primarily liable. The testator intended by charging his lands, to give an additional security for the payment of the legacy. The case of *Jackson v. Ferrand*, 2 Vern. 424, is a strong authority for the plaintiff. Considering this as a mere personal legacy, the plaintiff is clearly entitled, and as the testator's personal estate was sufficient for the payment of this legacy, the Court, if against the plaintiff upon the other grounds, will order the assets to be marshalled, that so much of the personal estate as may be necessary, may be left applicable to the payment of this legacy.

Mr. Attorney-General, *Mr. Browne*, and *Mr. Floyer*, for the defendant.

The *Master of the Rolls* held upon a former bill, that this was a trust estate throughout. The representatives of the personal estate are not made defendants, so this is a demand merely out of the real estate.

We admit, that if this legacy has been charged solely upon the personal estate, it would have been payable, this Court in conformity to the doctrine of the Ecclesiastical courts, not considering such legacies as lapsed by the death of the legatee before the day of payment; but that rule has never been applied to legacies charged on land, nor is there any difference whether the question arises between a legatee and a devisee, or a legatee and an heir, or whether the legacy is charged on a mixed fund of real and personal estate, or upon land only. The only case relied upon by the plaintiff is *Jackson v. Ferrand*; but it appears from the report of that case in Prec. in Ch. 109, that the ground of the decision was, that a marriage had taken place, which is not so in the present case. The question in the *Duke of Chandos v. Talbot*, 2 P. Wms. 601, was of a legacy charged upon both real and personal estate. So also in *Jennings v. Look*,

2 P. Wms. 276, and in *Yates v. Phettilplace*, 2 Vern. 416. *Carter v. Bletsoe*, 2 Vern. 617, and *Smith v. Smith*, 2 Vern. 92, were also cited. The question as to marshalling the assets cannot arise, for the personal representatives are not before the Court.

April 28, 1738.—*Lord Chancellor*. There is not the least ground for considering the rents and profits of the lands already received by the trustees, or the monies arising from the leases which the testator has directed them to make, as personal [316] assets. That would be to overturn the constant doctrine of this Court, for where there is a general devise in fee to executors to sell, it has never yet been determined that such an interest should be taken to be personal assets. Was it ever known that a legatee claiming a legacy upon such a devise, could go into the Ecclesiastical Court and compel the executors or trustees to account for the rents and profits. This is not a bare power only to the trustees to sell, but a general and express devise to them and their heirs, whereby the testator hath given to them the whole interest in the estate; the dispositions which he has afterwards made, are but declarations of the trusts.

As to the principal question, I confess that I have always had some doubt about the general rule which has been laid down, that where a legacy is charged both upon the real and personal estate, it shall by the party's death before the time of payment, be looked upon as extinct with regard to the real estate, though it would not had it been a charge upon the personal estate only, because it seems to me that the security for the payment of the legacy, which is the real estate, should be as extensive as the principal fund; but notwithstanding this doubt of mine, the point has been determined in so many instances, that I am bound by the decisions, particularly by that of *Poulet v. Poulet*, 1 Vern. 204, 321. Nor is there any difference whether the charge was created by deed or by will, or whether intended as a portion for a child, or as a legacy to a stranger, as appears from the case of the *Duke of Chandos v. Talbot*, 2 P. Wms. 601, 610, and *Jennings v. Looks*, in the latter of which I was counsel.

It has been said, that this is a case in which the assets ought to be marshalled, for the purpose of throwing the debts upon the real estate, and leaving the personal estate open for the payment of the legacy, but if the executors were now before the Court, or if the bill were to be retained for the purpose of making them parties, I do not think that the present case could be brought within the rule for marshalling assets, which applies only where it was originally proper to be done, as where different demands were from the first chargeable upon different funds, and not where both demands having originally had the same security, one of them has by a subsequent accident, such as the death of a legatee under twenty-one, become chargeable upon one fund only.

The case of *Jackson v. Ferrand*, was decided upon the [317] ground of the child having been actually married before her death, and from thence it may be inferred, that had she died under twenty-one and unmarried, the legacy would have been considered as gone. The case of the *Duke of Chandos v. Talbot*, is a very strong authority, because Lord King, who made that decree, was for a considerable time inclined to the other side; but was at last overpowered by the decision of *Yates v. Phettilplace*, 2 Vern. 416. and *Smith v. Smith*, 2 Vern. 92. It has been said, that the reason of this difference between legacies charged upon land, and those payable only out of personal estate, is founded upon the partiality with which the interests of heirs are supposed to be considered by the Court; but I take the real ground of the distinction to consist in this, that in the administration of personal assets, this Court has adopted the rules of the civil law, by which the Ecclesiastical Court are governed, and that by that law, a legacy is not lost by the death of the legatee before the day of payment; but that with respect to every thing which concerns real estates or interests out of lands, this Court follows the rules of the common law, and that at common law, if one promises to pay another a sum of money when he shall attain the age of twenty-one years, no action can be maintained before that time, and if the party dies before the age of twenty-one years, the money is lost for ever.

The bill was dismissed.(3)

(1) The statement of this case, and the arguments of counsel, are taken from Lord Hardwicke's Note-book; the judgment from a manuscript report, which is found in substance to agree with Mr. Atkyns's report, and with another manuscript report of the same case.

(2) There is a difference between legacies charged upon land, and those payable out

of personal estate; with regard to the latter, the Court of Chancery adopts the rules of the civil law, in conformity with the Ecclesiastical Court. Thus, where there is a present gift of a legacy out of personal estate, to be paid at a future time, the legacy vests immediately, *Cloberry's case*, 2 Vent. 342. *Duke of Chandos v. Lord Talbot*, 2 P. Wms. 613, and the cases cited by Mr. Cox in note 1 to that case. *Crickett v. Dolby*, 3 Ves. 13. So where interest is given before the time of payment, *Fonereau v. Fonereau*, 3 Atk. 645. *Hoath v. Hoath*, 2 Bro. Ch. Ca. 4. *Walcott v. Hall and Others*, 2 Bro. Ch. Ca. 305. *Hanson v. Graham*, 6 Ves. 249.

But it seems that these rules of the civil law are not applicable to the construction of deeds or articles, or trusts, though relating to a personal fund, but only to those cases where the legatee could compel payment of his legacy in the Ecclesiastical Court, see this case, p. 317. *Hubert v. Parsons*, 2 Ves. 262. *Lord Teynham v. Webb*, 2 Ves. 207. *Jennings v. Looks*, 2 P. Wms. 276; and see *Van v. Clarke*, 2 Atk. 510. Nor are they applicable to interests arising out of land, for if a sum of money be charged upon land, payable at a future time, and the party dies before the time of payment, the charge sinks into the land. Nor is there any difference whether the charge is created by deed or will, or whether intended as a portion for a child, or as a legacy to a stranger, per Lord Hardwicke in this case; or whether interest is or is not given; or whether the land be the primary or auxiliary fund; or whether the person upon whose estate the charge is made be *hæres natus* or *hæres factus*, *Bond v. Brown*, 2 Ch. Ca. 165. *Lady Poulet v. Lord Poulet*, 1 Vern. 204 and 321. *Smith v. Smith*, 2 Vern. 92. *Yates v. Phettiplace*, 2 Vern. 416. *Carter v. Bletsoe*, Pre. Ch. 267. *Tournay v. Tournay*, Pre. Ch. 290. *Stapleton v. Cheales*, Pre. Ch. 318. *Jennings v. Looks*, 2 P. Wms. 276. *Bateman v. Roach*, 9 Mod. 106. *Duke of Chandos v. Talbot*, 2 P. Wms. 601. *Gordon v. Raynes*, 3 P. Wms. 134. *Bradley v. Powell*, Cas. Temp. Talb. 193. *Hall v. Terry*, *Boycott v. Cotton*, post. *Attorney-General v. Milner*, 3 Atk. 112. *Gardner v. Standerwicke*, note to 1 Bro. C. C. 106. *Pearce v. Loman*, 3 Ves. 135; or whether it is charged upon land directed to be purchased with personal estate, *Harrison v. Naylor*, 2 Cox's Cases, 247. [*Care v. Care*, 2 Vern. 508, is stated by Lord Hardwicke to be overturned, and not to have determined the point there mentioned, and, *Jackson v. Farrand*, 2 Vern. 424, to be an anomalous case, see *Boycott v. Cotton*, post]; unless the time of payment has been postponed for the convenience of the estate, d. per Lord Hardwicke in *Lowther v. Condon*, 2 Atk. 133. *Buller v. Duncomb*, 1 P. Wms. 457. *Pitfield's case*, 2 P. Wms. 513. *King v. Withers*, Ca. Temp. Talb. 117. *Shermans v. Collins*, 3 Atk. 319. *Hutchins v. Soy*, Comyn. Rep. 716. *Hodgson v. Rawson*, 1 Ves. 44. *Godwin v. Munday*, 1 Bro. C. C. 190. *Dawson v. Killet*, 1 Bro. C. C. 119; or unless the testator has expressed an intention that the legacies should vest before the time of payment, *Watkins v. Cheek*, 2 J. & P. 199.

Where portions are given out of land, and no time appointed for the payment, the right to the portion vests immediately, *Lord Rivers v. Lord Derby*, 2 Vern. 72. *Cowper v. Scott*, 3 P. Wms. 119. *Wilson v. Spencer*, ib. 172. But there are exceptions to this rule in respect of portions; as where a child dying at five years old, the Court decreed it not to be raised, because the child died so young, that the end for which it was given ceased, per Lord Hardwicke, in *Lowther v. Condon*, 2 Atk. 133; and see *Bruen v. Bruen*, 2 Vern. 439. *Warr v. Warr*, Pre. Ch. 213. *Lord Hinchinbroke v. Seymour*, 1 Bro. C. C. 395; and if a settlement be ambiguously expressed, the Court leans strongly towards the construction which gives a vested interest to a child, when that child stands in need of a provision; usually as to sons at the age of twenty-one; and as to daughters at that age or marriage, per Sir Wm. Grant, *Howgrave v. Cartier*, 3 V. & B. 86. *Emperor v. Rolfe*, 1 Ves. 209. *Cholmondeley v. Meyrick*, 1 Eden, 77. *Willis v. Willis*, 3 Ves. 51. *Hope v. Lord Clifden*, 6 Ves. 499. *Schench v. Legh*, 9 Ves. 300. *King v. Hake*, ib. 438. *Hallifax v. Wilson*, 16 Ves. 168. *Walker v. Main*, 1 J. & W. 1.

(3) Mr. Atkyns states that the part of the above judgment which relates to the question, whether the produce of the lands decreed to be sold for the payment of debts was to be considered as personal assets, was interposed between the arguments for the plaintiff and those for the defendant; but that circumstance does not appear from either of the manuscript cases.

[318] JONATHAN IVIE an Infant, by GEORGE ROOKE his next Friend, *Plaintiff*; (1, and JOHN IVIE, BELFIELD, STRANGE, BUCK, and GEORGE IVIE, *Defendants*.

May 2nd, 1738. 1 Atk. 429.

A. by his will devises to his eldest son *Jonathan*, a real estate for life, remainder to his sons in tail-male, remainder to the testator's second son *John* for life, remainder to his sons in tail-male, remainder to plaintiff's father, *George Ivie* for life, remainder to his sons in tail-male, remainder over.

And also gave to three trustees, two long annuities of £100 each, in trust as to one for the plaintiff's father for life, and then for the plaintiff for life, remainder to the issue-male of his body, remainder over; and as to the other, in trust for testator's son *Robert* for life, and in default of issue-male, remainder to *John Ivie* for life, remainder to his issue-male in tail-male, remainder to *George* for life, remainder to plaintiff for life, with divers remainders over; and appointed *John* his executor, who possessed himself of the title-deeds of the real estate, and the tallies belonging to the annuities.

Jonathan Ivie is dead without issue, *Robert* likewise without issue-male, and the son *John Ivie*, born after testator's death, is since dead, and his father has administered.

In 1720, *John* joined with *George*, in a sale of the annuity devised to *George* for £3250, and the purchase-money was paid to *George*.

The plaintiff, the son of *George*, brings his bill to have the deed and writings relating to the real estate deposited in Court; and as to the annuity devised to *John* and to the plaintiff in remainder, to have security given for the payment of it, when his interest therein should take effect in possession.

And as to the other annuity, to have a satisfaction against *John*, for the breach of trust, in concurring in the sale thereof to the plaintiff's prejudice, and for an equivalent upon the death of his father, *George Ivie*.

Jonathan Ivie, the plaintiff's grandfather, by will, dated the 7th of March 1717, devised to his eldest son, *Jonathan Ivie*, his manor of *Bearford*, with the advowson thereto belonging for life, remainder to his sons in tail-male, remainder to the testator's son, *John Ivie* for life, without impeachment of waste, remainder to his sons in tail-male, remainder to the plaintiff's father, *George Ivie*, for life, remainder to his sons in tail-male, remainder over; and also gave to the defendants *Strange*, *Buck*, and *Belfield*, two long annuities of £100 each, in trust as to one for the plaintiff's father for life, and then to the plaintiff for life, remainder to the issue-male of his body, with divers remainders over. And as to the other, in trust for his son *Robert* for life; and in default of issue-male, remainder to the said *John Ivie* for life, re-[319]-mainder to his issue-male in tail-male, remainder to the said *George Ivie* for life, remainder to the plaintiff for life, remainder to the plaintiff's issue-male, with divers remainders over; and appointed *John Ivie* his executor, who possessed the personal estate, together with the title deeds to the real, and the tallies and orders belonging to the annuities; and in 1720, without the consent of the trustees, subscribed them all into the stock of the South Sea Company.

Robert Ivie, after the death of the testator, died without issue-male; *Jonathan Ivie*, the testator's eldest son, died several years since without issue, and *John Ivie* had a son, who died since the testator, and the father has administered to him, and is now without any children. In the year 1720, the trustees declining to accept the trust, *John* joins with his brother *George*, in the absolute sale of the annuity devised to *George* for £3250, and all the purchase-money is accordingly paid to *George*.

The plaintiff insists, that by the death of *Robert*, without issue-male, he is entitled to have the lands settled according to the will, and the produce of the long annuities; and therefore the bill is brought for an execution of the trusts in the will of *Jonathan Ivie* his grandfather, and that the deeds and writings relating to the real estate, may be deposited in Court, for the mutual benefit of all parties entitled thereto, and against his father and his uncle *John*. As to the annuity devised to *John* and to plaintiff in remainder, to have security given for the payment of this annuity to him, when his interest therein should take effect in possession, and as to the other annuity, to have a satisfaction against *John* for the breach of trust in concurring in this sale to

the prejudice of the plaintiff, and that an equivalent might be provided for him to have the benefit of it, upon the death of his father, when the annuity would have come to him, if no such sale had been made thereof.

Lord Chancellor was clearly of opinion, that as to the annuity devised to *Robert*. and afterwards to *John* for life, &c., that there being words of limitation annexed, such [320] as would create an estate-tail in the case of a real estate, upon the birth of the son of *John*, the whole interest in remainder, after the death of *John*, vested in such son, and that the defendant *John Ivie*, is absolutely entitled to that annuity as administrator to his son, and therefore, as to this demand, he ordered the bill should stand dismissed.(2)

As to the other demand, he said, when a trustee had, in a corrupt or unfair manner, been guilty of a breach of trust, the Court will sometimes compel such trustee to make a satisfaction to the utmost; yet, as *John* was induced in this case to come into a sale of this annuity at the pressing instance and request of his brother, in order to raise money, and the money was in fact received by *George*, he would not charge the defendant *John* with the price of the annuity, as it then sold, but decreed that *George Ivie* and *John Ivie*, or one of them, do, at their or one of their own charges, purchase an exchequer annuity of £100 a-year for ninety-nine years of the like nature and value of the exchequer annuity which was sold, and assign the same to trustees to be approved of by the master, and that the trusts thereof be declared according to the limitations in the will; and further declared, that it appearing by proofs in the cause, the said annuity was so sold at the request of the defendant *George Ivie*, the tenant for life thereof, and that the purchase money came to his own use, the defendant, *John Ivie*. ought to be indemnified by *George* from the expence he may be put to by being obliged to purchase such annuity, and that in case *John* shall purchase such annuity, and assign the same to such trustees, or shall be at any expence in the purchase thereof, he shall be at liberty to prosecute this decree against *George Ivie* in the plaintiff's name, to compel *George* to purchase such annuity, and assign the same as aforesaid, in order to oblige *George* to reimburse *John* the principal money, which shall have been so laid out by him, in and about the purchase of such exchequer annuity, and the interest thereof, and all such expences as he shall have been put to as aforesaid; and that till *George* shall have so done, such growing [321] payments of the annuity which shall be so purchased by *John*, as shall accrue during the life of *George Ivie*, be paid to *John* towards such indemnity, and directed the defendants *George* and *John* to pay the plaintiff his costs as to this part of the cause.

As to that part of the bill which prayed the deeds and writings of the real estate, which were in the hands of *John* the tenant for life, might, for the better security of the plaintiff, in whom the inheritance was lodged, be taken out of his hands and deposited in Court; his Lordship agreed this to be the common practice in the case of a remainder-man, whose interest was expectant on a mere tenancy for life; (3) but as there was a contingent limitation to all the sons of *John*, and after that an estate for life in *George*, the plaintiff's father, he thought the plaintiff's interest too remote to warrant such a proceeding; and that, as such limitations are extremely frequent, if such a practice should be suffered to prevail, the title-deeds of half the estates in the kingdom might be brought into Court; besides, in the present case, the first tenant for life is not the heir at law; but takes by the will as well as the remainder-man, so that there is no danger of destroying the deeds, as there might be in case he was heir, in order to better his estate, and as there is no precedent for any thing of this kind, he declared he would not make one; and there-[322]-fore, as to so much of the plaintiff's bill as seeks to have the title deeds deposited in this Court, his Lordship ordered the bill to stand dismissed. (Reg. Lib. A. 1737, fol. 794.)

(1) The whole of this case has been taken from *Atkins*, the *Lord Chancellor's* note of it being very short, and no other report of it having been found.

(2) So *Seale v. Seale*, 1 P. Wms. 290. *Butterfield v. Butterfield*, 1 Ves. 134-154. *Stratton v. Payne*, 3 Bro. Parl. Ca. 257. *Earl of Chatham v. Tothill*, 6 Bro. P. C. 450 [2nd ed. 7 Bro. P. C. 453]; and see 1 Madd. Rep. 488. *Glover v. Strothoff*, 2 Bro. C. C. 34. *Chandless v. Price*, 3 Ves. 99; more fully reported in 13 Ves. 479. *Barlow v. Salter*, 17 Ves. 479. *Elton v. Eason*, 19 Ves. 73. *Donn v. Penny*, 1 Mer. 20. *Brouncker v. Bagot*, ib. 271.

(3) It seems formerly to have been the common relief granted to a remainder-man

or reversioner against the tenant for life to have the deeds relating to the estate deposited in Court for safe custody, D. per Lord *Hardwicke*, *Southby v. Stonehouse*, 2 Ves. 612. *Reeves v. Reeves*, 9 Mod. 132. *Joy v. Joy*, 2 Eq. Abr. 284, pl. 4. Though such relief could not be given in favour of a son who was tenant in tail in remainder against his father who was tenant for life, being different from the case of a stranger, Lord *Lempster v. Lord Pomfret*, Ambl. 154. *Pyncent v. Pyncent*, 3 Atk. 571; otherwise where there was evidence that the father was destroying the deeds, D. per Lord *Hardwicke*, ib.; or where the deeds might be auxiliary to an action at law or relief in equity, or where discovery was sought for proper purposes, D. per Lord *Hardwicke*, Ambl. Rep. 155. But now the rule appears to be that the title-deeds should remain with the tenant for life, D. per Lord *Redesdale*, in *Bowles v. Stewart*, 1 Sch. & Lef. 223. And in *Knott v. Wise*, a manuscript case cited in *Duncombe v. Mayer*, 8 Ves. 323, Lord *Thurlow* is reported to have said, "That the remainder-man had not any action at law or any equity to take the deeds out of the hands of the tenant for life," *Duncombe v. Mayer*, 8 Ves. 323. So Lord *Thurlow* said, *prima facie* the deeds are properly in the custody of the tenant for life, *Ford v. Peering*, 1 Ves. jun. 76, and see *Webb v. Lord Lymington*, 1 Eden's Rep. 8. *Strode v. Blackburne*, 3 Ves. 225. But upon the confirmation of a widow's jointure the Court will order the deeds to be delivered up, Lord *Portsmouth v. Lord Effingham*; *Petre v. Petre*, 3 Atk. 511. *Senhouse v. Earl*, 2 Ves. 450. *Leech v. Trollope*, ib. 662.

BLATCH and AGNIS, in Behalf of themselves, and all other Creditors of FRANCIS ELLIOT, deceased, *Plaintiffs*; (1) and WILDER and Others, *Defendants*.

May 3rd, 1738. 1 Atk. 420.

A testator devises all his real and personal estate to be sold for payment of his debts, and appoints the defendant executor; the personal estate not being sufficient, a bill brought by bond and note creditors of the testator to be paid their demands out of the real estate. The question, whether the executor can sell the same, as the testator had given it generally to be sold, without directing who should sell.

Francis Elliot being indebted to the plaintiffs by bond and note, and to several other persons, and being seized in fee in divers lands, part freehold and part copyhold, and of a considerable personal estate, having duly surrendered the copyhold, made his will, and thereby devised all his real and personal estate, whether freehold or copyhold, to be sold for payment of his debts, and appointed the defendants *Wilder* and *Agnis*, executors. *Wilder* alone proved the will, and took upon him the execution thereof, and the personal estate not being sufficient to pay his debts, the plaintiffs bring their bill to be paid their respective demands out of the testator's real estate.

The defendants admit the will; but *Wilder* the executor submits to the Court, whether he can safely proceed to a sale of the estate, in regard the testator had only given it to be sold generally, without directing who should sell the same.

[323] Mr. *Fazakerley* insisted, the executor ought to sell, and for this purpose cited 2 Jo. 25; 2 Leon. 220.

Lord Chancellor. I am of opinion, that money arising from the sale of lands devised to an executor for that purpose, or which the executor is empowered to sell, are legal assets in his hands, and administrable as such, (2) and [324] such money, &c., being assets likewise in the same manner in the present case, it is a very reasonable construction, that the executor should be the person who should make the sale; and therefore I decree that in case the personal estate should not be sufficient to pay the debts and legacies, that then the real estate of the testator, both freehold and copyhold, shall be sold, and likewise that the executors and the heir shall join in the sale, and all other proper parties as the Master shall direct. And his Lordship declared that the money arising by such sale be applied in satisfaction of the debts and legacies of the testator remaining unsatisfied, and that the surplus of the monies arising by such sale or sales doth belong to *Ann Elliott*, the widow of the testator, and in case any of the said testator's creditors by judgment or specialty shall take any part of their satisfaction out of the personal estate of the said testator, then they are not to receive any thing out of the money

arising by sale of the real estate till the other creditors are made up equal to them. (Reg. Lib. A. 1737, fol. 380.)

It was agreed in this case, that where lands are devised to trustees to be sold for payment of debts, and the heir at law is an infant, he has no day given him to shew cause on his coming of age; otherwise where there is no devise of lands expressly to any particular person, for in that case he has; and this being one of these cases, his Lordship directed the infant, the customary heir of the copyhold premises, to join in the sale thereof, on attaining twenty-one, unless within six months after he shall attain such age, he shew cause to the contrary, and the purchaser of the copyhold in the mean time to hold and enjoy the same.

(1) This case is taken from *Atkyns*. It appears in Lord *Hardwicke's* Note-book; but there is only the following note of his judgment: "Decree for an account and sale of the real estate." No point appears to have been made in the cause, whether the real estate devised by the will was to be considered as legal or equitable assets.

(2) Lord *Thurlow* says, "there must be a mistake in *Blatch v. Agnis*, for it was always held, that an estate devised to an executor to sell was equitable assets," *Newton v. Bennet*, 1 Bro. C. C. 137. But what is here stated to have been said by Lord *Hardwicke*, is consistent with the old cases, for it was formerly held that whatever came to the executors' hands, or they were intrusted with as trustees, should be considered as legal assets, *Rol. Abr.* 920, pl. 7. *Dethicke v. Caravan*, 1 Lev. 224. *Burwell v. Corrant*, Hard. 406. *Girling v. Lee*, 1 Vern. 63. *Hawker v. Buckland*, 2 Vern. 106. *Greaves v. Powell*, 2 Vern. 248. *Anon. ib.*, 405. *Cutterback v. Smith*, Prec. Ch. 127. *Bickham v. Freeman*, Prec. Ch. 136. *Walker v. Meager*, 2 P. Wms. 550, and though in some of the old cases a distinction prevailed where the executor and trustee were the same person, and an intention was shewn by the testator to separate the office of trustee from that of executor; as where a testator devised lands to trustees and their heirs upon trust for payment of debts, and afterwards made them executors, *Deg v. Deg*, 2 P. Wms. 417, and Mr. *Cox's* Note (1) to that case. *Hickson v. Witham*, Finch, 195. *Chambers v. Harvest*, Mos. 123. *Hall v. Kendal*, Mos. 328. *Prouse v. Abingdon*, ante, p. 312. *Lewin v. Okeley*, 2 Atk. 50; or where a testator devised real estates to executors and their heirs; in both cases they were held to be equitable assets, *Silk v. Prime*, note in 1 Bro. C. C. 138. But now by modern cases, it seems settled that where the devisee of real estates unites the character of trustee and executor, a Court of Equity will prefer the character of trustee; and it makes no difference whether the real estate is devised to him, *quasi executor* or *quasi trustee* for the purpose of being sold to pay debts, the money arising from the sale of the real estate will be affected with a trust, and will be considered as equitable assets, *Newton v. Bennet*, 1 Bro. C. C. 135. *Barker v. Boucher*, 1 Bro. C. C. 140, in note. *Batson v. Lindegren*, 2 Bro. C. C. 94, but where the executor has a mere naked power to sell *qua executor*, it seems doubtful whether they would be considered as legal or equitable assets, see *Silk v. Prime*, 1 Bro. C. C. 140, and see *Barker v. Boucher*, *ib.*

In former cases where an estate descended or was devised to an heir charged with the payment of debts, it was held legal assets, because the descent was not broken, *Freemoult v. Dedire*, 1 P. Wms. 430. *Plunket v. Penson*, 2 Atk. 290. *Young v. Dennett*, Dick. Rep. 452. *Allam v. Heber*, 2 Str. 1270, but by the later cases it has been held, and seems now to be settled that an estate devised to an heir, or which has descended to him subject to the payment of debts, will be considered as equitable assets, *Hargrave v. Tindal*, 1 Bro. Ch. Ca. 136, note. *Batson v. Lindegren*, D. per Lord *Thurlow*, 2 Bro. Ch. Ca. 94. *Bailey v. Ekins*, 7 Ves. 319. *Shiphard v. Lutwidge*, 8 Ves. 26.

If there be a mortgage for years and the reversion in fee left in the mortgagor, it will be legal assets, because the bond-creditor might have judgment against the heir of the obligor, and a *cesset executio* till the reversion comes into possession, D. per Lord *Hardwicke*, in *Plunket v. Penson*, 2 Atk. 293.

But an equity of redemption of a mortgage in fee, *Cole v. Warden*, 1 Vern. 410. *Plunket v. Kirk*, *ib.* 411. *Sawley v. Gower*, 2 Vern. 61. *Trevor v. Perryn*, 1 Ch. Ca. 148. *Barthrop v. West*, 3 Ch. Rep. 62. *Plunkett v. Penson*, 2 Atk. 293. *Clay v. Willis*, 1 B. & C. 364, or of a leasehold estate, are equitable assets, the case of Sir *Charles Cox's Creditors*, 3 P. Wms. 342. *Hartwell v. Chitters*, Ambl. 308. *Lyster v. Dolland*, 1 Ves. jun. 431. *Scott v. Scholey*, 8 East, 467. Judgment creditors.

however, having a general lien upon land, have a priority over bond and simple contract creditors in respect of the equity of redemption of a mortgage in fee, *Sharpe v. Earl of Scarborough*, 4 Ves. 538.

By the statute of Frauds the trust of an inheritance though not of a term are made legal assets, *King v. Ballett*, 2 Vern. 248, and see *Lyster v. Dolland*, 1 Ves. jun. 431.

[325] LAWSON v. STITCH.(1)

May 5th, 1738. 1 Atk. 507.

A testator having £500 upon mortgage and no other sum out upon security gives by will to the defendant £500, to remain and continue at interest on such securities as he should die possessed of, or to be put out on government securities, at the election of his executors. Held, a pecuniary legacy.

John Lawson by will, dated the 20th of July 1733, amongst other legacies, gave to the defendant £500, to remain and continue at interest on such securities as he should die possessed of, or to be put out on government securities, at the election of his executors.

It appeared in fact, that the testator had a mortgage for the principal sum of £500 on the estate of one Mr. *Pope*, and that he had no other sum out at interest; and it was insisted by the defendant, that he had several times declared that he would leave him the said £500.

There being a deficiency of assets to answer all the other legacies given by the will, the question is, If this is a specific legacy? for if it is, it would not be liable to any proportionable abatement, with the other pecuniary legatees.

It was insisted by the *Attorney-General*, that this is a specific legacy; that it appearing the testator had in this mortgage sufficient to answer the charge, and that too appearing to be the only security the testator had, it must be presumed he intended this legacy should be satisfied out of this mortgage; that wherever any security itself is devised, or any part of the money due on such security, such legacy is always to be taken as a specific one, and in support of his argument, he cited the case of *Phillips v. Carey*, at the *Rolls*, the 14th of May 1728. "There the testator devised a legacy of £1000, payable "at the age of twenty-one or marriage, to be retained in the hands of *Atwell* (who had "money of the testator's in his hands, as his banker), the *Master of the Rolls* held this "legacy should [326] not carry interest, only from the time limited for payment, which "is the case always of general pecuniary legacies; but that by this manner of devising "this £1000 it was severed from the rest of the testator's estate; and specifically appropriated for the benefit of this legatee; and that it should carry interest immediately." (Lord *Thurlow* in *Ashburner v. M'Guire*, 2 Bro. Ch. Ca. 113, said that this case had often been denied to be law, vide *Heath v. Perry*, 3 Atk. 102, and notes.)

Lord Chancellor. It is pretty difficult to make pecuniary legacies specific ones; but some such there are, as in the case of a sum of money in such a bag, the devise of a bond, or other security, or a devise of money out of such security, and in such case there can be no abatement. (See *Purse v. Snablin*, post [470].)

But this seems to me by no means a specific legacy; here is no particular charge of the legacy on this mortgage, and the election given to the executor plainly shews, the testator did not intend to make the mortgage the particular fund out of which the legacy should issue, but only gave the legatee a power of taking part of the mortgage money, if it should happen to be a subsisting mortgage at the time of his death, or if otherwise, that part of the testator's money, to the amount of £500, should be laid out in the purchase of some government security or other, to that value.

That the case at the *Rolls* was very different, for that was plainly a devise only of part of a debt due from *Atwell* to the testator, not did this point come in judgment, or was it at all necessary to be determined there; the question only was, from what time the legacy should carry interest; and though it was held to carry interest immediately, yet it will not follow from thence it was a specific one, but liable to an abatement with the other legacies, if any deficiency had made that necessary.

N.B.—It was said by the *Attorney-General* in this case, that where a particular debt was devised, or part thereof, and the same was recovered by the testator in his

lifetime, in an adversary way, that will amount to an ademption of the legacy ; otherwise, if voluntarily paid off by the debtor to the testator ; it was admitted by the *Lord Chancellor* in this case, that distinction had prevailed, and that it was the practice of the Court. (2)

[327] His *Lordship* declared, that the £500 given to the defendant, is to be considered as a pecuniary legacy, and liable to abate in proportion with the other legatees. (Reg. Lib. B. 1737, fo. 299.)

(1) This case is taken from *Atkyns*. In Lord *Hardwicke's* Note-book there is only the following note :—" Decree for account of assets and payment of legacies."

(2) This distinction was adopted by Lord *Harcourt*, in *Orme v. Smith*, 1 Eq. Ca. Ab. 302, pl. 2 ; by Lord *King* in *Rider v. Wager*, 2 P. Wms. 328 ; and Lord *Talbot* in *Partridge v. Partridge*, D. Cas. temp. Talb. 226 ; though Lord *Talbot*, in a prior case, was of a different opinion, *Ashton v. Ashton*, 3 P. Wms. 384 ; but Lord *King* afterwards held, that a compulsory payment should not be an ademption of a legacy, *Ford v. Fleming*, 2 P. Wms. 469 ; and Lord *Macclesfield* was of the same opinion, *Earl of Thomond v. Earl of Suffolk*, 1 P. Wms. 461 ; for the insecurity of the debt might be a reason for its being called in ; and see *Attorney-General v. Parkin*, Amb. 566. *Ashburner v. M'Guire*, 2 Bro. Ch. Ca. 108. *Hambling v. Lister*, Amb. 401 ; but Lord *Thurlow*, in contradiction to all the preceding authorities held, that the bequest of a debt is adeemed by the debt being paid to the testator in his lifetime, whether the payment be compulsory or voluntary, *Stanley v. Potter*, 2 Cox's Cases, 180, and see *Pulsford v. Hunter*, 3 Bro. Ch. Ca. 415 ; and this decision of Lord *Thurlow's* has been followed by Sir *Wm. Grant*, in *Fryer v. Morris*, 9 Ves. 360, and by Sir *John Leach* in *Barker v. Rayner*, 5 Madd. 209 ; but see *Coleman v. Coleman*, 2 Ves. jun. 639, *contra*, and see *Roberts v. Pocock*, 4 Ves. 150.

[328] JOSEPH CHAPMAN, MARY DICKENSON, and BLISSET MARIA DICKENSON, an Infant, Plaintiffs ; (1) and ELIZABETH BLISSET, Widow, JOSEPH BLISSET, MARY BLISSET, and ELIZABETH BLISSET, Infants, Defendants.

May 6th, 1738. Cas. temp. Talb. 145.

Where a testator, after giving certain legacies to his daughter, and after charging his real and personal estate with the payment of certain legacies, annuities, and £20 *per annum*, for ten years, for putting out apprentices, as his trustees should appoint, devises and bequeaths all the rest and residue of his real and personal estate to trustees, their heirs, executors, and assigns, upon trust, to pay certain annual sums to his son *Isaac* for life ; the rest and residue of the yearly rents and profits, during his life, to be applied for the maintenance and education of his children, except £100 *per annum* to his wife, and after his son's decease gives one moiety of the trust estate to such child or children of his son *Isaac* as he should leave, their respective heirs, executors and assigns, and the other moiety thereof to the child or children of his grandson *Joseph*, and the child or children of his daughter, their heirs, executors, and assigns. *Isaac* having died before the birth of the plaintiff, who is the only child of *Joseph* ; held, that by the devise of the real estate, the legal estate of inheritance vested in the trustees, and that the devise to the plaintiff was a contingent remainder of a trust estate, and that the legal estate in the trustees supported the contingent remainder. And part of the testator's personal estate, in the events which had happened, being undisposed of ; held, that it should be divided amongst the next of kin, according to the Statute of Distributions ; and that the testator's daughter being advanced in marriage, that her representative should not bring into *hotch-pot* the advancement made to the daughter upon her marriage. (The rule of *hotch-pot* does not apply to persons who are legatees claiming under a partial intestacy ; see this case, page 335, and see *Vachell v. Jefferys*, Pre. in Ch. 170. *Cowper v. Scott*, 3 P. Wms. 126. *Walton v. Walton*, 14 Ves. 318. But see *Ward v. Lant*, Pre. in Ch. 182.)

Joseph Blisset, the testator, having issue one son, *Joseph*, and one daughter, *Sarah Dickenson*, who had issue one son, *Joseph Dickenson*, by his will, dated 16th of October 1708, after giving several legacies to his daughter *Sarah Dickenson*, and amongst

various other bequests, £200 *per annum* to his wife charged upon his real and personal estate, and £30 *per annum* to his grandson *Joseph Dickenson*, for his maintenance, till he came to the age of fifteen years, and then £200 to put him out an apprentice, and from thence only £20 *per annum* during his apprenticeship, and if he attained the age of twenty, then £1000, and if twenty-three, then £1000 more; and after giving £100 to put out certain [329] poor children to be apprentices, with the approbation of his trustees, and £20 *per annum* for ten years, to put out certain other poor children to be apprentices, as his trustees should appoint; devised and bequeathed all the rest and residue of his freehold and copyhold messuages and hereditaments in, &c., and all his leasehold messuages and hereditaments in, &c., and all his annuities in the Exchequer for ninety-nine years, and all his stock in the Bank of England, and all that was owing to him from, &c., and all other his freehold, and copyhold, and leasehold messuages and hereditaments, and all other his real and personal estate, of what nature or kind soever, not therein particularly devised and bequeathed, unto *Thomas Bland*, *John Cole*, and *Thomas Abbot*, their heirs, executors, and assigns respectively, in trust to pay his son, *Isaac Blisset*, at every quarter-day, £37, 10s. for his support during his life, and upon this further trust, that if his said son should marry with the consent of his wife, and his trustees for the time being, then he appointed the further sum of £37, 10s. a-quarter during his life should be paid to him, over and above the said first mentioned £37, 10s. a-quarter, and if he should have any child or children, he gave the rest and residue of the yearly rents and profits of his said trust estate, over and besides the said yearly payments thereby bequeathed, to be applied during the life of his said son for the education and benefit of such child or children, and if his said son should marry with consent as aforesaid, then he gave his wife the yearly sum of £100 *per annum* for her life, as a jointure after his said son's death, and then proceeded in these words, "And after my son's decease, I give one moiety of the said trust estate to such child or children of my said son *Isaac* as he shall leave, their respective heirs, executors, and assigns, and to the survivor of them, and the heirs and assigns of such survivor; and the other moiety of my said trust estate I give to the child or children of my said grandson *Joseph*, and every other child and children of my said daughter, their heirs, executors, and assigns, and to the survivor of them, and to the heirs and executors of such survivor; and if my said son *Isaac* should die without issue, then I give the first mentioned moiety to my grandson *Joseph*, and such other child and children as my said daughter shall have, and the heirs, executors, and assigns of my said grandson, and child and children of my said daughter; and if my said grandson and daughter shall both die without issue, [330] then I give the said moiety given to my said grandson and children of my said daughter to the children of my said son *Isaac*, their heirs, executors, and assigns; and if my said son, daughter, and grandson, shall all die without issue, then and in that case, and from thenceforth, and not otherwise, I give the said trust estate, except a sum of £200, which over and above what I have already given her, I give to the said *Bridget Carter*, I give to and for the benefit of *Greenwich Hospital*, and I make my said trustees executors of this my will."

Isaac Blisset, the testator's son survived him, and died in 1728, leaving issue by his wife, the defendant *Elizabeth Blisset*, the other defendants *Joseph*, and *Mary*, and *Elizabeth Blisset*.

The testator's grandson, *Joseph Dickenson*, survived his mother and *Isaac Blisset*, and about four years after the death of the latter, had issue, one daughter, the plaintiff, *Blisset Maria Dickenson*, and died in 1733, having, by his will, given all his real and personal estate to his wife the plaintiff *Mary Dickenson*, and appointed her and the other plaintiff *Joseph Chapman*, his executors.

The object of the present suit was to have an account of one moiety of the surplus of the testator's estate, and one of the questions raised was "Whether the plaintiff *Blisset Maria Dickenson* was entitled to any interest in the testator's real estate, she not having been born until a considerable time after the death of *Isaac Blisset*, the particular tenant, and no trustees being interposed to preserve the contingent remainders."

The cause was first heard before the *Master of the Rolls*, who on the 6th of December 1734, decided in favour of the plaintiff *Blisset Maria Dickenson* upon that point.

From this decree, the defendant *Joseph Blisset*, the heir at law of *Isaac Blisset*, appealed, and the cause having been heard before Lord *Talbot*, his Lordship delivered his judgment as follows:

The general question is, whether the limitation to the plaintiff of a trust-estate be a good or a void limitation. If it be a void one, there is an end of the question as to the real estate.

It has been insisted upon that this is a limitation of a legal estate, and of a remainder of a legal estate, and not executory ; and if it be a legal devise for the life of *Isaac*, the rest of the remainders will be contingent remainders, [331] which not taking place at the death of *Isaac* will be void, and therefore the first question is whether this be a limitation of a legal estate, or of a trust ; and if of a trust, then how far such a limitation of a trust-estate will be good without trustees to preserve the contingent remainders.

The first question depends upon the will and intention of the testator, whether he intended that the estate should remain in the trustees for a particular time, and then go over executed in other persons. It is agreed that there was to be some legal estate in the trustees, for the things to be performed by them, do plainly require it ; they were to pay *Isaac* £37 quarterly, and £20 a-year for 10 years, to put out apprentices.

The other things required, do not quite so clearly require a legal estate in the trustees. There being therefore these particular purposes, it is necessary that the estate should remain in the trustees till they are performed. But it is contended that although the limitation be to them and their heirs, yet it is to be considered as giving them the legal estate only during the life of *Isaac*, and that on his death the legal estate was to go to the devisees. As to this there is no case mentioned where a limitation indefinitely to trustees and their heirs (and which, in part, must give them a legal estate) has been considered as partly legal and partly not so. I do not say that it may not be so in some cases, but this is one of the most unfavourable cases possible where the making it a legal devise is only in order to defeat the intent of the testator ; for, suppose *Isaac* had died before the expiration of the ten years, must the estate have been taken from them ? and the will is to be construed as it stood at the death of the testator, and not according to events happening afterwards ; and besides, what sort of a portion must this be, a legal estate for part of ten years, and a trust for the remainder ? I therefore think that the devisees' interest cannot be considered as a legal estate.

Considering it therefore as a trust estate, the next question will be, whether the limitation to the plaintiff be a contingent remainder, or an executory devise ?

As an executory devise, it would be good even in a legal limitation ; and the only objection is, that it is limited *per verba de presenti*, but this is of no weight with me, for the words must be considered as he used them. It appears that his grandson *Joseph* was an infant and young, and he knowing that his grandson had no children, devises a moiety to the child and [332] children of his grandson *Joseph*. These words, indeed, import the present time, but as he knew that *Joseph* had no children, he must have intended them in a future sense.

This is confirmed by several of the other parts of the will, for the remainder over is given to such children as his daughter *shall* have, and the last provision he makes is in case his grandson and daughter *shall* both die without issue, and therefore it was impossible for him to shew his intention more clearly than he has done, that he meant such children as *should* be born.

In its creation therefore, when compared with the preceding limitations, it appears to be executory till *Isaac* had a child ; but yet it is true that when *Isaac's* child was born, he had a freehold estate in the trust during the life of *Isaac*, so that the question will be, if this is considered as a remainder, whether on the death of *Isaac* before the contingency happened it became void. If this was a limitation of a legal estate, it would be clearly void, for the freehold cannot be in abeyance, and here was nobody to take it ; but with regard to trusts, the reason of that rule fails ; for if any question had arisen on those estates, bills might have been brought, and trustees inserted, who would have been answerable for any wrong done ; and therefore though the general rule as to legal estates be so, and the construction of limitations of trusts be the same as of legal limitations, yet I do not apprehend that it holds in cases of contingent limitations or remainders, or that equity has gone so far as to say that contingent remainders shall be void for want of trustees to preserve them ; for where is the necessity to make such trustees, when the whole legal estate is executed in the original trustees : and why should not their original estates preserve the whole trusts. Therefore, whether this be considered as an executory devise or contingent remainder of a trust estate, it is good, and the plaintiff is entitled to a moiety.

The decree directed that the proper accounts should be taken, and amongst other

things declared that the defendants *Joseph, Elizabeth, and Mary Blisset* from the death of *Isaac Blisset* became entitled to one moiety of the residue of the said real estate, and to one moiety of the residue of the said personal estate ; and that the plaintiff *Blisset Maria Dickenson*, became entitled to the other moiety thereof from the time of her birth; and that the rents and profits of that moiety of the real estate, and the interest and produce of that moiety of the personal estate which became [333] due from the death of *Isaac Blisset* to the birth of the said *Blisset Maria Dickenson*, were not disposed of by the will of the testator ; and that therefore the rents and profits of that moiety of the real estate during that time descended to the defendant *Joseph Blisset*, as heir at law to the testator ; and that the interest and profits of the moiety of the personal estate during that time ought to be distributed according to the statute of Distributions.

Under this decree a claim was made before the Master on behalf of the infant plaintiff *Maria Blisset Dickenson*, as representing the testator's daughter, or of the other plaintiffs as personal representatives of *Joseph Dickenson*, to one moiety of the undisposed part of the testator's personal estate as one of the next of kin to the testator.

This claim was opposed on behalf of the defendants, the children of *Isaac Blisset*, upon the ground that the testator's daughter had received from her father £1500 upon her marriage, and that that sum ought therefore to be brought into the account.

This point having been brought before the Court upon petition on behalf of the plaintiffs, the *Lord Chancellor* directed that the plaintiffs should be at liberty to apply to have the cause re-heard.

The cause accordingly now came on to be re-heard upon that point, and upon a petition of re-hearing presented by the defendant, *Joseph Blisset*, the heir at law of the testator, against that part of the decree by which it was declared that the plaintiff *Blisset Maria Dickenson* was entitled to one moiety of the testator's real estates ; he claiming that moiety as heir at law to the testator.

Mr. Attorney-General and Mr. Floyer, for the plaintiffs.

As to the undisposed part of the personal estate, it is a rule that *hotch-pot* does not prevail in cases of equitable and partial intestacy, whether arising from a lapsed legacy or an undisposed surplus, *Cowper v. Scott*, 3 P. Wms. 124. *Vachell v. Jeffreys*, Pre. Ch. 169. *Wheeler v. Sheer*, Mos. 288, 304.

As to the question relative to the moiety of the real estate, the defendant claims it as heir at law, insisting that the limitation to the children of *Joseph Dickenson* became void by the death of *Isaac Blisset*, before the birth of *Joseph Dickenson's* children ; and in support of that claim insists, that the limitation was of the legal estate, and operated by way [334] of remainder, and not by way of executory devise. We on the other side contend, 1st, That that limitation was an executory devise ; and, 2dly, That if it was a contingent remainder, yet that the legal estate continued in the trustees, and that the remainder therefore was not defeated by the death of the first taker before the contingency happened. The trustees are directed to pay several annuities and sums of money, which they could not do without the legal estate. No contingency or time is mentioned at which that legal estate is to determine, and the ultimate devise to *Greenwich Hospital* is of a trust estate. If then the legal estate continued in the trustees, it would have been absurd to have introduced other trustees for the purpose of preserving contingent remainders.

The reason why the law requires a contingent remainder to vest during the life of the particular tenant, is to avoid the legal estate being in abeyance, which it never could be in the present case, for a *præcipe* might at any time have been brought against the trustees.

Mr. Browne and Mr. Fazakerley, for the defendant *Joseph Blisset*.

As to the first point, the rule of this Court is to distribute the undisposed part of the personal estate according to the statute of Distributions, which must include all the rules of that statute. In the civil law, the *Collatio bonorum* took place whether the deceased left a testament or not, Domat. 2. 694. 2 Inst. 33. The case of *Wheeler v. Sheer*, Mos. 288, 304, turned entirely upon the custom of the province of York. The case of *Ward v. Lant*, Pre. Ch. 184, is an authority for the defendant. As to the moiety of the real estate, we contend that the devise to the children of *Joseph Dickenson* was a contingent remainder, and not an executory devise ; and that though the legal estate remained in the trustees during the life of *Isaac Blisset*, yet that the limitations over were of the legal estate. The intermediate estates may be legal estates, though the devise to *Greenwich Hospital* be of a trust estate ; but supposing the limitations to-

be of trust estates throughout, the same rules as to contingent remainders must prevail in equitable as in legal estates.

May 6, 1738.—*Lord Chancellor*. The question as to the personal estate relates to a small part of the profits which arose between the time of the death of *Isaac Blisset*, and of the birth of the child of *Joseph Dickenson*. These profits the executors, having legacies under the will, cannot take, and [335] they consequently become an undisposed part of the personal estate.

I am of opinion, that under the circumstances of this case, there should not be any *hotch-pot* of this undisposed part of the personal estate ; but I do not say that this will be so in all cases.

Before the Statute there was no law for the distribution of personal estates, the administrators were entitled to the whole. The Ecclesiastical Courts indeed compelled them to account, and to make distributions ; but prohibitions from the courts of *Westminster Hall* were always granted upon such compulsions, and before the Statute this Court never exercised a power over equitable intestacies, to compel the executors to distribute.

The only case in which the statute of Distributions operates as a law, is that of a complete intestacy ; for where there is a will, and an executor appointed, this Court compels him to distribute as a trustee only, not by force of the Act, but of an equity drawn from it.

But in cases where the Act is not a compulsory law, but is adopted as a direction only to the Court, the Court will not follow it farther than the equity and reason of that Act require.

The object of the Act is to make certain persons inheritable ; and the object of the provision as to *hotch-pot*, is to produce an equality amongst those persons. This Court, therefore, adopts that provision, where that object can thereby be obtained, as in cases where the whole personal estate falls under an equitable intestacy ; but where a part only of the personal estate is undisposed of, and legacies are given by the will to the persons claiming that part, the bringing advancements made in the testator's lifetime into *hotch-pot*, would be so far from attaining an equality, that it would produce a directly contrary effect.

For it is admitted that the legacies cannot be brought into *hotch-pot* ; it is plain, therefore, that an equality will not be produced by the adoption of that rule as to advancement. The cases of *Wheeler and Sheers*, and *Cowper and Scott*, and *Vachell and Jefferys*, are all in point, and are opposed only by the authority of *Ward and Lant*.

This Court will never follow the statute of Distributions as to *hotch-pot*, except in cases where an equality can be obtained by so doing.

As to the second point respecting the real estate, I am of [336] opinion that the trust continues throughout. It is a complicated devise of real and personal estate to these trustees, and it is admitted that the trust continues as to the personal estate. The limitation is general to the trustees and their heirs. A devise to A. and his heirs, in trust for B. during his life, would certainly be a fee in the trustees, with a resulting trust after B.'s death for the heir at law.

I am of opinion that the whole limitation is a declaration of trust, and that the legal estate in fee, which remained in the trustees, will support the contingent remainders ; for it is immaterial for the purpose of supporting contingent remainders, whether the whole legal estate, or whether a particular one for that particular purpose, is vested in trustees, for there will always be a tenant to the *præcipe* in any action which may be brought against the estate, to provide for which is the reason that abeyances are not permitted by law.

On one of the papers in the cause, the following note is indorsed in the *Lord Chancellor's* handwriting :—

I adjudged that there was no *hotch-pot* in this case, as to the undisposed part of the personal estate ; and that by the devise of the real estate, the legal estate of inheritance vested in the trustees, and that the subsequent dispositions were trusts throughout, and consequently, that the legal estate in the trustees supported the contingent remainders. (Reg. Lib. A. 1735, fol. 298. Reg. Lib. A. 1738, fol. 681.)

(1) The Statement of this case, and Lord *Talbot's* judgment, are taken from the papers in the cause, the arguments of counsel from Lord *Hardwicke's* Note-book, and the judgment of Lord *Hardwicke* from a manuscript.

[337] MATTHEW POWELL, Administrator of ABIGAIL his late Wife, *Plaintiff*; (1) and MARTHA HILL, Widow and Executrix of ROPER HILL, and Administratrix *cum testamento annexo* of Sir ROGER HILL, ELIZABETH MARIA HILL, and Others, *Defendants*.

May 11th, 1738.

By marriage articles made on the marriage of *Roger Hill* with *Martha Hill*, certain sums of money are agreed to be laid out in lands, to be settled upon *Roger Hill* for life, remainder to *Martha Hill* for life, remainder to the issue of the marriage, remainder to Sir *Roger Hill*'s right heirs; and another sum is agreed to be settled to the same uses, except that *Martha Hill* was to have no life estate therein. The husband being dead, and there being no issue of the marriage in 1729, *Elizabeth Maria Hill*, as the co-heir with her sister, becoming absolutely entitled to part of the sums, and entitled to another part, subject to the life estate of *Martha Hill*, in 1732, sells her interest therein to the plaintiff, who was a protestant; upon a bill brought by the plaintiff to have that part of the sums to which *Elizabeth Maria Hill* was absolutely entitled paid to him, and to have that part to which she was entitled, subject to the life estate of *Martha Hill*, laid out in the purchase of lands, to be settled pursuant to the articles; it was decreed accordingly, there being no evidence that *Elizabeth Maria Hill* was a papist at the time of the descent cast, though it was proved that in 1735, *Elizabeth Maria Hill* was a nun in a convent at *Lisbon*, professing the Roman Catholic religion.

Sir *Roger Hill* had issue two sons, *Roger Hill* and *Locky Hill*, and two daughters, the plaintiff's late wife *Abigail*, and the defendant *Elizabeth Maria Hill*.

Upon the marriage of *Roger Hill*, the eldest son of Sir *Roger Hill*, with the defendant *Martha Hill*, Sir *Isaac Shard*, the father of *Martha Hill*, agreed to pay £6000 as his daughter's marriage portion to trustees, and Sir *Roger Hill* agreed to pay them the like sum of £6000, and covenanted that at his death his heirs and executors should pay the further sum of £12,000; and it was agreed that the said sums of £6000 and £6000 should be laid out in lands, to be settled to *Roger Hill* for life, remainder to *Martha Hill* for life for her jointure, remainder to the issue male of the marriage, remainder to Sir *Roger Hill* and his heirs; and it was agreed that the £12,000, when paid, should be laid out in land, and settled to the same uses as the said sums of £6000 and £6000, except that *Martha Hill* was to have no life estate in the same.

[338] Sir *Roger Hill* died in 1729, and soon afterwards his eldest son *Roger Hill*, and soon after him the younger son, *Locky Hill*, died, upon which the plaintiff's wife *Abigail*, and *Elizabeth Maria Hill*, became entitled as co-heirs. In 1725, some small portion of the £6000 and £6000, was invested in the purchase of a small freehold estate at *Uxbridge*, and the residue was afterwards invested in South Sea stock. The £12,000 covenanted to be paid by Sir *Roger Hill* was never paid, or laid out in the purchase of lands.

By indentures of lease and release of the 15th and 16th October 1731, and between plaintiff and his wife of the one part, and defendant *Elizabeth Maria Hill* of the other part, in consideration of £4250 paid by the plaintiff to *Elizabeth Maria Hill*, she conveys and assigns to the plaintiff, his heirs, and executors, all her share, right, and interest in the several sums, and the benefit of the covenants and securities, and all lands purchased or to be purchased with such money; *Abigail*, the plaintiff's wife, having died without issue on the 3d of April 1732, and the plaintiff having obtained administration to his wife; *Elizabeth Maria Hill*, by bargain and sale enrolled, dated the 17th May 1732, in consideration of the sum before paid to her, and of 10s. bargains, sells, and assigns to the plaintiff all the said monies and the lands purchased or to be purchased, and the benefit of all covenants and agreements relating thereto.

The present suit was instituted for the purpose of having the estate purchased settled according to the marriage articles, and the residue of the £6000 and £6000 settled on *Martha Hill* for life, remainder to plaintiff in fee, and the £12,000, with interest from Sir *Roger*'s death, to be paid to the plaintiff.

The defendant *Martha Hill*, being the executor of Sir *Roger Hill*, resisted payment, upon the ground that *Elizabeth Maria Hill* was a papist, and disabled under the act 1 Jac. 1, c. 4, s. 6.

Evidence was given that *Elizabeth Maria Hill* was, in 1735, living at a convent
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in *Lisbon* as a nun, attending mass and professing the Romish religion, but the time of her going there was not ascertained.

May 11, 1738.—*Lord Chancellor*. I do not think that the facts established in this case are such as to bring the point of law into question. There is no evidence when *Elizabeth Maria Hill* went abroad, or with what intent she went. The only [339] thing proved is, that she is a papist, and in a nunnery at the present time.

In order to bring her within the statute 1 Jac. 1, it must be shewn that before the descent cast, she went abroad with the intent there mentioned. For if she was not under the disabilities of that Act, at the time of the descent, the estate vested in her; and it was admitted, in the Duchess of *Hamilton's* case, that if the person was not disabled at the time of the descent, and as the estate vested, the disability subsequently incurred will not divest the estate, whatever may become of the pernaney of the profits, and that such person may therefore certainly convey. The present case, therefore, is not brought within the statutes 1 Jac. 1, c. 4, 11 & 12 W. 3, or 3 Geo. 1, c. 18; and I do not give any opinion upon the construction of those Acts.

The *Lord Chancellor* to his note of this case has added the following memorandum:—I decreed for the plaintiff, there being no sufficient proof that the defendant *Elizabeth Maria Hill* was under a disability at the time of the descent cast upon her, which was in February 1729, it being proved only that she was a nun at *Lisbon*, in 1733; and as to the disability on the Act 11 & 12 W. 3, by reason of her being a papist, it appeared that this estate came to her by descent, and she was plainly the reputed owner thereof, and the plaintiff was admitted by all the answers to be a protestant purchaser for a valuable consideration, 3 Geo. 1, c. 18.

By the decree his Lordship directed that the *South Sea* stock, being the residue of the said sums of £6000 and £6000, should be laid out in the purchase of lands, to be settled pursuant to the articles upon *Martha Hill* for life, remainder to the plaintiff in fee; and *Martha Hill*, admitting assets, directed that she should pay the £12,000 to the plaintiff, with interest for the same, from the end of six months after the death of Sir *Roger Hill*. (Reg. Lib. B. 1737, fol. 303.)

(1) The statement of this case is taken from Lord *Hardwicke's* Note-book, the judgment from a manuscript report.

[340] JOHN BURGOYNE, and ANNA MARIA his Wife, *Plaintiffs*; (1) and ROBERT BENSON, and the Executors of the late LORD BINGLEY's Will, GEORGE FOX, and HARRIET his Wife, the Daughter and Heir of LORD BINGLEY, and Others, *Defendants*.

May 12th, 1738. 1 Atk. 376.

In 1714, Lord *Bingley* conveys lands at *Cheshunt* to himself for life, remainder to *Samuel Benson* for life, remainder to his first and other sons, subject to a power of revocation by Lord *B.*, if he settled lands in *Yorkshire* of as great or greater value to the same uses; by his will he devises the lands at *Cheshunt* to the plaintiff for her life; and by subsequent deeds, for the purpose of revoking the uses as to the lands at *Cheshunt*, conveys lands in *Yorkshire*, but which are of less value than the lands at *Cheshunt*, to the uses of the deed of 1714. *Robert Benson*, who was the eldest son of *Samuel Benson*, having refused to take the estate in *Yorkshire*, being of less value than the estate at *Cheshunt*: Held, that the power of revocation was not well executed by Lord *B.*, and that *Samuel Benson* was entitled to the estate at *Cheshunt*, but that he was a trustee of the estate in *Yorkshire* not for the plaintiff, the devisee of the *Cheshunt* estate, who was a volunteer, but for the heir at law of Lord *Bingley*.

By a settlement made upon the marriage of the late Lord *Bingley* with *Elizabeth*, the daughter of Lord *Guernsey*, dated the 18th of December 1703, a term of 1000 years of part of the estates, including certain lands at *Hatton* in *Yorkshire*, was limited to trustees upon trust, in case of failure of issue-male of the marriage, to raise £10,000 for daughters' portions.

By deeds of lease and release, dated the 25th and 26th of August 1714, Lord *Bingley*, in consideration of his natural love and affection for his kinsman, *Robert*

Benson, conveyed certain lands called *Cheshunt Nunnery*, then in the occupation of *J. B.*, at the rent of £120 *per annum*, or thereabouts, to hold to the use of Lord *Bingley* for life, remainder to his first and other sons in tail-male, remainder to *Samuel Benson*, the father of *Robert Benson* for life, remainder to his first and other sons in tail-male, remainder to the right heirs of Lord *Bingley*. And it was thereby provided that Lord [341] *Bingley* should have power from time to time, by deed or writing to be signed and sealed in the presence of two or more credible witnesses, to revoke the uses thereby declared of the same lands or any part thereof, and thereby to limit or appoint any new uses, so as upon and at the time and times respectively of doing thereof, the said Lord *Bingley* should, in lieu thereof, convey and settle other lands, tenements and hereditaments in the county of *Yorkshire*, free from incumbrances, of as good or better yearly value than the lands and premises thereby granted were then worth, to the same uses and upon the same trusts, and for the same intents and purposes as the lands thereby granted were settled. There was also a power of leasing reserving a rent of not less than £120 *per annum*.

Lord *Bingley* by his will dated the 27th of June 1729, devised to the plaintiff *Anna Maria Burgoyne*, for her separate use, his house called the Nunnery at *Cheshunt*, with all his estate, as well copyhold as freehold in the county of *Hertford* for life, with the household goods which should be there at his death. He also gave her an annuity of £400, and another house for life, and all his lands in *Yorkshire* and elsewhere he devised to trustees for the benefit of his only child, the defendant *Harriet Fox* for life, remainder to her first and other sons in tail, remainder over; and directed that his personal estate should be laid out in lands to be settled to the same uses.

By indentures of lease and release dated the 29th and 30th of June 1730, to which *Robert Benson* was a party, reciting the deed of 1714, and that Lord *Bingley* was desirous of revoking the uses of the nunnery at *Cheshunt*, and to settle other lands of the same value to the same uses; Lord *Bingley* revoked the uses of the nunnery at *Cheshunt*, and limited the same to the use of himself and his heirs, and conveyed the lands at *Hatton* in *Yorkshire*, to the uses of the deed of 26th of August 1714, and covenanted that those lands were of the yearly value of £120, and that he had full power to convey, and reserved to himself the same power of revocation.

After the death of Lord *Bingley*, a decree was made at the Rolls, by consent, for the payment of the £10,000 portion to his daughter *Harriet Fox*.

Samuel Benson being dead, *Robert Benson* refused to take the estate at *Hatton*, because inferior in value to that at *Cheshunt*, and because it was subject to the term of [342] 1000 years for securing the £10,000 portion, and insisted upon his title to *Cheshunt Nunnery* under the deed of 26th of August 1714, recovered that estate by ejectment.

The bill was brought by the devisee, under the will, of the *Cheshunt* estate, and prayed that the plaintiff might be declared to be entitled to that estate; or if *Robert Benson* should be held to be entitled to retain that estate, then that the plaintiff, in lieu thereof, might be declared to be entitled to the *Hatton* estate.

Mr. Noel, Mr. Fazakerley, and Mr. Murray, for the plaintiffs.

The settlement of the *Cheshunt* estate by the deed of 1714, is well revoked by the will, or by the deed of 1730; for it was not necessary, by the former deed, that the estate to be settled as an equivalent, should be so settled at the particular time of the revocation, provided it was done in time to secure the interests of those claiming under it. The plaintiffs are entitled to the benefit of the covenant in the deed of 1730, so as to have the estate made up to the value of £120 *per annum*, and to have the £10,000 paid out of the personal estate, and so to remove that objection to the *Hatton* estate. The plaintiffs claim under the will, which is not revoked but confirmed by the subsequent deed of 1730. If one of two joint-tenants makes a will, and then the other joint-tenant dies, the whole of the land will pass by the will, *Perkins on Devise*, 500. So if one articles for a purchase of land and then makes his will, and afterwards takes a legal conveyance, the land passes, *Prideaux v. Gibbon*, 2 Cas. in Ch. 144. *Greenhill v. Greenhill*, 2 Vern. 679.

It the plaintiffs shall not succeed in obtaining the *Cheshunt* estate, yet they are entitled to the estate at *Hatton*; for if the settlement of 1714, had not been properly revoked, the legal estate of both is in *Robert Benson*, but as it is clear that only one was intended for him, and]as he chooses to retain the estate at *Cheshunt*, he must hold the other as a resulting trust for the heir at law, and as against the heir at law,

the plaintiffs are clearly entitled. The election of a third person ought not to prejudice them. Those who take under the will cannot defeat the testator's intention in any other point. *Streatfield v. Streatfield*, Ca. temp. Talb. 176. *Reeve v. Reeve*, 1 Vern. 219. *Noys v. Mordaunt*, 2 Vern. 581.

Mr. *Attorney General* for the defendant *Robert Benson*, insisted that the deed of 1714, was not revoked, and that it had been so determined by the recovery in ejectment. That [343] the *Hatton* estate, independently of the 1000 years' term, was not of equal value with the estate of *Cheshunt*, which, previous to Lord *Bingley's* death, was let for above £175 *per annum*, whereas the covenant, if that was to be resorted to, was only that the *Hatton* estate should be of the annual value of £120, in which he disclaimed all beneficial interest.

Mr. *Floyer* and Mr. *Banks* for the defendant *Fox* and his wife *Harriet*, the heir at law, contended, that the deed of 1730 revoked the will by which the reversion of the *Cheshunt* estate might otherwise have passed, and that the estate at *Hatton* was to be considered as a resulting trust for the heir at law, the plaintiff being a mere volunteer, and not entitled to any equivalent for the devise intended for her by the will.

May 13, 1738.—*Lord Chancellor*. The first question is, whether there was a good revocation of the uses of the deed of 1714, either by the will, or by the deed of 1730; and I am clearly of opinion that the power of revocation was not well executed in respect of the difference of the value of the two estates, and the term of 1000 years which covered *Hatton*, as part of the *Yorkshire* estates settled in 1703.

I am likewise clearly of opinion, that the deed of 1730, was a revocation of the will, *quoad* the devise of the *Hatton* estate, as part of all the testator's lands, &c., in *Yorkshire*, mentioned to be devised by the will; and therefore, *Hatton* could not be subject to the particular uses created by the will. Vide *Shower's Parl. Ca.* 150.

But as it was admitted, that though *Robert Benson* had the legal estate both in *Cheshunt* and *Hatton* estates, the former under the settlement in 1714, and the other in 1730; yet as one only was plainly intended him, and he chuses to adhere to the *Cheshunt*, &c., he must be a trustee as to the other estates, for some person or other who in equity has a right to it. And I think the heir at law of the testator will plainly be entitled to this trust; and the principal question therefore is, as between the plaintiff and the heir at law.

And as the plaintiff claims only under the will, and is therefore a mere volunteer, he is not entitled to any equity of this kind. It is quite a new attempt for a mere volunteer, not being a wife or child, to come to a Court of Equity to seek an equivalent for a void devise.

In the case of *Noys v. Mordaunt*, 2 Vern. 581, it is plain Lord *Cowper* went upon this, a provision which was [344] thereby to be made by a father for his child; and it is likewise in this respect distinguishable, that the dispute there was between persons who claimed under the same will, here it is between a devisee and the heir at law, who is always favoured.

In *Reeve v. Reeve*, 1 Vern. 219, particular notice was taken by the testator, in his will, of his apprehension that the £3000 charge would be good against the jointure. No express intention of any thing of that kind appears in the present case. Here it was likewise to make provision for an only daughter, and no inference can be drawn from those resolutions, in favour of a mere volunteer, as the plaintiff is.

N. B.—Held clearly by the *Lord Chancellor*, there was no pretence for paying off the £10,000 charged on the term of 1000 years, out of the personal estate of Lord *Bingley*, but the land on which it was originally charged must bear the burthen of it; and what was done by the decree in this case could be only matter of agreement between the parties. (See *Bartholomew v. May*, ante, page 255, and the cases there cited, in note (2) to that case; and see *Coventry v. Coventry*, 2 P. Wms. 222. *Evelyn v. Evelyn*, 2 P. Wms. 664. *Lanoy v. Athol*, 2 Atk. 444. *Tankerville v. Fawcett*, 2 Bro. C. C. 57. *Ward v. Dudley*, 2 Bro. C. C. 316. *Howell v. Price*, 1 P. Wms. 294. *Galton v. Hancock*, 2 Atk. 439.)

His Lordship declared he saw no cause to give the plaintiff any relief in equity; and therefore ordered that the matter of the plaintiff's bill stand dismissed without costs.

(1) The statement of this case, and the arguments of counsel, are taken from Lord *Hardwicke's* Note-book. The judgment from *Atkyns*, which has been compared with another manuscript report, and in some few particulars altered by Lord *Hardwicke's* Note-book.

[345] EDWARD HEATHER, an Infant, *Plaintiff*; (1) and MARTHA HEATHER, ANN and ELIZABETH HUNTINGFORD, JAMES RIDER, and Others, *Defendants*.

May 19th, 1738. 1 Atk. 425.

Edward Heather by his will gives an annuity of £20 to his daughter and the heirs of her body and appoints his son executor, who by his will gives to her and her daughter an annuity of £20 to be paid out of real estate; and by an indorsement upon the will with a pencil, "Directs that this annuity shall not be taken for another £20 annuity, but to confirm the £20 *per annum*, left her and her daughter by her father"; Held that the daughter was not entitled to both annuities; not upon the ground that the indorsement being unattested could affect the real estate charged with the annuity; but by way of exoneration of his father's personal estate, he being the only person chargeable by way of personal demand as the executor of his father.

Edward Heather by his will, dated April 19, 1730, gave to his daughter, *Ann Huntingford* and the heirs of her body, £20 a-year to be paid to her quarterly without any abatement; and in case she died without issue then to his sons *William* and *Edward Heather*, whom he appointed his executors, and who proved his will.

William Heather died, leaving *John Heather* one of the defendants, his eldest, and the plaintiff his second son.

Edward Heather, the son of the first named *Edward Heather*, by his will, dated May 1, 1731, gave to his sister *Ann Huntingford* and her daughter *Elizabeth*, £20 *per annum*, to be paid quarterly without any abatement, out of his five freehold houses in *Holborn*; but in case they died without issue then the £20 a-year was to return to the plaintiff or the family of the *Heathers*. And after some other bequests he gave all his real estate which he had of his father and all his personal estate, stock in trade, money, and securities, to the plaintiff.

Upon the back of the will in pencil, the testator indorsed the following words, which were proved in the Ecclesiastical Court, as a codicil to the will:—"I hope the £20 given to my sister *Huntingford* herein will not be taken for another £20 a-year; but to settle and confirm the £20 *per annum* [346] her father left her and her daughter; and if they die without lawful issue let it come to my heir."

The *Master of the Rolls* having held that *Ann Huntingford* and *Elizabeth* her daughter were entitled to two annuities of £20; that question now came on before the *Lord Chancellor* upon an appeal from that decision.

Anne Huntingford having become a bankrupt, her assignees claimed the two annuities.

Mr. *Attorney-General* and Mr. *Floyer*, for the plaintiff, contended, that it being clear that the last testator, *Edward Heather*, did not intend that his sister *Ann Huntingford* and her daughter should take the annuity under his will and also that under the will of his father, one annuity only was payable; because otherwise *Ann Huntingford* and her daughter would be taking under the will and defeating its intentions at the same time.

Mr. *Robinson*, for *Ann Huntingford* and her daughter, contended, that the codicil not being attested could not operate upon the annuity, which by the will was charged upon freehold property; and that the annuity, as given by the will could not be considered as given in satisfaction of the annuity under the father's will, the one being given to *Ann Huntingford* in tail and the other to her and her daughter.

Lord Chancellor. The testator's intention is most plain (if the Court can take notice of it), by the indorsement that his sister should have only one annuity, and that he was only willing to confirm and settle it on a more secure fund than a fluctuating personal estate, by charging it on his real estate, which was not done by the father's will.

If it had been inserted in the will, there could have been no doubt; but as nothing can be taken either to enlarge or diminish what affects a real estate, unless it be executed according to the statute of Frauds and Perjuries; and as the testator has not complied with the directions of that statute, this indorsement cannot be of any weight.

I very much question if this last annuity can be taken as a satisfaction of the

annuity given by the father's will, it being charged on a different fund, and given in another manner; for regard has been always had to the particular [347] circumstances, limitations, and funds out of which legacies are to arise; yet I think she is not entitled to both annuities; but not so much on account of the codicil, as by way of exoneration of the personal estate of the father. He was the only person chargeable by way of personal demand, and might by codicil or testamentary schedule, which affects a personal estate according to the rule in the civil law, direct that in case his sister should take the annuity under his will, she should not have it out of his father's personal estate, but that his personal estate should be discharged therefrom; and taking it in that light, it does not contradict the statute of Frauds and Perjuries, and for that reason his Lordship altered Sir *Joseph Jekyll's* decree. (See *Newman v. Newman*, 1 Bro. C. C. 186. *Thellusson v. Woodford*, 13 Ves. 223. *Ex parte Earl of Ilchester*, 7 Ves. 372.)

His Lordship declared, that in case the defendant, or the assignees under the said commission awarded against the defendant, *Ann Huntingford*, should insist on the benefit of the annuity of £20 given to her by the will of her brother, *Edward Heather*, in that case, they are not entitled to receive any benefit of the annuity of £20 given to the said defendant, *Ann Huntingford*, by the will of her father, *Edward Heather*, payable out of his personal estate, and of whose will *Edward*, her brother, is executor. (Reg. Lib. A. 1737, fo. 569.)

(1) The statement of this case, and the arguments of counsel, are taken from Lord *Hardwicke's* Note-book. The judgment from *Atkyns*.

ANONYMOUS.(1)

May 31st, 1738. 1 Atk. 489.

The Court will not appoint a receiver of an infant's estate where there is no bill filed. (So *Ex parte Mountfort*, 15 Ves. 445; and *Cherry v. Cherry*, at the Rolls, 1801, cited in 15 Ves. 449.)

There is no instance of appointing a receiver of the rents and profits of an infant's estate, where there is no bill depending in this Court; if it were only filed, there might be an application for this purpose on behalf of the infant.

(1) This case does not appear in Lord *Hardwicke's* Note-book.

[348] EDES versus BRERETON.(1)

June 1st, 1738.

Persons concerned in the marriage of a ward of Court committed, though they were ignorant of her being a ward of Court.

Upon the petition of the uncle and guardian of the plaintiff, *Mary Edes*, who was a ward of the Court, and an infant under the age of sixteen, and whose fortune amounted to £8000, against *Charles Pearson*, who was under the age of twenty, and who was the son of Lord *Tankerville's* steward, for marrying the infant clandestinely, without the leave of the Court; it was sworn by the petitioner, that the marriage was brought about by the contrivance of *Pearson* with Lord *Ossulston*; that Lord *Ossulston* went to London, and brought a parson from the *Fleet*, who had 100 guineas for marrying the couple; that they were married at *Up Park*, Lord *Tankerville's* seat. Lord *Ossulston* was present at the marriage, and gave the lady away as her father. None of these facts were denied by Lord *Ossulston's* affidavit, but both he and *Pearson* denied any knowledge of the orders of the Court, or that they knew that *Mary Edes* was a ward of Court.

Mr. *Fazakerley*, for *Pearson*, the husband. *Pearson* is under age. The petitioner did not take proper care of the infant; he kept her under too much restraint, intending to marry her to his own son. *Pearson* did not know of the proceedings of this Court,

therefore offended innocently. I admit that want of that knowledge is not an absolute excuse. The punishment of the husband will be the punishment of the wife too.

Mr. Noel, for Lord *Ossulston*. There was an inadvertency in sending for the clergyman, but Lord *Ossulston* was ignorant of her being a ward of the Court.

Lord *Chancellor*. Lord *Ossulston*, by his affidavit, admits, that at the request of *Pearson*, he procured *Barry*, the parson, to marry them, and he denies knowledge of any of the orders of the Court. It is positively sworn by the petitioner, that the marriage was brought about by the contrivance of *Pearson* with Lord *Ossulston*; that Lord *Ossulston* went to *London* and fetched the parson from the *Fleet*, [349] who had 100 guineas for marrying them; and that Lord *Ossulston* was present at the marriage, and gave away the lady as father, in a room at *Up Park*. None of these facts are denied by his affidavit. Let *Pearson*, *Mary Tench* the maid-servant, and Lord *Ossulston* be committed to the *Fleet* for their contempt. *Barry*, the parson, was committed by a former order.

It appears from the Register's Book, that Lord *Ossulston* and *Mary Tench* having surrendered themselves to the warden of the *Fleet*, in obedience to the order of the 1st of June, presented a petition, shewing that they were ignorant of *Mary Edes* being a ward of the Court, and that they were sorry for their offences, which came on to be heard on the 13th of June, when they were, upon their undertaking payment of all the guardian's costs relating to this matter, discharged out of custody, on paying to the warden of the *Fleet* his fees.

On the 27th July, *Charles Pearson* presented a petition, stating his ignorance of the infant being a ward of the Court, and that he was sorry for his offence, and that he was willing and desirous as far as was in his power, and promised to settle upon the infant, when they both came of age, her real and personal estate. His Lordship ordered a receiver of the infant's real and personal estate, and that *Charles Pearson* should be restrained from conveying, disposing, or alienating any part of his said wife's real estate, without leave of the Court, and referred it to the Master to see what was proper to be allowed for the maintenance of *Charles Pearson* and his wife; and the said *Charles Pearson's* solicitor undertaking to pay the costs of the present application, he was discharged upon payment of the Warden's fees. (Reg. Lib. A. 1737, fo. 479. fo. 547.)

(1) This case is taken from Lord *Hardwicke's* Note-book.

[350] HENRY HERVEY, and CATHERINE, his Wife, ANN CLUTTON, Widow of THOMAS CLUTTON, deceased, which said CATHERINE and ANN are two of the Daughters of Sir THOMAS ASTON, Bart., deceased, *Plaintiffs*; (1) and Dame CATHERINE ASTON, Widow of Sir THOMAS ASTON, Sir THOMAS ASTON, Bart., eldest Son and Heir of the said Sir THOMAS ASTON, deceased, Sir JOHN CHESHYRE, HENRY WRIGHT, and ANDREW KENDRICK, *Defendants*.

[See *In re Moore*, 1888, 39 Ch. D. 131.]

On Appeal from an Order of the Master of the Rolls.

April 29th, Nov. 21st, 1737; June 5th, 1738. 1 Atk. 361.

Sir *Thomas Aston*, by settlement, reserving to himself a power of revocation, conveys certain estates to trustees for a term of years upon trust, in case he shall have one or more son or sons living at the time of his death, and more daughters than one living at that time, or who shall, in his life-time, be married with his consent, that then it may be lawful for the said trustees, by and out of the rents and profits of the premises, and by such interest, produce, and increase, as shall be made of the same, or by such mortgage or leasing thereof, or such ways and means as to them shall seem meet, to raise, levy, and receive for, and as the portion of every such respective daughter, the sum of £2000, and after such respective sum of £2000 shall be so received and raised, shall and may pay to every such daughter the sum of £2000 at the respective days of their marriage, with the consent of Lady *Aston*, if living, and being his widow, or if she be dead or married again, then with the consent of the trustees, or the survivor of them, or the executors, administrators, or assigns of the survivor, and also by and out of the rents and profits of the premises, to pay yearly to each the sum of £50 until the age of eighteen, and after that age, and until their marriage, with such

consent as aforesaid, and during the life, and until the second marriage of their mother, £70 yearly, and from and after their marriage, with such consent as aforesaid, or after the death or second marriage of their mother, the yearly sum of £100, until their respective marriages or deaths, which should first happen, and in case of the death of any of the daughters before they should be married with such consent as aforesaid, then the portion shall cease. and the estate be exonerated thereof ; and if raised, shall be paid to the person entitled to the reversion of the estate, the funeral expenses of such daughters so dying before marriage, to be paid by the person entitled to the reversion.

Sir *Thomas Aston*, by his will, directs, that out of other real estates (which he directs should be accounted as part of his personal estate), and out of all other monies to which he was entitled, certain sums shall be raised and paid to his daughters, to be for the augmentation of their portions, provided by the settlement, to be paid to them at such times, and subject to such conditions, provisoes, limitations, and agreements, as their original portions were made subject to ; and in case any of his daughters shall happen to die, their additional portions are not to go to their personal representatives.

Two of the daughters of Sir *Thomas Aston*, after his death, having married without the consent of their mother, they were held not entitled either to the original portions provided by the settlement, or the additional portions given by the will.(2)

Sir *Thomas Aston* having issue by his wife, the defendant, Lady *Aston*, one son, the present Sir *Thomas Aston*, and [351] eight daughters, by indentures of lease and release, bearing date the 27th and 28th of May 1712, between himself of the first part ; Sir *John Chetwood* and *John Crew*, of the second [352] part ; and Sir *Robert Burdett*, since deceased, and Sir *John Chesshyre*, of the third part ; conveyed to certain trustees and their heirs, all his manors, lands, and hereditaments, to hold the same to them and their heirs, to the use of himself for life, remainder as to the hall and park of *Aston*, and other part of the premises in *Cheshire*, to the use of his wife, the defendant, Lady *Aston*, during her widowhood, and so long as she should make *Aston Hall* the place of her usual residence ; and as to the rest of the premises, and also the premises limited to Lady *Aston* after the determination of her interest therein, to the use of his son, the defendant, now Sir *Thomas Aston*, for life, remainder to trustees, to preserve contingent remainders ; remainder to his first and other sons in tail male ; remainder to the second and other sons of the settlor, Sir *Thomas Aston*, by the defendant, Lady *Aston*, for life, remainder to the first and other sons in tail male, and for default of such issue, as for the premises in the counties of *Warwick* and *Berks*, to the use of Sir *Robert Burdett* and Sir *John Chesshyre*, for 1000 years, and as to the rest of the premises, as the respective uses thereof should determine, and also the premises in the counties of *Warwick* [353] and *Berks*, after the determination of the term of 1000 years, to the use of the first and other sons of the settlor, Sir *Thomas Aston*, by any other wife, in tail male ; remainder to the first and other daughters of the defendant, now Sir *Thomas Aston*, in tail male ; remainder to the first and other daughters of the second and other sons of the settlor, Sir *Thomas Aston*, in tail male ; remainder to the first and other daughters of the settlor, Sir *Thomas Aston*, by the defendant, Lady *Aston*, in tail male, with divers remainders over.

The trusts of the term of 1000 years were declared to be that in case Sir *Thomas Aston*, the settlor, should die without issue male by his wife Lady *Aston*, or having issue male who should die before marriage and before the age of twenty-one years, and should have only two daughters by his wife Lady *Aston* living at the time of his decease, or who in his life should have been married with his consent ; That in that case and not sooner or before, Sir *Robert Burdett* and Sir *John Chesshyre* and the survivor of them, and the executors, administrators, and assigns of such survivor, should take and receive the rents, issues, and profits of the premises limited to them for 1000 years, and by such interest, produce, and increase as should be made or raised by the same or any part thereof, or by such mortgage or leasing thereof, or of any part or parcel thereof, or such ways and means as to them should seem meet, raise the sum of £5000, and the same so raised pay and deliver to or to the use of the younger of such two daughters, when and as soon as she should be married with the consent of the defendant, Lady *Aston*, if then living and not married again, and if dead or married again, then with the consent of Sir *Robert Burdett* and Sir *John Chesshyre*, or the survivor of them, or the executors.

administrators, or assigns of such survivor ; and upon this further trust that the said Sir *Robert Burdett* and Sir *John Chesshyre* and the survivor of them and the executor administrator or assigns of such survivor, should yearly after the death of Sir *John Aston* the settlor without issue male raise and pay to such younger daughter out of the rents issues and profits of the said premises until her marriage with such consent as aforesaid and during the life of the defendant Lady *Aston*, and until the second marriage of the said Lady *Aston* the yearly sum of £100, and from and after the marriage of such daughter with such consent as aforesaid, and after the decease or second [354] marriage of the said defendant Lady *Aston* the sum of £250 *per annum* until the said sum of £5000 should be raised and paid ; and after providing for the event of there being more than two daughters, and a son and only one daughter ; it was further declared that in case the said Sir *Thomas Aston* the settlor should happen to have one or more son or sons of his body by his wife the defendant, Lady *Aston*, living at the time of his death, and should happen to have more daughters than one living at the time of his death, or who should be in his lifetime married with his consent as aforesaid, that then it should be lawful for the said Sir *Robert Burdett* and Sir *John Chesshyre* and the survivor of them and the executors administrators and assigns of such survivor by and out of the rents issues and profits of the said premises so limited to them for the term of 1000 years as aforesaid, or by such ways and means as aforesaid to raise levy and receive for and as the portion of every such respective daughter, the sum of £2000, and after such respective sums of £2000 should be so had received and raised, should and would well and truly pay or cause to be paid unto every such daughter respectively the respective sums of £2000 at the respective days of their marriage with such consent as aforesaid, and also that it should be lawful for the said Sir *Robert Burdett* and Sir *John Chesshyre* and the survivor of them and the executors administrators and assigns of such survivor by and out of the rents issues and profits of the said premises so limited to them for 1000 years yearly from and after the decease of the said Sir *Thomas Aston* the settlor to pay and satisfy to the said daughters the respective yearly sum of £50 a-piece until their respective attainment of the age of eighteen years and after their respective attainment of that age and until their respective marriage with such consent as aforesaid, and during the life of the said defendant Lady *Aston*, and until the second marriage of the said Lady *Aston* the respective yearly sum of £70. and from and after the respective marriage of such daughters with such consent as aforesaid and after the decease or second marriage of the said defendant Lady *Aston*, then the respective yearly sum of £100 until their respective marriage or death which should first happen. And it was thereby agreed by and between all the parties to these presents ; and it was thereby declared that if any of the said daughters should depart this natural life before she or they should be married with such consent as aforesaid that then the sum or [355] sums intended for the portion or portions of her or them so dying should cease and the said premises be exonerated therefrom, and if raised and so far as the same should be raised should remain and be payable unto such person or persons to whom the remainder or reversion of the premises expectant upon the said term should for the time being belong or appertain, the funeral expenses of such daughter or daughters so dying before marriage to be first paid and satisfied by such person or persons to whom the remainder or reversion should so belong or appertain.

By this deed a power of revocation and of new appointment by deed or will was reserved to Sir *Thomas Aston*.

Sir *Thomas Aston* afterwards, by his will, dated the 26th of February 1722, after taking notice of the above settlement, of 28th of May 1712, and that the manor of *Southrey*, and certain other lands in the county of *Norfolk*, had lately been devised to him, subject to the payment of certain sums amounting to £3100, which he had paid, and that his personal estate designed for the benefit of his daughters was thereby much diminished, devised the said manor of *Southrey*, and the said other lands in the county of *Norfolk*, to the defendants, *Henry Wright* and *Andrew Kendrick*, for 500 years, without impeachment of waste, upon trust, by sale or mortgage, within six months after his decease, to raise the said sum of £3100, and to pay the same to his executrix, to be accounted as part of his personal estate, and to come in lieu of what had been so paid by him. And he further devised certain lands in *Frodsham*, in *Cheshire*, which he had lately purchased, to the same trustees, for a term of 500 years, without impeachment of waste, upon trust, within six months after his death, by sale or mortgage, to raise £1000, and to pay the same to his executrix, to be accounted part

of his personal estate, and subject to the said terms of 500 years and 500 years, he devised the said premises in *Norfolk* and *Frodsham* to the same uses to which the manor of *Nun Eaton* was limited by the above settlement. And he further directed that out of the said sums, so to be raised and paid out of the said *Norfolk* and *Frodsham* estates, and out of all other monies to which he should be entitled at his death, except what might be in the actual possession of himself or his wife, there should be paid to his daughters, who should be unmarried and unprovided for by him at the time of his death, the sum of £2000 if the same would extend so far, and if not, so [356] much as the same would extend to pay equally amongst them, to be for the augmentation of their portions, provided for them by the said settlement, to be paid to them at such times, and subject to such conditions provisoes limitations and agreements as their original portions were by the said indenture made subject and liable; and in case any of his daughters should happen to die before her or their original portions should become payable, then his will was, that the said £2000 should not be paid to the executors or administrators of them so dying; and in case the money out of which the said sum of £2000 a-piece was to be raised, should be more than sufficient for raising the £2000 a-piece for his daughters, he gave and bequeathed the residue thereof unto his wife, the defendant *Lady Aston*, to whom he gave and bequeathed all the rest and residue of his goods chattels and personal estate not therein before given and bequeathed, and appointed her sole executrix of his will, and gave to her the custody and guardianship of all his children until their ages of twenty-one.

The said *Sir Thomas Aston*, by a codicil to his will, dated the 17th of July 1723, after reciting the provision made for his daughters' portions, by the indenture of the 28th of May 1712, and his power of revocation, and that the term limited for the purpose of raising such portions would not commence until after other estates of inheritance, so that his daughter would have no benefit therefrom at his death, or until the death of his son without issue male, directed that the said term of 1000 years should commence from and after his decease, before the estate limited to his son, and for the better raising the said portions, he directed that all the lands settled by that indenture, except the lands in *Cheshire*, should be subject to that term of 1000 years, for the better raising of the portions by that indenture appointed to be raised according as the same were therein and thereby appointed to be raised and paid; and for better raising such portions, he directed and appointed that the said lands in *Cheshire*, except certain parts thereof limited to his wife during her widowhood, should be to the use of the same trustees, upon trust to pay his son certain annual sums, until his age of twenty-five years, out of the rents and profits, and to apply the rest and residue of the rents and profits for and towards the raising of the said portions of his daughters; and he declared his will to be, that the estates and uses in the said indenture limited, after his decease [357] should give way and place to the several uses therein and thereby limited.

Sir Thomas Aston, the father, died in the month of January 1724, leaving only one son, the defendant, *Sir Thomas Aston*, and eight daughters. The defendant, *Lady Aston*, proved his will.

In Easter Term, 1725, a bill was filed on behalf of the daughters, praying that the will and codicil might be established and the trusts performed.

By a decree in that cause at the Rolls, of the 6th of December 1725, it was declared, that the will and codicil were well proved, and that the plaintiffs were entitled to, and ought to enjoy the benefit of the respective provisions made for them by the settlement, will, and codicil, and directed the several maintenances to be paid accordingly, and reserved liberty to the plaintiffs to apply for their respective portions as they should become payable.

After this decree, the plaintiff, *Henry Hervey*, married *Catherine*, and *Thomas Clutton* married *Ann*, two of the daughters of *Sir Thomas Aston*. The suit having thereby become abated, in Trinity Term, 1734, the present bill of revivor was filed by *Henry Hervey* and *Catherine* his wife, and *Thomas Clutton* and *Ann* his wife.

Lady Aston, in her answer to this bill, stated that her daughter *Catherine* had married without her consent, after both she and her husband had had notice of the provisions of the settlement, as to the necessity of such consent; that she had refused her consent because *Mr. Hervey* had no property by which he could make any provision for his wife or family. That her other daughter *Ann* had also married without her consent, and under the age of twenty-one years, after having had notice of the provisions of the settlement.

This answer was not replied to, but on the 16th of April 1736 *Henry Hervey* and *Catherine* his wife, and *Thomas Clutton* and *Ann* his wife, presented a petition to the *Master of the Rolls*, for the payment of the portions of £2000 a-piece, claimed to be due under the settlement, will, and codicil, to Mrs. *Hervey* and Mrs. *Clutton* upon their respective marriages, stating that they had no other provisions whatsoever, and the husbands respectively offering to make such settlements of the said portions as the Court might think proper.

This petition came on to be heard on the 29th of May 1736, when his Honour ordered the payments of the main-[358]-tenance to be continued, and took time to consider as to the payment of the portions.

On the 5th of November 1736, his Honour, after fully stating the case, delivered the following judgment :—

This being a case of great consequence and concern, as well to the public as to private families, I have taken time to consider of it, that I might look into all the cases that are in the books, and find out what would result from them, and from the nature and reason of cases of this kind, and might contribute any endeavours to the fixing of a rule for judging in cases of this nature.

The general question is, whether the original and additional portions, or either of them, became payable upon the marriage of these ladies without the consent of their mother.

I observe that the marriage of Mrs. *Hervey* was after twenty-one, that Mrs. *Clutton's* was at nineteen ; that Mr. *Hervey* was expressly acquainted with the condition annexed to the payment of the portions ; and though it doth not appear Mr. *Clutton* was, yet I think, these or any other different circumstances attending the two marriages, makes no difference between one case and the other as to the matter in judgment.

Before I distinguish between the original and additional portions, I shall take notice of some things that are common to them both :—

1. They are provisions for children.
2. The loss of these provisions is a penalty.
3. This Court can impose upon the husbands terms or conditions, by way of settlement on the wives and their issue, as shall be thought reasonable, and this the petitioners submit to.

1. These are provisions for children.

Now provisions for children are not merely voluntary, parents are obliged to make a reasonable provision for them at their death, as well as in their lifetime, and if they did not, the law did it for them. The writ *De Rationabili parte bonorum* is to supply the want of such a provision, and this was anciently the common law of England, and how it came to be confined to particular places does not appear, Fitz Herbert's *Natur. Bre.* new edit. 284, 285. However, nature obliges every parent to make a reasonable provision for his child, and in this Court children have an equity, as creditors or purchasers have, though not in equal degree, they being a middle species between those and volunteers ; and this Court [359] makes good provisions for them defective in point of law. It helps them against the law. I need not mention instances, they are well known.

2. The loss of these provisions is a penalty.

It is said the portions here demanded are not payable but upon a condition precedent, and that not being performed, they never vested, and then the petitioners cannot be said to lose that which they never had.

Supposing this to be so, yet this is a legal distinction, not an equitable one, for children have a natural and antecedent right to a provision from their parents, and upon that foundation this Court relieves them ; indeed, the *quantum* of that provision is left to the parent, and in the present case Sir *Thomas Aston*, the father of the petitioners, hath fixed it, and hath thought £4000 a-piece a reasonable provision for his daughters.

3. This Court can impose terms or conditions upon husbands, by way of settlement upon their wives and upon their issue.

This is a power the Court is in possession of, for how long time I do not know, but it was so in 26 Car. II. as appears by the case of *Shipton v. Hampson*, Rep. of Cases in the time of Lord *Nottingham*, 145, 146, and is now fixed and established.

The Court, in these cases, acts *vice parentis*, which affords a very good reason for this Court not to be strict and rigorous in judgment ; these are considerations common to both the original and additional portions.

I come now to distinguish betwixt the one and the other, and because the question concerning the additional portions is the least difficult, and may lead to the consideration of the other, I shall therefore invert the order, and begin with the consideration of the additional portions.

And I am of opinion these portions did, by the marriage of the petitioners, become due, and ought to be paid.

Nothing is more certain and established, than that a legacy, given upon condition that the legatee marry with the consent of a third person, even of a parent, is due upon a marriage without such consent, unless it be given over.

Testamentary cases are of ecclesiastical cognizance, and must be judged by that law. The civil law, where it doth not differ from the canon law, is taken as part of the ecclesiastical law, and both these laws here in England have their sanction from, and are controulable by usage or practice, and thus they constitute the King's ecclesiastical law.

[360] *Swinburne*, an author often quoted and relied on in this Court, in his *Treatise of Wills*, p. 242, 243, lays it down as a general rule, that all conditions against the liberty of marriage, particularly conditions of marrying with the consent of another, are unlawful. The reasons given for the general rule are, that conditions in restraint of marriage are repugnant to the law of nature, and are hurtful to the commonwealth, whose interest it is that the country should be thoroughly peopled. That in the case of a condition to marry, with the consent of another, the person whose consent is to be procured, may make a hard choice, either by reason of the dislike of the parties, inequality of age, disagreement of manners or the like, which, if it were suffered, says Mr. *Swinburne*, would breed greater mischief, than if marriage without such consent, were endured. But then he makes a condition of marrying with the consent of another lawful as to part, *viz.* the marrying, and unlawful only as to the consent of the person, which shews it cannot be said in the present case, absolutely, that the condition is not performed, for it is performed in the reasonable, though not in the unreasonable part of it.

Pigott's case, as cited by *Winch, J.*, as a foundation for his opinion in the case of *Gresley v. Luther*, Moor. 857, in every material circumstance, comes up to the present case; a legacy was given to a daughter on condition she married with the consent of her mother, she married without such consent, and notwithstanding this, had a sentence (in the spiritual court it must be) for the legacy. I mention this as an authority to shew what the rule of the ecclesiastical law is, as agreed to by a Judge of the common law. But *Swinburne* goes further, and p. 245 puts the case of a legacy upon a condition in restraint of marriage given over to pious uses; in this case, says he, the condition is not to be rejected as unlawful, for the law doth more favour piety than the liberty of marriage; which particular reason shews his opinion, that where a legacy is given over, and not to pious uses, the restraint of marriage is unlawful. Agreeable to this opinion it is said, the civil law is so, by my Lord *Hale*, 1 Mod. Rep. 308; 1 Ch. Ca. 142; and Abr. of Cases in Equity, 110.

After all, this Court hath in some measure departed from the rule of the civil law, and where the legacy is given over, hath held, and I believe the ecclesiastical courts too have held, the condition throughout valid; but where the legacy is not given over, this Court hath constantly held the condition was intended to be only *in terrorem*. Before I go into authorities, let us see whether there be a foundation for this notion of a condition intended *in terrorem*, which I own at first sight seems to be too imaginary for a Court of Justice to build upon, but upon examination it will be found to be substantial, and to be made good by nature and reason.

1. By nature.

I think there is a foundation in nature for construing such conditions to be meant only *in terrorem*; generally, these conditions are annexed to legacies given by parents to children; such is the present case, and *ad ea quæ frequentius accidunt jura adaptantur*. Mr. *Swinburne* says, conditions in restraint of marriage are against the procreation of children, and repugnant to the law of nature. It is certain, mutual affection, or good liking of the contracting parties, is the natural inducement to marriage, and this is personal, and so these conditions are against nature with respect to the contracting parties, nor are they less against nature with respect to their parents. Let a parent, if he were living, be asked, if his daughter married against his consent to a man of no fortune or means of livelihood, which is the case he would most likely provide

against, let him consult natural affection, lay his hand upon his heart, and let him say whether he would leave his child destitute of all manner of provision; surely he would not be so severe: if not, this consideration creates a strong presumption that where a father at his death leaves a portion to his child, on condition of her marrying with the consent of another, that such condition was only intended to be *in terrorem*: but it is said, if this be known, it will not be *in terrorem*; then I ask, how long it will be before this is generally understood, and when it is, if a father would be so strict, he might, by giving the legacy over to another child or relation, make the condition effectual.

2. I say, the construing such a condition to be intended only *in terrorem*, may be justified or made good by reason.

Besides what hath been said of nature (which reason must always be governed by), I lay it down as a certain truth, that whatever is injurious to the commonwealth is unreasonable, for every man is obliged to consult the interest of that in the first place. I have already observed, that the Roman law or civil law looked upon these conditions in this light, *viz.* that they had a tendency to hinder the increase of [362] the number of people, and this is a reason which extends to this and every other kingdom and state; and reasons which affect the body politic, as they are the most extensive, are the most stringent, so that I think this Court is warranted by nature and reason in construing such condition to be intended only *in terrorem*, where the legacy is not given over.

But it was insisted on by the defendant's counsel, *viz.* that here is a disposition over to the defendant, Dame Catherine.

As to this point, the will directs, in case any of the daughters die before the original portions were payable, then the additional portions should not be paid to their executors or administrators, and if the money out of which the additional portions were to be raised should be more than sufficient (these are the words) "for raising the said £2000 a-piece for my daughters, I do give the residue thereof to my dear wife, to whom I give the residue of my personal estate not hereinbefore bequeathed." Here is nothing given to the wife by the first words but the residue of the money over and above the £2000 a-piece for the daughters; indeed, the latter words make Dame Catherine general residuary legatee, but that a bequest of the residuum ought not to be construed such a disposition over, as will substantiate the condition and defeat the legacy, will appear by authorities which I shall mention, and is a known rule, where the legacy is not given over, but would sink into the residuum or common mass, or even by express words appointed to go to the residuary legatee (which, by the way, is saying no more than the law says). In that case I have held (*Paget v. Haywood*, Nov. 15, 1733) and I do hold, that the legacy is not given over so as to effectuate the condition, but it is, notwithstanding, to be intended only *in terrorem*; however, that is not the present case, for this is plainly a legacy given on condition of marrying with the consent of another, and no disposition over.

As to authorities upon this head, I shall confine myself to such provisions or portions as were not charged upon land, but affected personal estate only, and take notice of the others upon the head of the original portions.

The first case is *Escott v. Escott*, 7th Feb. 1653, named only in the case of *Fry and Porter*, 1 Chan. Ca. 144; but I find it in the Register's Book of that year A. fol. 747, 6th February 1653. A man bequeathed to his nephews and nieces £500 a-piece; to his nephews at twenty-one, and his nieces at twenty-one or marriage: and in case either of his [363] nephews or nieces should marry before twenty-one, without the consent of their mother and uncle, his or her legacy should be void, and distributed amongst the others.

One of the nephews brought his bill against the mother, executrix of the will, and the uncle, for his legacy; the mother insisted that the plaintiff married without her consent. The uncle averred his consent, the Court decreed the legacy a very strong case against such conditions, for here was a bequest over; and though the uncle averred his consent, the mother denied hers; and the will makes the consent of them both necessary.

The next case is *Bellasis v. Ermine*, adjudged by Lord Chancellor Clarendon, assisted by Justice, afterwards Lord Chief Justice Hyde, and my Lord Chief Baron Hale, Trin. 15 Car. 2 [1663], 1 Ch. Ca. 22. A portion of £8000 was given to the plaintiff's wife, provided she married with the consent of A.; and if not, she to have but £100 *per annum*; she married without the consent of A. which was pleaded, and the plea overruled. The whole Court declaring this proviso was but *in terrorem*; but if the

portion had been limited to another, it had been otherwise ; which distinction too is affirmed by my Lord *Nottingham*, 1 Vern. 201.

The next case was upon a deed of trust concerning a sum of money. It is *Sutton v. Jenks*, 2 Chan. Rep. 95, adjudged 25 Car. 2 [1673-74], by my Lord *Nottingham*. This case, so far as concerns the present question, is in the main rightly reported as compared with the Register's Book. £1500 was to be put out at interest for the benefit of the plaintiff *Anne*, to be paid her at the age of twenty-one or marriage ; but if she married without the consent of the father and mother, or one of them, or the survivor, then £500, part of the £1500, to be paid to such person as the mother by writing under her hand should appoint. The mother by deed poll directed if her daughter married without the consent of her or of her father the defendant, then the £500 to be paid to her and the defendant, or the survivor. The mother died, afterwards the plaintiff *Sutton* married the plaintiff *Anne* in a clandestine manner, without her father's consent, and after he had forbidden her to marry him, on forfeiture of his blessing, and what otherwise she might expect from him. The defendant claimed the £500. Lord *Nottingham*, on hearing the cause, declared the plaintiff could not have the £500, but the defendant the father was entitled to it, with interest from the [364] marriage : Here I observe, that by the power of appointing the £500 in case of marriage without consent, and by the execution of that power, the £500 is given over, so that this precedent is not applicable to the present case.

The next is the case I mentioned before of *Shipton v. Hampson*. According to the Register's Book the decree is entered as of 28th of April 1675, Book B. 587 ; as far as concerns the present question, the printed book and the Register's book agree. There a legacy of £2000 was given by a father to his daughter the plaintiff, on condition she married with consent of the executors ; she married without their consent, notwithstanding which she had a decree for her legacy ; but there indeed the plaintiff had the same sum charged upon land without any condition ; and this she had released at her father's request, he promising to improve it for her, so it became a debt, to the payment of which he could not annex any condition. I mentioned this case therefore only for the sake of making the collection of cases any ways relating to this matter complete.

The next case is *Garrett v. Pritty*, 2 Vern. 293, 4th July 1693, Register's Book A. 821. A man by his will gives to his daughter £3000 ; but if she should marry without the consent of one *Scriven* before twenty-one, the legacy of £3000 should cease and be void, and in lieu gives her £500 only, and gives the son the residuum of the estate. The plaintiffs married without the consent of *Scriven* (it is taken for granted before her age of twenty-one), and brought their bill for the £3000, notwithstanding the clause of restriction, and decreed accordingly, says Mr. *Vernon*, principally because it was not expressly devised over, but to fall into the surplus.

The next case is *Stratton v. Grymes*, 2 Vern. 357, judged by my Lord *Somers*. A freeman of *London* gives two-thirds of his third or legatory part to his daughter ; but if she married without the consent of her mother, then her brother to have £500 of what he had given his daughter : she married without her mother's consent. *Per Cur'*. This is not to be taken as a clause *in terrorem*, but vests an interest in the brother, whom the testator considered as to what provision he was to have by his will, as well as the daughter. I mention this declaration of the Court, because it shews the true reason of the distinction that hath prevailed between such conditional legacies where they are given over, and where they are not.

The next case is *Amos v. Horner*, reported to be Mich. [365] 1699. Abridgment of Cases in Equity, 112. A man bequeathed £100 to his daughter on her day of marriage, on condition she married with the consent of certain persons ; and if she married without their consent, then to have £50 only, and gave the residue of his personal estate to the defendants ; she married without such consent, and it is said it was held by the *Master of the Rolls*, that this was more than a clause *in terrorem*, and that the devise of the surplus of the personal estate was a devise over ; which is contrary to the opinion of the Court as implied in *Bellasis* and *Ermine's* Case ; and expressed in *Garrett* and *Pritty*, and contrary to the known rule of the Court ; but after all there is no foundation for this report ; for there was no resolution in *Amos* and *Horner* ; by the Register's Book it appears that the cause was brought on in Michaelmas 1698, and that it was put off for want of parties, and never came on again that I can find.

The last case I shall mention on this head is *Creagh v. Wilson*, 2 Vern. 572. *John Wilson*, a clergyman, bequeathed £200 to his granddaughter, the plaintiff *Elizabeth*, provided she continued with his executors ; but if she should be taken from them by her father (who was a papist) before twenty-one, or in case she should marry against the consent of the executors, he gave her but £10. The plaintiff *Elizabeth*, with the consent of the executors, was placed with a clergyman ; after she had been there some time, she had his leave, and the consent of one of the executors, to make a visit to her father, who took that opportunity of marrying her to the plaintiff *Creagh*, a Papist, and gave her himself a portion of £800. The bill was for the legacy, and the *Master of the Rolls*, Sir *J. Trevor*, decreed it with interest and costs. But my Lord *Cowper* reversed the decree, and dismissed the bill as to the £200, and directed only the £10 ; here it was part of the condition that she should not be taken from the executors by her father, which was done ; for my Lord *Cowper* declared the taking her away from the clergyman with whom she was placed by the executors, agreeable to the intent of the testator, that she should be bred a Protestant, was a taking her from the executors ; and though she had a consent to go to her father, yet no consent that he should marry her, which was the very thing the testator intended to provide against ; and it was a marriage against the consent of the executors, where they had not an opportunity before the marriage to declare their dislike, and afterwards [366] they dissented ; and here I observe was a total defeating the intention of the testator which was that she should be bred a Protestant, and not marry a Papist, which I conceive would be a good condition annexed to a legacy according to the Ecclesiastical Law, as it is to be taken here since the reformation of religion, so that this resolution doth not contradict former resolutions, nor affect the present case, where the condition is barely to marry with consent of another, and without any particular view or contemplation.

From the view of these cases, I am, in point of authority, well warranted in the opinion, that the legacies given by the will, ought to be decreed out of personal assets, *viz.* either such as were so at the testator's death, or such as by the will and decree are to be considered as such, I mean the £4100. Before I enter upon the consideration of the question concerning the original portions, I will, preparatory to it, make an observation upon what I have said, relating to the additional portions, *viz.* that the construing such conditions annexed to legacies, where they are not given over, to be meant only *in terrorem*, is not founded in the law ; for the Roman or Civil Law made void conditions of this kind in general, whether the legacies were given over or not, as prejudicial to the public ; but the Church of Rome, placing great sanctity in celibacy, the superstitious notions of that Church prevailed over the public spirited notions of the State of Rome ; and that with other errors obtained here, and in consequence such conditions were allowed very probably without any limitation ; but then the spirit or temper of this Court, which moderates the rigour of the law came in, and where such legacies were not given over, set up the notion of their being intended only *in terrorem*. This I mention, because it may be of use in the consideration of the remaining question concerning the original portions, because they arise out of a trust, and all trusts are to be judged and only to be judged by the rules and maxims of a Court of Equity ; and this Court hath taken or used a latitude or liberality in the construction of trusts, and governed itself more by the intention than the letter ; and even in the case of Uses, though they are now legal estates, yet because they were originally equitable interests only, my Lord *Coke* says, Co. Litt. 49 a. The intention of the parties works much in the raising and direction of uses ; and in the case of *Sheldon and Dormer*, 2 Vern. 311, my Lord *Somers* says, Courts of Equity have always, in cases of trusts taken the same rule of pursuing [367] the intention of the parties as in cases of wills, and that even in limitations of estates, where the letter is to be as strictly pursued as in any case. I observe in the present case we are not upon the construction of a limitation of estate, but the direction of trust-money ; and if this Court hath, in the case of money given by a will, and not given over, held the intention of the party in annexing a condition of this sort to be only *in terrorem*, this Court must, if it will be consistent with itself, adjudge the intention of the party in annexing such a condition to a gift of money by a deed to be likewise only *in terrorem* ; and therefore I am of opinion the portions provided by the settlement, as well as those by the will are due, and ought to be raised out of the trust term, subjected to the payment of them. I shall not repeat what I have said upon the former head, though all of it (except so much as relates to legacies as they are distinguished from other provisions, and are

alieni fori), I say every thing else may be applied to the question concerning the original portions provided by the settlement, and is, I think, a sufficient ground to determine in favour of them. unless this reasoning be controuled by authorities. I shall therefore state the authorities, and it will appear they do not gainsay the opinion I have given, but fall in with it.

Before I go into these authorities, it is fit I should take notice of what was insisted on by the defendant's counsel; *viz.* that the original portions are given over by the settlement, which says, "If any of the daughters die before marriage, with such consent, then the sum intended for her portion shall cease, and the premises be exonerated; and if raised, or so far as it shall be raised, shall be payable to such person or persons to whom the remainder or reversion should for the time being belong."

I think there is no ground from this clause to say the portions are given over. Whatever this disposition is, it is not to take place upon the breach of the condition, that is, marrying without consent, but upon the daughter's dying before marriage with such consent; so that it is taken for granted, if she marries at all she will marry with consent; and, therefore, this seems to be no more than to provide for the case of his daughter's dying unmarried. If it was intended otherwise, and the disposition over was to take place upon the daughter's death, if she had before married without consent, what is to become of the profits raised before the marriage, during the intermediate time between the marriage and the daughter's death; to whom shall they be paid? It might happen, the next in remainder at her marriage might not be next in remainder at her death. This uncertainty shows Sir *Thomas Aston* had no particular person in view to take these profits, which is necessary to make it such a disposition over as will effectuate the condition; besides, being fruits fallen, they could no otherwise be disposed of than as are to the advantage of the inheritance, which like a legacy falling into the *residuum* will not be taken as a disposition over.

But after all, could any profits be received by the trustees? indeed, they might in point of law have entered immediately, as soon as the term commenced; but then, I say, they ought not to have entered according to the known rule of this Court, for the portions not being then payable, and the trustees having a power to raise the portions in a gross sum when they became due, the raising them before that time would be injurious to the owners of the land into which it would sink, if it never became payable; and upon a proper bill for that purpose, this Court would enjoin the trustees, and if the trustees did not or could not enter, then this clause says, the sum intended for the portion shall cease, and the premises be exonerated; and though it goes on and says, what shall become of the portion if raised, or so far as it shall be raised; yet this is a needless caution, because the portions ought not to be raised, or so much as begin to be raised, till they are payable, and consequently here is nothing that is or can be given over.

Thus it stands upon the settlement, the codicil of Sir *Thomas Aston* makes no alteration as to this matter, for though it appoints the profits of the *Cheshire* estate not in jointure till his son attains the age of twenty-five, to be applied first for raising a maintenance for his son, and the residue towards the portions of his daughters, yet this is a new trust; and the cases of the daughters dying before marriage with consent, as it is in the settlement, is not put; but on the contrary the codicils suppose the portions will be payable, and expressly directs the residue of the profits to be applied for and towards raising the portions of his daughters.

I shall now, taking it for granted this is no disposition over, proceed to the stating the authorities, which any way relate to the portions provided by the settlement.

The case of *Fry v. Porter*, so often mentioned in reports of law and equity, is not an authority applicable to the pre-[369]-sent case, for though there was a gift on a condition of this kind, yet it was of a legal estate; besides, there was a devise over, and there being no equitable circumstances to vary the case from what it was at law, this Court had not the proper cognizance, but here we are in the case of an equitable interest, properly and only cognizable in a court of equity. I shall now consider such cases, either by way of trust or charge upon land.

The first case I find is *Farmer v. Compton*, 1 Ch. Rep. 1. Register's Book of 1636. A. fol. 1088. There a portion of £4000 was to be raised out of lands, payable to the defendant's daughter at twenty-one, or when with the consent of her father she should be married; and if she died before such age or marriage, the portion to go over to his other children. A marriage between the plaintiff and defendant's daughter, with the

consent of the fathers on both sides was agreed, and directions given for a settlement, but before it was executed the young couple married without the knowledge of either of the fathers, and they being ignorant of it the settlement was executed; afterwards the father of the daughter was acquainted with the marriage, and part of the portion was paid. My Lord Keeper *Coventry* who heard the cause, sent this case to the Judges of *Serjeant's Inn*, in *Fleet Street*, who certified their opinion that this marriage ought in justice and equity to be esteemed a marriage with the consent of the father, of which opinion likewise was my Lord Keeper. Here was a marriage as to the time without consent, and to be sure without the good liking of the father, though the consent to the treaty before, and his approbation after the marriage, and no disagreement in the mean time, made it in equity a marriage with his consent.

The next case is *Vintner v. Picks*, 1 Ch. Rep. 121; Register's Book of 1638, B. 443.

Richard Picks by his will, gives to plaintiff, *Eleanor* his daughter, £200, payable at twenty-one or marriage, and by a marginal note to his will adds £200 more, with this clause, "if she behaves herself dutiful to her mother." This the plaintiff *Eleanor* had not, having married the other plaintiff without the consent and contrary to the will and liking of her mother. Upon hearing the cause, on the 24th April 1638, by my Lord Keeper *Coventry*, it was referred to Mr. Justice *Croke* and Mr. Justice *Berkley*, and two Masters in Chancery (who in those days were commonly civilians), to consider how far this marriage was a breach of the condi-[370]-tion, and certify whether in their opinion these sums did belong to the plaintiffs or not. They reported their opinion that the £200 in the margin, as well as the £200 in the body of the will, did belong to the plaintiff *Eleanor*, notwithstanding the marriage.

The 21st of May following, the cause came again to be heard upon this report of the Judges and Masters, when the plaintiffs' counsel prayed a commission to examine the value of the lands charged with the portion, and the profit received by the defendants, and whether there were assets in the defendants' hands to pay the portion, which was ordered *nisi*. The 26th of June following, the plaintiffs moved to make the last order absolute, and that the £400 might be paid, then the defendant's counsel consented a commission should issue as desired, which was ordered accordingly, and the commissioners were to treat between the parties, being mother and son, and make an end if they could: this is what appears in the Register's Book. It is to be observed, that the plaintiff's marriage, without the consent of her mother, is taken to be an undutiful behaviour, as no doubt it was, and a breach of the condition annexed to the gift of the £200 by the marginal note, and yet it was decreed.

The next case is *Norwood and Norwood*, 1 Ch. Rep. 121, and the same Register's Book, B. 560 and 580. A portion was charged on lands payable at twenty-one or marriage, so as the plaintiff married with the assent of her mother and other trustees. The plaintiff attained her age of twenty-one and brought her bill; the defendant admitted the charge, but alleged the plaintiff was about to marry without the consent of her mother and trustees: the portion was decreed with damages, that is, interest from the age of twenty-one, when to be sure the portion vested and became payable.

The next case is *Fleming v. Waldgrave*, 1 Ch. Cas. 58; Register's Book, 16 Car. 2 [1664-65], fol. 107. Decreed by Lord *Clarendon*, assisted by Sir *Harbottle Grimstone*, Master of the Rolls. *Francis Copledike* granted a term of ninety-nine years in land, to Sir *Edward Waldgrave* and his lady, for securing £700 for the benefit of *Thomasin Copledike* his sister, in case she did not marry contrary to the consent of Sir *Edward Waldgrave* and his lady; but if she married contrary to their liking, then for the benefit of such to whom Sir *Edward* or his lady, or the survivor should appoint, and in default of appointment, to Sir *Edward* and his lady, or survivor. *Thomasin* married without their consent, and [371] afterwards died without issue. Sir *Edward* died without making any appointment, and his lady made a deed of gift to one *Small*, of all her goods and chattels, and died; and administration to her and also to *Thomasin* was granted to *Francis Copledike*, who created the term, and he assigned it to a trustee for the benefit of himself, his wife and children. The question was, to whom the interest of the term did belong. The Court declared it was not in the power of Sir *Edward Waldgrave* and his lady to dispose of the term otherwise than for the benefit of *Thomasin*, if she had lived; and *Francis Copledike* having taken administration to Lady *Waldgrave*, and to her, was entitled to it, and it was decreed accordingly. Upon this case I observe, that it was a trust of land, and a disposition over of the money, and

though the condition is marrying contrary to the consent of Sir *Edward Waldgrave* and his lady, not without their consent, yet that distinction is pretty nice ; however, if it is to be admitted, yet thus much I conceive the condition implies, that the marriage should either be consented to before, or approved of afterwards, which it doth not appear to be, either by Sir *Edward* or his lady ; and as to my lady the contrary appears by her deed of gift of all her goods and chattels, which certainly included this term ; besides, the Court declared it was not in the power of her and her husband to dispose of it otherwise than for the benefit of *Thomasin*, and though the administration to Lady *Waldgrave*, as well as to *Thomasin*, is mentioned in the decree, yet that must be in respect to the legal interest of the term, which was in her but for the benefit of *Thomasin*.

The next case is *Needham v. Vernon*, Reports in Lord *Nottingham's* time, 62 ; Register's Book of 1674, B. 382. A term was created in trust, to employ the rents and profits for raising £1500 a-piece portions for the plaintiffs, to be paid at their respective marriages, with the consent of the trustees, and if either married without, to have but £100, and the remainder was given over. The portions were raised and admitted to be vested, the plaintiffs offering to give security to indemnify the trustees against the defendants, to whom the portions were limited over ; the portions were decreed to the plaintiffs.

There is a case so like this, that I shall mention it out of time, and only name it : it is a case in that family which is now before the Court, *Aston v. Aston*, 2 Vern. 452, and [372] reported in *Precedents in Chancery*, 226, by a wrong name, viz. *Ashlon v. Ashton*.

The next case is *Bostock v. Ireton*, Reports in Lord *Nottingham's* time, 234 ; Register's Book, 1675, lib. 4, fo. 131. *Thomas Bostock*, the plaintiff's father, having issue only the plaintiff and defendant *Mary*, made his will, and bequeathed to the defendant, *Mary*, £2700, secured by a mortgage, upon condition she married with the consent of the executors, and in case she married without such consent, then he bequeathed £850, part of the money, to the plaintiff. The plaintiff brought his bill for £850, insisting the defendants, *Ireton* and his wife, married without the consent of the executors, or if they did give their consent, it was upon conditions which were never performed. Upon hearing the proofs read, the Court declared the defendants, the executors, had consented to the marriage upon *Ireton* and his father making a settlement of £500 *per annum*, and the marriage being had, and *Ireton* and his father being ready, on the receipt of the portion, to make such settlement, the executors could not now retract their consent, and ordered the bill to be dismissed, but the bill being also to have a settlement made according to the proposals, and the defendant *Ireton* and his father being present in Court, and declaring they were ready to make the same, it is ordered, the £2700 be paid to *Ireton*, upon his and his father's entering into recognizances in £6000 penalty to make such settlement, to be allowed by a Master, and to abide the further order of the Court, and the trustees to have costs out of the estate.

Here was a disposition of a sum of money charged upon land, and the condition annexed to that disposition under favour not performed, the consent of the executors to the marriage was conditional, and though they might give their consent conditionally, yet it must be on a condition to be performed before the marriage, for otherwise it might never be performed, and then the executors' consent would be null and void, and consequently it would be a marriage without consent, therefore, the consent of the executors must be understood to be, as I doubt not but it was, upon making a settlement before the marriage, which was not done ; however, the Court made good the consent, by matter *ex post facto*, agreeable to the genius of this Court, which qualifies the rigour of the law ; and the Court at the same time made [373] provision for the wife and children, as by the way it can do in the present case.

The next case is the Earl of *Salisbury v. Bennett*, first reported in 2 Vent. 365 ; Register's Book, 1691, A. 609.

The case was this, *Simon Bennett* having two daughters, the plaintiff and defendant, by his will gave them £20,000 a-piece, to be paid at twenty-five or marriage, which should first happen, so as such marriages were not before sixteen, and were with the consent of his wife and his cousin *Lee*, his executors, or one of them, and if either of his daughters married otherwise, then to have only £10,000, and gave the residue of his personal estate to his children, and by deed charges his real estate in aid of his personal. The father of the plaintiff, the Earl, and Mr. *Bennett*, treated of a marriage between the plaintiffs, but the Countess then not being twelve years old, the marriage was agreed

to be respite, and before the marriage both the fathers died. Afterwards, plaintiff married with the consent of the executors, but before the Countess was sixteen ; on a bill brought by the plaintiff, that cause came on to be heard before Lord Keeper *North*, Pasch. 36 Car. 2 [1684]. It was urged by the plaintiff's counsel, that the marriage being with consent, it might be at any age. But, says Mr. Justice *Ventris*, my Lord Keeper was of opinion, both parts of the condition must be performed. Thus far that book. By 2 Vern. 223, and Skyn. 285, and Register's Book of 1691, A. 609, it appears the plaintiffs had before libelled against the executors in the Arches, and were stayed by injunction, and the cause brought to hearing on bill and answer, the plaintiff, the Earl, then an infant. My Lord *North* declared the plaintiff's demand being a legacy, another Court was as proper, upon which intimation, further proceedings were had, during the Earl's minority, in the Arches, but he being come of age, and £10,000 being paid, brought a new bill for the remaining £10,000, or else that the injunction might be dissolved. This cause was brought to hearing before the Lords Commissioners *Rawlinson* and *Hutchins*, May 1, 1691 ; the Court declared that upon consideration of the words of the will, and all the circumstances of this case, they were fully satisfied the plaintiff, the Earl, ought to be relieved as to the remaining £10,000, notwithstanding any construction that can be made on the words of the will, to make the plaintiff's, Lady *Salisbury's*, marriage before her age of sixteen years, amount to a forfeiture, and declared the £10,000 [374] ought to be a charge on the personal estate, and if that was not sufficient, then the real estate to be charged therewith.

Here I observe the portion was charged upon land, and the condition not performed, for it was part of the condition that the marriage should not be till 16, nor I conceive was it dispensed with by the father, for though he treated of the marriage, yet that was before the marriageable age, and he might have altered his mind, and so might his daughter ; besides, he might trust himself with marrying her before sixteen, but not any body else.

The next case is *Ventris v. Glydd*, a case I had some memory of, and I take it out of the Register's Book, 1694, B. 235. Sir *Nicholas Sloughton* having a son and four daughters, devised his real estate to his executors in trust to raise £600 a-piece for the portions of his daughters, upon condition they married with the consent of his two sisters, in writing, under their hands and seals ; and in case any of his daughters should marry without such consent, or die before such marriage, their part to go to the surviving daughters who should marry with such consent ; and if they all died unmarried, or married without such consent, then to his son *Lawrence*, and requested him to make up his sister's portions £800 a-piece, if they married with such consent. Sir *Nicholas* died. The son secured £200 a-piece more to his sisters, on the condition in his father's will, and died. The inheritance descended to his sisters. The plaintiff *Frances* married the plaintiff *Ventris*, who made a suitable settlement, and before marriage applied to both the aunts, and obtained the consent of one, but not of the other, the defendant *Glydd* ; who said, by her answer, she was not satisfied that the plaintiff's estate was not encumbered, and thought it too small, and desired time to enquire, and that he would desist in the mean time, instead of which they married immediately. My Lord *Somers*, who heard the cause, declared, he saw no ground for the plaintiff *Frances* forfeiting her portion by this marriage, and decreed accordingly, and did not think fit to give costs to either side, the surviving trustee, the defendant *Glydd*, having not proceeded well in the matter ; by the depositions, all the misbehaviour of the trustee, whose consent as well as the other's was requisite, was her not consenting to the match, which was a reasonable one, though she had a year's time to enquire into the plaintiff's, the husband's, circumstances.

[375] The next case is my Lord *Falkland* and *Bertie*, 2 Vent. 333. Mr. *Carey* devised lands to trustees in trust for his niece and heir at law, Mrs. *Willoughby*, for life, in case she should be married to the Lord *Guildford* within three years after his death, and then to the first and other sons of my Lord *Guildford* by her in tail, and in default of such issue, or if the marriage did not take effect in three years, then to my Lord *Falkland* for life, and to his first and other sons in tail, remainder to his own right heirs.

The marriage did not take effect, and after the three years she married Mr. *Bertie*. Overtures had been made to my Lord *Guildford's* guardians, and applications to the Court, and an order from my Lord Chief Justice *Jefferies*, that she should not marry my Lord *Guildford* without a jointure, and she was an infant. My Lord *Somers*,

assisted by the two Chief Justices, *Holt* and *Treby*, decreed the trustees to convey to the plaintiff, Lord *Falkland*; but upon an appeal to the House of Lords, Mr. *Vernon* says it was ended by compromise.

I do not think this case applicable to the present, though it was mentioned, nor do I think it will be a precedent in any case, because of the particularity of it; I am sure it is of no authority against relief in the present case, amongst other reasons for this, that there was a condition of marrying a particular person, which is undoubtedly a good condition by our law, and even by the civil law, *Swinb.* 245.

The last case in this Court which I shall mention, is *King v. Withers*, Pre. in Ch. 348, and Reports of Cases in Equity, in Chancery and Exchequer, 26. The defendant's father devised to the defendant lands, charged with £2500 to his daughter, at her age of twenty-one or marriage, which should first happen; provided if she married in the lifetime of her mother without her consent, then £500, part of the £2500, should cease, and be applied towards payment of his debts, which he charged on other lands, and appointed his wife guardian of his daughter and executrix; the daughter attains her age of twenty-one, and without the consent of her mother married.

Her husband and she brought their bill for the £2500. My Lord *Harcourt* decreed the whole £2500, for that she attaining the age of twenty-one, her title to the whole was complete, and not to be impeached afterwards by marrying without her mother's consent, notwithstanding it is expressed, that if she married in the lifetime of her mother [376] without her consent, the £500 to cease, and be applied to the payment of debts in ease of the land, which under favour is a devise over, let the debts on the estate devised be what they will, notwithstanding the contrary is said in that case, and though the £500, as well as the £2000, was vested at twenty-one, yet the breach of the condition might fetch it back again, as in the cases of *Needham* and *Vernon*, and *Aston* and *Aston*, I mentioned before. In this case my Lord said, the portion was to be raised out of land, and therefore must have the same consideration as a devise of the land. I observe this *dictum* was not in support of the judgment, but rather the contrary, nor can I agree to it; viz. that trust money out of land is to have the same consideration as land itself, for the reasons and authorities I have before given and taken notice of.

These are all the authorities in this Court of this kind that I can find, but there is another, and a considerable one, or rather stronger against relief than the present case, it was in the Duchy Court, before a Chancellor learned in the law, Mr. *Lechmere*, afterwards Lord *Lechmere*, and two Judges, my Lord *King*, afterwards Lord Chancellor, and Mr. *J. Dormer*; it is the case of *Semphill v. Baily*, Pre. in Ch. 562. I have had the Register's Book searched, and there is no material variance from the report. *Nathaniel Gaskell* had issue three daughters; the plaintiff *Sarah* was the eldest. An amour, says the book, was carried on between her and the other plaintiff in the father's lifetime, which he greatly disliked, and declared if his daughter married him he would never give her a groat, and makes his will, and devises his real and personal estate to his executors to the following uses: viz. if his daughter the plaintiff married with the consent of his executors, then he devises to her £1000, to be paid at twenty-one or marriage, which should first happen, and devises particular lands to her and her issue in strict settlement, with remainder over to his other daughters; and after providing for his other daughters, pretty much though not altogether in the same manner, he goes on and says, if any of his daughters die without issue, then that child's part to go to the survivor, and gives the overplus of his real and personal estate to be equally divided amongst his three daughters.

After his death, the plaintiff, the husband, renewed his addresses to the other plaintiff; the executors in writing expressed their dislike, and gave her notice of her father's [377] will, and the danger of forfeiting her portion, and that they could not give their consent, because they knew it was a match her father disliked; notwithstanding all this, she being under twenty-one, married the other plaintiff: they brought their bill for the £1000 portion. Upon hearing the cause, the Chancellor of the Duchy, and my Lord *King* were of opinion (Justice *Dormer* dissenting), that the plaintiffs were entitled to the £1000, and the executors were decreed to pay it with interest out of the personal, and rents and profits of the real, estate; but if that not sufficient, the plaintiffs were at liberty to apply for further order, that is to be sure for a sale, and the executors to have their costs, but the other defendants, the sisters, to pay costs, which shews the Court thought it a strong case for relief; notwithstanding here was a marriage ex-

pressly contrary to the father's good liking, and that which seems to have occasioned the annexing the condition to the portion by his will, and which was a condition precedent. The reasons for this decree are reported very fully, some of them are taken from the inaccuracy and particular wording of the will, which seems to be thrown in to make weight; but the Court went mainly upon the general reasons of these cases, for the book says, these clauses in restraint of marriage have never been taken favourably, that if there be no devise over, as there was not here, these devises have been held to be only *in terrorem*; that though lawyers know it would be no forfeiture, yet the parties themselves might not be so learned, and therefore it would be some terror.

It is observable, that notwithstanding this was a sum of money charged upon land as well as a legacy, and accordingly decreed, yet the condition was construed to be only *in terrorem*, and so was the condition annexed to a devise not of money out of land but of land itself; held by Sir *Harbottle Grimstone* in the case of *Fry and Porter*, 1 Ch. Cas. 140. Though indeed, for the reasons I mentioned before, this decree was reversed.

And now after these cases I may very well assert, there is no foundation in authority any more than in reason for a distinction between conditions in restraint of marriage annexed to money given out of land, and such conditions annexed to money given out of personal estate, but that in both cases they are to be taken as intended only *in terrorem*. They intr trench upon the freedom of choice, which is the foundation of the marriage contract, and the happiness [378] expected from it; they are injurious to the commonwealth, and the taking them strictly or rigorously is putting a harsh and unreasonable construction upon them, and such as is not consistent with the natural affection of parents to their children, upon whom only it may happen the penalty would light, as it would in the case of one of these ladies, Mrs. *Clutton*, whose husband it seems is dead since the last hearing.

I cannot pronounce the decree without observing, that this way of arguing and determining may be misconstrued and thought to loosen the bands of filial duty; far be that from me. It is both a moral and positive duty. Parental authority is antecedent to all political societies, but then it is not absolute or unlimited; let us examine then how far the parental authority extends in relation to the present question.

In children's disposing of themselves in marriage, undoubtedly they ought to ask counsel or advice of their parents if they are living, or if dead, of those they appoint for that purpose, and such advice ought to have great weight with every child. If it hath not, I will say as *Bracton* doth in another case, *Deum expectet ultorem*; but that children ought to be absolutely determined in their marriage by the will or consent of parents, much less of others of their appointment, or else not to marry at all, that is what I cannot think for the reasons I have mentioned.

This distinction between consulting and advising with parents about marriage, and being absolutely determined by them is not out of my own head, I take it from the civil law, which allows the former as an obligatory condition to a legacy, but disallows the latter, *Swinb.* 243, 245.

And after all this middle way between rigorously imposing upon children, and leaving them absolutely to themselves, might answer the end of parents better, and prevent many unhappy marriages; for he must know little of the world that doth not know, that the estate or fortune of the person proposed is too often the sole motive of parents or others consenting to the marriage, which then proves as unfortunate as it is disagreeable; and I doubt those whose consent is made necessary, seldom think themselves justified if they give it from any consideration, at least think *quærenda pecunia primum est virtus post nummos*. But however this may be, I must take things as I find them in the present case, and upon the whole, I think the portions by the will are due [379] by the rule of the ecclesiastical law; the portions, by the settlement by the rule of equity; both of them affirmed by the authorities in this Court, together with an additional one which I have mentioned, and not one authority to the contrary; I must therefore decree for the plaintiffs.

His Honour declared it was his opinion, that the plaintiffs were entitled to their original portions provided for them by the said settlement, and also to the additional portions given to them by Sir *Thomas Aston's* will.

From this order of the *Master of the Rolls*, the defendants, Lady *Aston* and Sir *Thomas Aston*, presented a petition of appeal to the *Lord Chancellor*, which came on to be heard on the 29th of April 1737, when the *Attorney-General*, Mr. *Browne*, Mr. *Wilbraham*, and Mr. *Legg*, were heard for the plaintiffs, and Mr. *Pauncefort*, Mr. *Hollings*, Mr. *Fazakerley*, and Mr. *Murray*, for the defendants.

The *Lord Chancellor*, thinking this a case of great importance and difficulty, directed a second argument, which accordingly came on to be heard on the 21st of November 1737, before the *Lord Chancellor*, assisted by Lord Chief Justice *Lee*, Lord Chief Justice *Willes*, and Mr. Justice *Comyns*, and was argued by Mr. *Attorney-General*, Dr. *Strahan*, and Mr. *Browne*, for the plaintiffs, and Dr. *Andrews*, Mr. *Hollings*, and Mr. *Fazakerley*, for the defendants.

Mr. *Attorney-General* and Mr. *Browne*. The questions arise upon the portions given by the settlement, and by the will; first, as to the portion given by the will. It is to be considered whether the father really intended that the consent of Lady *Aston* to the marriage of his daughter should be a necessary qualification to entitle them to their portions, and if so, whether that be an intention to which this Court will give effect. As to the intention, it is impossible that the testator should have intended to refer to the discretion or caprice, not of his wife or trustees, but of the executors, administrators, or assigns of such trustees. The question is whether his daughters should have any or no portion, or whether they should marry or not, or whom they should marry. We do not complain of the wholesome exercise of parental authority, but of the delegation of it to strangers throughout the whole of the children's lives. If the strict words are to be adhered to, a daughter who had married with the testator's consent in his lifetime, would not have been entitled to any legacy, nor could any of the daughters, [380] if Lady *Aston* had become *non compos*. The object of the testator was to make a provision for his daughters upon marriage simply, for he directs that the term shall cease upon his daughters dying without marriage, adding nothing as to consent. The condition as to marriage is not of the substance of the portion, but is only a circumstance superadded to the time of payment; but if it was the testator's intention to impose this restriction with all the strictness contended for, then we insist that the testator's intention must be tempered by the reason and policy of the law, and that the restriction being illegal, must be rejected as void, and that the bequest will therefore be to the daughters when and as soon as they shall be married.

The civil law holds this restriction upon marriage to be illegal, Swinb. part 4. C. 12. Godolph. Orph. Leg. 380. Our law has adopted that rule, except in cases where the legacy is given over, in all other cases, it considers the restrictions as in *terrorem* only, *Jervois v. Duke*, 1 Vern. 20. *Bellasis v. Ermine*, 1 Ch. Ca. 22. *Pigot's case*, Moore, 857. *Garrett v. Pritty*, 2 Vern. 293. *Needham v. Vernon*, Rep. in Ch. 62. The Court will not give effect to such a restriction, unless it be confined to a particular person or time, or unless there be an express disposition over. It will be contended, on the other side, 1st, that the marriage with consent is a condition precedent; 2d, That the legacy is in fact given over; and 3d, That it is to be raised out of land. As to the first, the civil law makes no distinction between conditions precedent and subsequent; in *Larder v. Abingdon*, 28 June 1731, the *Master of the Rolls* held that there was no difference between a condition precedent and subsequent. *Semphill v. Baily*, Pre. in Ch. 562, was a case of a condition precedent, but if this be a condition at all, it is a condition subsequent, for it is annexed to the time of payment, which does not prevent the legacy from vesting. As to the second objection, there is no disposition over in this case, for these legacies are directed to fall into the residue, *Paget v. Haywood*, Nov. 12, 1733, and that not upon marriage without consent, but upon death without marriage with consent. As to the third objection, these legacies cannot be considered as given out of land, because the land is directed to be sold, and the money to be produced is directed to be paid to the executors to increase the general fund of the personal estate. As to the original portions under the settlement, it will be objected, that being to be raised out of [381] trust term of lands, they must be regulated according to the doctrines of the common law; but we insist that this restriction upon marriage is against the public good, and is therefore void, whether applied to portions or legacies. Portions upon settlements are always considered in the most favourable light, and this is not a legal question concerning estates in land, but a question relative to a trust term, which is peculiarly cognizable in a Court of Equity, and which ought therefore to be decided by the same principle which the Court has adopted with respect to legacies. In the case of *Fleming v. Waldgrave*, Cases in Chancery, 58, the portion was secured upon a lease, and in *Bostock v. Ireton*, upon a mortgage. In cases where these restrictions have been admitted the Court has adopted the greatest latitude of construction, 1 Mod. 310. *Earl of Salisbury v. Bennett*, 2 Vern. 223. The settlement provides, that upon the death of a daughter before marriage with consent, so much of the portion

as may have been raised shall be paid to those in remainder, which assumes, that a marriage with consent was not intended necessarily to precede the raising of the portions; independent of all other objections, the restriction in this case is void, because the forfeiture can only be saved by the consent of that person who is to benefit by its being incurred.

Doctor *Strahan* on the same side.

I shall state the rules of the civil law, and consider it first generally as a provision for daughters.

The civil law has apportioned a father's estate, which it is not in his power to take away; if he should give it away, he must assign some satisfactory reason; he could not clog it, or put any restraint upon marriage.

The writ, *de rationabili parte bonorum*, shews the civil law has been received and countenanced in England.

With regard to marriage portions, the civil law has a particular law for that purpose, *Cod. lib. 5, tit. 11, De dotis promissione et nuda pollicitatione*, *lex 7, Dig. lib. 23, 2 Tit. de ritu nuptiarum, lex 19. De patribus cogendis in matrimonium collocare; Qui liberos, quos habent in potestate, injuria prohibuerint ducere uxores, vel nubere, vel qui dotem dare non volunt; ex constitutione divorum Severi et Antonini proconsules, præsidisque, provinciarum coguntur in matrimonium collocare et dotare.*

If parents had been allowed to annex conditions to portions, it might, perhaps, have been an unreasonable one, [382] and have frustrated the design of portions. This was contrary to the policy of the Republic of Rome, the *jus trium liberorum*.

Marriages ought to be free, *libera debent esse matrimonia*, and it is a general rule in the civil law, where a condition is annexed to a legacy by way of total prohibition of marriage, that it is absolutely void.

Jacobus Gothofrædus de fontibus juris civilis, p. 291, mentions the *Julian law, de patria potestate* in the time of *Augustus*, that if any person adds a restraint to marriage let them be free from the condition; they endeavoured then to find out conditions which would not in direct words restrain marriage, but in the implication would have the same effect, by making the consent of a third person the condition of marrying. This was declared to be eluding the design of the *Julian law, Dig. lib. 35, 1, Tit. De conditionibus et demonstrationibus et causis et modis eorum quæ in testamento scribuntur. Lex 72; Si arbitratu Titii Seia nupserit, meus hæres ei fundum dato; vivo Titio, etiam sine arbitrio Titii eam nubentem legatum accipere, respondendum est: eamque legis sententiam videri, ne quod omnino nuptiis impedimentum inferatur. &c.* This is *Papinian's* determination, who was looked upon to be the brightest of all the *Roman lawyers*; and *Cujacius*, in his comment upon this very law, says, his authority is of great weight, and has such regard paid to it in our Court, that conditions restraining marriage are held by us, upon his authority, to be absolutely void. *Mantica, lib. 11, n. 8. Grassius, lib. 1, n. 9. Covarruvius, n. 3*, takes a difference between marriages with the consent, and with the advice and counsel of another. *Sanchez de sanct. matrimon. sacramento disputat. 34, n. 19. Non tantum conditio non ineundi matrimonium, rejicitur, legato, sed etiam conditio ineundi arbitratu vel consensu tertii, et ratio est, quia qui tenetur consensum vel licentiam alieni petere, tenetur sequi, atque ita matrimonii libertas impediatur.*

Swinburne, part the 4th, sec. 12, lays it down as a general rule, that all conditions against marriage are unlawful, contrary to the procreation of children, repugnant to the law of nature, and detrimental to the commonwealth.

In the present case *Lady Aston* will have the benefit, who is the person to refuse. *Dig. lib. 30, tit. 1, de legatis et fidei commissis, lex 43, parag. 2. Legatum in aliena voluntate poni potest, in hæredis non potest.* The heir in this case is to have the benefit also by refusal; and therefore *nunquam* [383] *presumeretur velle obligari*, and ought not to receive any countenance.

The emperor *Justinian, Cod. lib. 6, tit. 43. Communia de legatis: et fidei commissis: et de in rem missione tollenda*; saith, *Rectius igitur esse censemus in rem quidem missionem penitus aboleri: omnibus vera tam legatariis quam fidei commissariis unam naturam imponere, et non solum personalem actionem præstare, sed et in rem, quatenus eis liceat easdem res sive per quodcunque genus legati, sive per fideicommissum fuerint derelictæ, vindicare in rem actione instituenda.*

Where a condition is null and void, the question will be then, whether any devise over or limitation will be good?

When the validity of the condition which is annexed to the legacy is taken off, it becomes absolute, and no devise over can affect it, *Dig. lib. 35, tit. 1, De condit. et demonstrat. lex 22, Quotiens sub conditione mulieri legatur, si non nupserit, et ejusdem fideicommissum sit, ut Titio restituat, si nubat: commode statuitur et si nupserit, legatum eam petere posse et non esse cogendam fideicommissum præstare*, the condition being void in law, the legacy is discharged of it.

Supposing such consent should be necessary, yet it must be a reasonable objection to the marriage, that is intended by this condition. Here the plaintiff Mr. *Hervey* has £300 *per annum*, in possession, and as much in reversion, and was ready and able to make a proper settlement; and therefore there could be no reasonable grounds for Lady *Aston's* refusal.

Doctor *Andrews* for the defendants.

Deeds are undoubtedly of a stricter nature than a will; and as the will in the present case plainly refers to a deed, it must be construed with the same strictness as a deed, this is not properly a condition, but a description of the person who is to take.

It is a legacy uncertain, but to be made certain by a fact; for it is not daughters by name, but to a daughter only who marries with the consent of the mother, and nobody can take but those who bring themselves within the description. I do maintain that this is a legacy which has never vested, because the condition on which it is given by the testator has not been performed, and, according to the law of the twelve tables, *voluntas testatoris in testamento totum facit*, *Dig. lib. 35, tit. 1, lex 75; lib. 36, tit. 2, lex 21, 22*: and though a prohibition of marriage hath not been allowed, yet the civil law permits a restraint upon it, *Cod. lib. 5, tit. 4, lex 1. [384] Cum de nuptiis puella quæritur, nec inter tutorem et matrem et propinquos de eligendo futuro marito convenit; arbitrium præsidis provinciæ necessarium est*. That part of the condition which requires the marriage to be with the consent of the mother is not void. The law of the twelve tables is positive. Afterwards came the *Lex Julia et Poppæa*. Restraints upon marriage were allowed, prohibitions disallowed. By the civil law a gift of a share to a wife so long as she continued a widow and in case of her marriage *liber esto* was good.

That law permitted the father to exercise a greater power in restraint of the marriage of his wife or child than a stranger, *Dig. lib. 33, tit. 4, lex 11; Cod. lib. 5, lex 1*.

The civil law does not take place even in our ecclesiastical courts except where it is founded upon the *jus gentium*, and that only because it has been adopted, and not as the positive law of the Romans. *Grotius* lays it down, that, after the death of the father, the mother is entitled to the same obedience from the children as the father, founded upon the fifth commandment.

The *jus trium liberorum* is not in force with us; if a *Roman* had three children, and not able to maintain them, the commonwealth maintained them; but the public here takes no notice, the parishes must support them. In the *Roman* law children were entitled to the *legitima pars* to which the father could not annex any condition; but to what was over and above that part he might. By our law a man has an absolute power to dispose of his estate, and if he marries, though he has lawful children, yet he may dispose of his estate to the illegitimate issue, in prejudice to the legitimate. By the *Roman* law the portion was the woman's distinct property: here it belongs to the husband, and here it should be considered as if the father had said, I give £2000 to such a man as shall marry my daughter with the consent of the mother.

Mr. *Hollings* and Mr. *Fazakerley* on the same side.

There can be no question as to the testator's intention; he contemplated the event of his daughters' contracting improvident matches, and in that case has directed that they should receive certain annuities which their husbands could not waste, and has given them portions in the event only of their marrying prudently; marriage without consent is as no marriage at all with respect to their portions, but the daughters continue to be entitled to their annuities as if no [385] marriage had taken place; in this disposition there is nothing irrational; but the father had power to give any thing or nothing, and to make the vesting of what he gave depend upon what event he thought proper. The deeds and wills of individuals are private laws.

The testator's intention was not only consistent with, but in furtherance of the object of the law which has laboured to protect children against the effects of imprudent marriages, 20 Hen. 3, c. 6; 3 Edw. 1, c. 22; 4 & 5 Ph. & M. c. 8; 12 Car. 2, c. 24.

So the Custom of *London* recognizes the propriety of requiring consent to marriages.

The rules of the civil law are of no authority upon the present question, because, although Courts of Equity have adopted the principles of that law with respect to personal legacies to avoid any contradictory judgments between concurrent jurisdictions, they have been careful to avoid the introduction of those rules with respect to legacies arising out of land.

The provisions as to marriage do not amount to a condition, and do not impose any penalty; nothing is given till marriage with consent; that is the contingency upon which alone the portions and legacies are payable, and that contingency has not happened. They are not given to daughters or a daughter when married, but to daughters married with consent; the plaintiffs do not bring themselves within that description; they come too soon; the time of payment is not arrived; a legacy upon marriage with a particular person, or with a person of a particular name is not payable, unless such marriage takes effect. *Lord Falkland v. Bertie*, 2 Vern. 333.

It is said that this provision applies only to the time of payments, but in portions or legacies to be raised out of lands, the time of vesting and of payment is the same. *Poulet v. Poulet*, 1 Vern. 204. *Yates v. Phettilplace*, 2 Vern. 416. *Smith v. Smith*, 2 Vern. 92. *Tournay v. Tournay*, Prec. Ch. 290. A portion charged on land is to be considered as land; every trust term is part of the inheritance; no case has been cited in which portions under the present circumstances have been raised out of land; in *Fleming v. Waldgrave*, 1 Ch. Ca. 58, it is probable that the money was secured upon mortgage, which would be mere personal estate. There can be no doubt of such provision being legal at common law, by which the present case must be determined, 1 Roll. Abr. 118, pl. 6. *Fry v. [386] Porter*, 1 Ch. Ca. 138; 1 Mod. 300. In *King v. Withers*, Eq. Ca. Ab. 112, pl. 10, Lord *Harcourt* was of opinion that if the title had depended upon marriage with consent, the consent would have been necessary.

In the present case there is a devise over, or what is equivalent to it, for directing that the portions shall sink into the estate or residue, is equally indicative of an intention that other persons than the daughters should take, which repels any presumption of the clause having been introduced *in terrorem*, *Amos v. Horner*, 1 Eq. Ca. Abr. 112, pl. 9. *Stratton v. Grymes*, 2 Vern. 357. *Creagh v. Wilson*, 2 Vern. 572. If this be not a gift over, a remainder man is incapable of such gift.

The additional portions under the will are given in augmentation of the original portions, and must receive the same construction: No case has been cited in the Ecclesiastical Courts, in which a legacy given upon a contingency has been held to be payable before the contingency has happened.

Mr. Attorney-General in reply.

As to the original portion it is contended, 1st, That the intention is plain not to give them, except upon a marriage with consent.

2dly, That this intention is agreeable to the rules of law and equity.

The testator has not expressed any such intention; he has introduced no negative words, and has not said that the portions shall not sooner vest; but he has expressed a contrary intention by directing that the term shall cease upon his daughters' death without marriage generally. The term then is to continue if these daughters should die, although they have married without consent; but for what purpose if they are not to have their portions. The Court has adopted a rule by which the intention is to be discovered, and which is, that the restriction shall be presumed to have been introduced only *in terrorem*, where there is no limitation over; nor is such construction without reason, or likely to be contrary to the real intention of the party; for the primary object is generally to provide for the support of the child, and the secondary and inferior object to guard as much as possible against an improvident marriage; but to construe that restriction as a forfeiture after an improvident marriage has taken place would be to sacrifice the greater to the lesser object, after that lesser object can be no [387] longer obtained. It has been said that the law favours the exercise of parental authority over the marriages of children. That is true as far as relates to infants; but this is an attempt to go beyond the law, and to subject the whole lives of these daughters to the control, not of parents but of strangers.

It is said that the cases upon legacies are governed by the rules of the civil law adopted to preserve an uniformity of decision, and are therefore inapplicable to the question upon the settlement which concerns land.

The civil law as such, I admit is of no authority here; and even with regard to legacies, this Court has departed from the rules of the civil law, which holds these

restrictions absolutely void, and gives effect to them where there is a limitation over. This shews that this Court acts upon principles of its own, and it will therefore apply those principles in the same manner where the reason is the same. The reasons of the rule apply as much to portions out of land, as to portions out of money ; but these portions are not to be considered as land, they are to arise out of a trust-term, which is purely a creature of Equity, as to which the Court will give the same favourable construction as to wills. In *King v. Withers*, Ca. temp. Talb. 117. *Jackson v. Farrand*, 2 Vern. 424, and *Precedents in Chancery*, 109, the rule contended for as applicable to the portions out of land was departed from. The cases of *Fleming v. Waldgrave*, Cas. in Ch. 58. *Needham v. Vernon*, Rep. in Ch. 62, and *Aston v. Aston*, 2 Vern. 452, are authorities for the plaintiffs. This case is strictly within the principles adopted by this Court, for there is no limitation over. The direction that the portions shall sink into the residue is nugatory and useless ; it is directing what would take place without any such direction, as devising an estate to an heir at law. As to these portions under the settlement, I therefore contend, 1st, That the rule of construing restrictions of this nature to be *in terrorem*, is a rule of this Court only. 2dly, That it is equally applicable to portions out of land as out of personal estate. 3dly, That with reference to the present case there is no difference between money to be raised out of land, and mere money. 4thly, That no precedent has been cited on the other side, and that there are three precedents in favour of the plaintiffs. As to the portions under the will it is contended, that they are given in augmentation of the portions under the settlement, and must receive the same construction. But though the settle-[388]-ment is referred to by the will, yet that is not stronger than if the very words had been repeated, and the same words in the same will have frequently received a different exposition as applied to land and money, *Papillon v. Voice*, 2 P. Wms. 471. *Forth v. Chapman*, 1 P. Wms. 663.

It is said, that in this case there is a limitation over to the remainder-man of the estate, but that is not so ; it is merely directed that the portions should not be raised. The case of *Amos v. Horner* has been relied upon, but there does not appear to have been any decree in that case.

Dr. Strahan also in reply.

By the civil law, a restriction from marrying without the consent of another, was considered as amounting to a total prohibition of marriage, and was, therefore, held to be void. It has been contended, that some restrictions upon marriage were allowed by that law ; but such exceptions do not amount to any contradiction of the general rule : some alteration has been said to have taken place in later times ; the only alteration I am aware of was, that of giving the husband a power of restraining the second marriage of his widow, this was done by the *Lex Julia Miscella Gravina* 357 ; but which was afterwards abolished by the Emperor Justinian. The case in Dig. Lib. 33, tit. 4, L. 14, differs widely from the present, there the father having a son and two daughters, one of whom was married, says *Filiam meam Crispinam quam vellem tradi nuptiis cuicunque amici mei et cognati approbarent, providebit tradi Pollianus sciens mentem meam in æqualibus portionibus in quibus et sororem ejus tradidi*.

This amounts only to a wish. By the Roman law, a father could not appoint a tutor to his children beyond the age of fourteen. This is an attempt to institute a perpetual guardianship ; as to marriages, it has been urged that no precedent has been cited in the ecclesiastical courts, I certainly do not recollect any, we have no printed reports in our courts ; but no precedent has been cited on the other side, the rule of law therefore, for which I contend, stands unimpeached.

On the 5th of June 1738, Mr. Justice Comyns, Chief Justice Willes, Chief Justice Lee, and the Lord Chancellor, delivered the following judgments. Mr. Justice Comyns, after stating the case at large :—

On this case two questions have been taken into consideration.

[389] 1. Whether the £2000 appointed to be raised by the settlement, 1712, out of the term of one thousand years, is not become due and payable to the plaintiffs, notwithstanding their marriage was without consent of their mother, dame *Catherine Aston*.

2. Whether the £2000 to be paid by the will, will not at least be due in case the £2000 by the settlement should not. Mr. Attorney-General has been pleased to speak to the last of these questions first, and it might be most proper on behalf of his client to do so. But as the first question seems most fully to point out and demonstrate the intention of Sir T. Aston, and is prior in time, I shall begin with the consideration of the first question.

1. The first question then is, when Sir T. A., by voluntary settlement made after marriage, limits his estate to trustees for one thousand years, on trust to raise £2000 for the portion of each daughter, to be paid at the days of their respective marriages, with consent of mother, if living, and not married again, or if dead, or re-married with consent of trustees or survivor, his executors, administrators, and assigns, and on trust to raise £70 *per ann.* for maintenance from eighteen till marriage with such consent, whether if a daughter after the age of twenty-one marry without consent of a mother then living, a court of equity ought to compel the trustees to raise the £2000 for portion of such daughter?

Before I deliver my opinion on this point, to avoid as much as may be, any contrariety in the determination of this Court, it may not be amiss to take a short view of the former cases on this head, and the foundation on which decreed, and lay out of the present case what seems to be uncontroverted, and admitted on all sides.

Now it is admitted on all hands, and I think, cannot be controverted, that if a pecuniary legacy be given on condition, that if the legatee marry without consent of such persons, the legacy should be void, or a less sum paid, but no devise of the money over to any other, such legacy would be decreed by this Court, though the marriage was without the consent required. This has been settled very often. In the case of *Bellasis v. Ermine*, 15 Car. 2 [1663-64], 1 Ch. Ca. 22. In the case of *Fleming v. Waldgrave*, 16 Car. 2 [1664-65], agreed 1 Ch. Ca. 58. So in the case of *Jervois v. Duke*, M. 1681, 1 Vern. 19. *Garrett v. Pritty*, Trin. 1693, 2 Vern. 293, and I know no case contrary.

[390] Now the true reason of these determinations seems to be what Lord Chief Baron Hale intimates in *Fry v. Porter*, 1 Mod. 308, to keep up a uniformity between this and the ecclesiastical court. For since by the ecclesiastical law such a condition would be looked on as illegal and void, this Court hath thought it proper to adopt the rule of the ecclesiastical law thus far, for it would be strange that a legatee should sue in the ecclesiastical court and recover, but if he sued in this Court should be barred of the same legacy.

It must likewise be admitted, that as at common law, conditions that defeat an estate are construed strictly; so where conditions have been annexed to defeat a legacy on marriage without consent, this Court hath not strained to make a breach of the condition, but hath decreed the legacy where the breach is not clear and manifest, or the condition not plain and certain. And therefore where the legacy is given to be paid at the age of twenty-one, or marriage, but without consent of the mother, void; if legatee attain the age of twenty-one, she shall have the legacy, though she after marry without consent, for being vested at the age of twenty-one, the construction must be, if she marry without consent under that age, as held *Norwood v. Norwood*, 1 Ch. Rep. 121. *King v. Withers*, 1712, Eq. Ca. Abr. 26, 112.

So if the condition annexed to legacies be, provided she be dutiful to her mother, *Vintner v. Picks*, 1 Ch. Rep. 121; or condition be annexed by will when like portion secured on land, which she released on promise it should be no prejudice, legacy was decreed, though marriage was without consent required, *Skipton v. Hampson*, 1675, Reg. B. 587. So where such a condition is annexed, and the marriage is treated of or approved by the father, who annexed the condition (which is a sort of dispensation) as in the case of *Farmer v. Compton*, 1 Ch. Rep. 1. *E. Salisbury and Bennett*, 2 Vern. 223; 2 Vent. 359; *Skin*. 285. *Clarke v. Berkeley*, M. 1716, 2 Vern. 720.

So if major part of trustees whose consent was required, do consent, *Wiseman v. Foster*, 2 Ch. Rep. 23; or one consents though the other do not, *Escott v. Escott* (*Escott v. Escott* is cited in *Fry and Porter*, 1 Ch. Ca. 144, and see *Ventris v. Glydd*, pages 362 and 374, of this case, and *Clarke v. Parker*, 19 Ves. 1), 1 Ch. Ca. 144. *Ventris v. Glydd*, 1694, by Lord Somers; or permits treaty, though no express consent, *Mesgret v. Mesgret*; or consent conditionally, as on making convenient settlement, [391] which is offered to be done, though not done before marriage, *Bostock v. Ireton*, Finch. 234.

I apprehend this Court will always judge whether the condition be lawful or certain, and can or ought to be performed, and whether it be performed or not according to the reason of the thing, and the true intent and meaning of the parties; but on the other hand, it must likewise be admitted, that it is a settled and established rule in this Court, that where a legacy is given on condition that if the legatee marry without consent, the money shall go to another, the legacy will not be decreed if the legatee marry without the consent required; this was agreed in the cases mentioned, *Sir H. Bellasis v. Ermine*, *Jervois v. Duke*; it was so determined in the case of *Sutton v. Jewkes*, 25 Car. 2

[1673-74], 2 Ch. Rep. 95. *Davis v. Halton*, *Stratton v. Grymes*, 1698, 2 Vern. 357, and in no case was it held otherwise.

This is more strongly so where the settlement is of lands by devise or otherwise, on such conditions which a man limits or disposes upon what terms he pleases, as held in *Fry v. Porter*, 1 Ch. Ca. 138, 141; 2 Ch. Rep. 26; 1 Vent. 199; 1 Mod. 300.

Much more so where the marriage with consent is required as a condition precedent to the vesting of the estate, as appears from the case of *Bertie v. Lord Falkland*, 3 Ch. Ca. 129; 1 Salk. 231; 2 Vern. 333.

Now upon what foundations is it that the Court allows not the legatee to recover, if she marry without the consent required, when there is a devise over of the money, although she should recover if it had not been devised over, since the ecclesiastical court would have equally rejected the condition in both cases alike.

I see no reason, unless it be that in one case where there was no devise over, there does not appear so full and absolute an intention of the testator or donor to defeat or disannul the legacy, it is rather a caution or admonition he desires should be complied with than a fixed resolution, she should lose the gift if she do not; and, therefore, the Court may so far conform to the ecclesiastical law as to construe not as an absolute condition, but rather intending *in terrorem*. Whereas, when there is a devise over, it is evident the testator meant she should not have it if she did not comply with the condition; as it is said in *Fry* and *Porter's* case; the Earl of *Newport* as really meant Mr. *Porter* should have the estate if his grand-daughter married without [392] the consent of the Earls of *Warwick* and *Manchester*, as he meant she should have it if she married with such consent. Since then a condition not to marry without the consent of others is in itself lawful and reasonable and fit to be complied with (for that is admitted in all these cases); where there appears a full and complete intention of the donor, who may give upon what terms and conditions he pleases, that the gift should not take effect unless the condition be performed, a Court of Equity will not dispense or relieve against a deliberate and manifest breach of it.

This being presumed I come to consider the present case more directly.

The question in this case has been considered, and very properly under two branches.

1st. Whether the plaintiffs by their marriage are entitled to the £2000 appointed by the settlement to be raised out of the term of 1000 years though such marriage was without Lady *Aston's* consent?

2nd. Whether if they should not be entitled to the portions by the settlement, they may not be entitled to the £2000 given by the will.

As to the first question, on the best consideration I can take of this matter I think they are not entitled to the £2000 by the settlement till marriage with consent of mother or trustees.

1st. It is the plain intention of Sir *T. A.* these portions should not be paid till marriage with consent; he had provided for them maintenances of £70, or if their mother died or re-married £100 *per annum* till marriage with consent, and then and not before the £2000 portion was to be paid.

This appears from every branch of the trust; the first branch in case Sir *T. A.* should have no son and two daughters living at his death or born after or who should marry in his life with his consent, then and in such case and not sooner or before Sir *R. B.* and Sir *J. Chesshyre* should raise £5000 and pay to or to the use of the younger of the said two daughters when and as soon as she shall be married with consent of dame *Catherine Aston*.

In the same words it is in the second branch; if no son and more than two daughters then trustees were to raise £3000 for each daughter and pay it at their respective days of marriage with such consent as aforesaid.

In like words it is in the third and fourth branches; if there should be one or more sons, and but one or more daughters.

[393] And through the whole it is most evident his intent was daughters should have no portions paid till married with consent.

This is still more evident if possible in that Sir *T. A.* hath raised £70 *per annum* for the maintenance of his daughters from the age of eighteen till married with such consent as aforesaid.

Now it never could be the intent that the daughters should have their portions and maintenance both at the same time; but by express words of the trust the £70 *per annum* were to be paid till marriage with mother's consent, and if their portions were

to be paid before, then they would have the portions and likewise the £70 *per annum* both.

But it was objected that the marriage was the principal thing in the consideration of Sir T. A. when he raised this trust, and the consent of the mother or the trustees was only a circumstance.

But it seems plain to me that the marriage with such consent was the main thing Sir T. A. had in view ; when he limited these portions he designed his daughters only £70 or £100 *per annum*, if they did not marry with the consent specified ; if they did, they were to have the £2000 portions.

The words are express, the £2000 is to be paid at the days of their marriage with such consent as aforesaid.

It is agreed the marriage is necessary, and the consent is made as necessary to entitle them to the payment as the marriage.

It is known to be where a condition *copulative as it is called, that is a condition* consisting of several requisites, are to precede an estate in trust, all must be complied with before the estate or trust can take effect, this might be made out by several cases ; but it will be sufficient to mention the case of Sir *Cæsar Wood* alias *Creamer* against *The Duke of Southton*, Parl. Ca. 83.

Sir H. Wood, on his daughter's marriage with Duke of S., made a settlement on trust to raise a maintenance for his daughter until her marriage or age of seventeen, and if his daughter after sixteen should marry and have issue male by the duke then for the settlement of the estate on such issue male, and for the better provision of the duke and his wife, on trust for the duke and his wife for their lives and after to the first and other sons in tail male.

[394] The daughter married the duke under sixteen, but died after without issue male, and the question was, whether a trust did not arise to the duke for his life, and the Court at first thought it did, but on further consideration that decree was reversed in the House of Lords ; for the trust to the duke being limited if the daughter married and had issue male, it was said the words were express and certain that there must not only be a marriage, but issue male ; and when a condition copulative consisting of several branches is made precedent to any use or trust, the entire condition must be performed else the use or trust can never arise or take place, and it would be a violence to break the condition into two parts which is but one according to the plain and natural sense of it.

The same was determined in this Court and affirmed in the House of Lords, *Wood v. Webb*, Parl. Cas. 87.

The case is so apposite there needs no application ; the condition of payment is on marriage with consent ; they cannot be divided, but both must take place before their portion is due.

But it is further objected that the £100 *per annum* for maintenance after Lady A.'s decease or second marriage is limited till marriage or death which shall first happen ; and the proviso which determines the term of 1000 years saith, that if the £2000 portions are raised as aforesaid, or paid or secured by those in remainder or reversion, or there be no daughter or younger sons or all die, the daughters before marriage and sons before twenty-four, term shall, &c. ; where the expression is before marriage generally ; which shews Sir T. A. had regard to marriage, and that marriage with consent was not necessarily insisted on or required by him.

But it is most evident that the £70 *per annum* is expressly ordered to be paid till marriage with consent as aforesaid during the life and widowhood of Dame *Catherine Aston* ; then when the £100 *per annum* is after her death or second marriage to be paid to the daughter till that marriage or death, it must necessarily be intended such marriage as before spoken of, that is marriage with consent ; it cannot be intended or imagined that Sir T. A. should limit a longer continuance to the £70 *per annum* than the £100 *per annum*, that one should be paid till marriage with consent, the other determine on marriage though without consent. But if you would suppose the £100 *per annum* [395] that commences after Lady A.'s death or re-marriage should cease when the daughter marries whether with consent or not, consequently the portions after Lady A.'s death would be payable on marriage ; that is not the present case, for now the question is, in respect to the portions in Lady A.'s lifetime, which, as the maintenance is not to cease till marriage with her consent, so the portions cannot become payable till marriage with her consent.

As to the proviso that the term of 1000 years shall cease if no daughter living or all die before marriage, it was necessary it should be so worded, for the term was not to cease on marriage without consent, since part of the trust was to pay the maintenance till marriage with consent or death, so that the term was not to determine if the daughters died before marriage without consent, for they were to have maintenance after such marriage till death; and therefore unless they died before marriage, the term was not to cease or be assigned to those in reversion or remainder.

It was likewise objected, that if such construction was put upon the words that the daughters' portions should not be payable till marriage with the mother's or trustees' consent, then the daughter who married in her father's life could never have her portion; but it is plain that the daughter who married in her father's life with his consent is not within the latter part of the clause, being provided for by the former part of it, which saith that if Sir T. A. should have two or more daughters living at his death or born alive after, or who should be married in his lifetime with his consent, the trustees should raise and pay £2000 as and for the portion of every such daughter, so that her portion was immediately payable, and the subsequent words to be paid at the days of their respective marriages, must relate to those that were not then married not to those that were.

Besides there is a subsequent clause, that if any daughter should be preferred or advanced in marriage by Sir Thomas in his lifetime, but not with the whole sums intended for their portions, and Sir T. A. should declare in writing such advancement was in part, then so much only should be raised as would complete the portion intended, which evidently shews that the daughter married in his lifetime was in no danger from the construction contended for of losing her fortune, for if it was not paid on the marriage the residue was to be raised by virtue of the trust.

[396] But the main objection was, that this constraint of marriage without consent was void by the civil law.

2nd. That the maxim of the civil law had been followed by this Court and adopted in cases similar or as strong as the present case.

3rd. That such restraints are unreasonable, tend to discourage marriage, and encourage a vicious course of life.

As to the civil law, it is a commendable study, and may be of use to the students of the common law, but ought not to interfere with, much less supersede the rules of the common law.

Mr. *Selden*, Diss. ad Fletam, L. 3, s. 5, seems to make a just observation in relation to its use in Courts of Westminster Hall. It is manifest, he says, that some sort of use of the civil law prevailed in the decisions to be made by the laws of England, not that any thought this realm subject to the imperial law, or that the common law could receive any change from it, for all taught the common law was to be followed where it varied from, or was repugnant to it; but where there was no express rule of the common law in the case, they recurred to the reasoning of the civil law, where that was reasonable, or if both laws were the same, they made use of the words of the civil law for the greater confirmation or illustration of the matter.

Let us then see what the civil law is in this point; but in order to judge how far it is fit to be guided by it, it will be proper to consider the ground and foundation of it.

As to the Stat. of Wills; the 32 H. 8, gave power to devise lands held by knight's service if a third part was left to descend to his heir. So the *Lex Falcidia*, among the Romans, gave power to devise so as a fourth part was left to the heir; *Legare jus esto dum non minus quam quartum partem eo Testamento Hæredes capiant*, Dig. L. 35. tit. 2. If less than a fourth was given to the heir, it was to be made up a fourth, Dig. 35, tit. 18.

If nothing was given to the heir, the will was set aside as *testament. inofficiosum*, Just. L. 2, tit. 13.

This fourth part was called *Legitima Portio*, as due of right, but as it was usually paid on marriage when the party went into another family, it was sometimes evaded by devising a fourth indeed, but on condition not to marry. To remedy this, as Dr. Strahan observed, the *Lex Julia* provided, *Qui cælibatus aut Viduatatis conditionem hæredi Legatorione injunxerit, hæres Legatorius ea conditione [397] liberi sunt neque minus hæreditatem legatumve ex hac lege consequent*: Goth. de fonte Jur. Civilis. 291. Others endeavoured to evade by hindering their children's marriage, to prevent which the law Dr. Strahan cited was made, *Qui liberos quos in potestate habent injuria prohibuerint*

ducere uxores vel nubere; (and by a subsequent law), *Qui dotem dare nolunt per Proconsules Præsidēsque provinciar. coguntur in matrimonium collocare et dotare*, Dig. L. 23, tit. 2, lex 19.

The *Lex Julia* avoided conditions restrictive of marriage in legacies to widows as well as single persons, but by construction it was relaxed in respect to widows, and therefore *Gaius* says, if a man left a legacy to his wife, on condition if she married it should go to another, *Non dubium est quin nupserit cogenda est restituere*, Dig. 32, tit. 3, L. 14. And where, in Dig. L. 35, tit. 1, L. 22, such a condition is said to be void, *Si mulieri legatur*. *Gothofred*, in margin, says, *Quid si uxori*, and answers, *Si nupserit cogenda est*, and tells us the law was abrogated as to legacy to a wife, Nov. 22, Ca. 24. So *God. Orph. Leg.* part 3, ca. 17, s. 9, and *Swinburne* say, that though such conditions be void in legacies to a single woman, the civil, or rather the canon law, allows it in legacies to a widow, especially if given by a husband to a wife, or by a son to his mother.

As the *Lex Julia* was evaded in respect of legacies to widows, another evasion was attempted, by annexing a condition that the legatee should not marry but *ad arbitrium* of such a person as the donor knew would not consent.

But this was looked on as a mere evasion, and therefore construed to be void. *Rescindi debet quod fraudendæ legis causa adscriptum est*, Dig. L. 35, tit. 1, lex 64. But this was held so only *ubi fraus legi facta est*, and therefore a condition not to marry a particular person is allowed. *Cum ita legatum sit, Si neque Titio, neque Seio, neque Mævio nupserit. Si plures denique personæ comprehensæ fuerint: magis placuit cuilibet eorum si nupserit amissuram legatum*, Dig. L. 35, tit. 1, lex 63. So *Swinb.* part 4, saith, a condition not to marry a merchant, or a widow, or any living at *York*, or any other town, is good, unless where marriage cannot probably be had with any other; whence it appears, that by the civil law, a condition restrictive of marriage was not looked upon as unlawful, but where it amounted, in a manner, to a total restraint of marriage, which condition was made void by the express words of the *Lex Julia*.

It is true, that the Roman lawyers having construed these [398] clauses which restrain marriage to the *arbitrium* or consent of others, as designed to elude the *Lex Julia*, the Ecclesiastical Courts looked upon all conditions of that nature void.

How such conditions are regarded when precedent to the vesting of the legacy, I shall hereafter consider.

But it is said, this rule of the ecclesiastical law is adopted into this Court, and has been followed in cases similar or as strong as this.

The first case mentioned was *Gresley v. Luther*, Mo. 857, and *Pigot's* case there cited by *Winch*.

The principal case was an assumpsit on promise by defendant, to give such a sum to plaintiff, in consideration she should give her consent and furtherance to her daughter's marriage with him, *Winch* objected that the consideration was not good, because in *Pigot's* case, a person to whom a legacy was given, on condition that she married with consent of her mother, had sentence for her legacy, though it was pleaded in bar she married without her mother's consent.

The case of *Pigot* was plainly a case in the Ecclesiastical Court, where such a condition (as was said before) is always disallowed, for though it was said it was pleaded in bar, that is only a common lawyer's language, to express that it was insisted on by way of defence, in the defendant's answer to the libel there, that the marriage was without the mother's consent.

And it was before proved at large, that in pecuniary legacies, on condition to be void if legatee married without the mother's consent, if no devise over, this Court decreed the legacy, though no consent, but if there was a devise over, this Court has as constantly decreed otherwise.

So that there is nothing in *Pigot's* case that varies from this known and common rule and distinction as to the principal case. It was determined by the other Judges that the condition was good, and the plaintiff recovered, and the reason is given as appears *Hob. 10, 1 Ro. Abr. 19, s. 9*, where the same case is reported, because nature gave parents power of disposing of their children, and in nature their children are bound to obey them.

But three other cases have been relied on as equivalent to the present.

1. *Fleming v. Waldgrave*, Ch. Ca. 58.

A lease for years was made to Sir *Edward Waldgrave* and his lady in trust to raise

£700 for A. if she did not marry [399] contrary to the good liking of Sir E. W. and his lady, if she did, then for such person as Sir Edward and his lady or survivor should nominate, and for want of nomination to Sir E. W. and lady or survivor of them. A. marries without their consent; they died without nomination, Lady W. survives, and makes a deed of gift of all her goods to Sandall, who prefers his bill against Francis Copledike, the administrator to A. and Lady W. both, to have the benefit of this lease, which was decreed to Copledike the administrator.

The case is obscurely reported, and the reasons of the decree not mentioned, but it is apparent Sandall could not have the decree unless A. had married contrary to the good liking of Sir E. W. and his lady, and Sandall had been nominee of lady W.; but the gift of all her goods could not amount to a nomination to entitle him to £700, and though marriage is said to be without consent, it is not said to be contrary to liking, and possibly on this foot it was decreed for the defendant, for in *Creagh v. Wilson*, 2 Vern. 573, it is said, there may be a difference between marrying without consent and marrying against consent (according to the case of *Fleming v. Waldgrave*), and if the marriage did not appear to be against consent, then the condition was not broken, and it might well be said, it was not in the power of the trustees to dispose of the lease otherwise.

But nothing in this case shews that the condition (if she do not marry against the good liking of Sir E. W. and lady) would not have defeated the trust for £700 if it had been broken, or that her marriage contrary to their good liking would not have been a breach of the condition.

2. Another case insisted on was *Needham* and Sir H. Vernon, Finch, 62.

A settlement was made by Lord Kilmorey and his son in trust, to raise £1500 a-piece for portions of daughters, payable at their marriage with consent of trustees, or the major part of them, and if portions raised before marriage, they were to be improved, that they might receive the increase for better maintenance till marriage, or if any married without such consent, her portion should go over to the others, the trustees having received the rents since the death of Lord K., and raised the portions; two of the daughters and the son prefer a bill against the trustees to have the benefit of the trust, and the daughters being in years, and intending not to marry, desired the portions to be laid out in the purchase of annuities for their better maintenance during their lives. It [400] being agreed, if either died, the portion of her so dying, would go to her executors or administrators, and they offering to give surety to indemnify the trustees against the claims of the infant children of Charles Lord K. to whose use the portion of her marrying without consent was given; it was decreed accordingly.

What favours the plaintiffs, the daughters of Sir T. A. in this case; the portions being payable here on marriage with consent of trustees, it was admitted, that if either of the daughters died before marriage, her portion would go to her executors or administrators.

1. All conditions are void by the civil law; hence Chancery declares such conditions to be only in *terrorem*, unless a limitation over, for in legacies the Chancery governs itself by the civil law, for it is good in common law, as in *Fry and Porter*.

2. Daughters may devise these portions if they die unmarried, executors or administrators will have them so agreed.

But this decree seems to have been made by consent; the son of Lord K. was party to the bill, and probably was the person to whom the benefit of the portions if not paid would result, and he consenting to the payment, the Court had less cause to be scrupulous or inquisitive about it.

When, therefore, the trustees were willing to accept security against the claim of the infant children of Charles Lord K. to whom the money was to go in case they married without consent required, which the trustees might the more readily accept, since they were not only in years and declared they would never marry, but when their fortunes were turned to annuities would be less likely to do so.

It is less to be wondered the Court, on such security, should decree these portions.

But it is manifest this decree was not founded on a supposition, that such limitation of portions to be paid at marriage, with consent of the trustees, was void or unreasonable, or would become due on marriage, without such consent, for payment was decreed before marriage, which on all hands is agreed to be necessary to entitle them to the payment of the portions.

On the contrary, such condition is supposed to be good, else what need of security to indemnify trustees against the infants to whom the money was devised over if they married without consent.

[401] And in case it was then apprehended, that on a trust to raise portions, payable at marriage, an interest was vested in *cestui que trust*, which would go to the executor or administrator, though she died before marriage; it has been since settled, that the portion on the death of children, before time of payment, shall sink into the estate for the benefit of the heir, and not go to the executor or administrator of the deceased. So it was determined, *Poulet v. Poulet*, and affirmed in the House of Lords, 1 Vern. 204, 321, where a term of years was created on trust to raise portions for daughters, to be paid at age of twenty-one or marriage, and the daughter died at the age of six years. So it was held in the case of *Yates v. Phettrplace*, 2 Vern. 417; Pre. in Ch. 140. So *Bruen v. Bruen*, 2 Vern. 439; Pre. in Ch. 195. So *Smith v. Smith*, 2 Vern. 92. So *Tourney v. Tourney*, Pre. in Ch. 290, where the trust was to pay a portion to the child, within a year after the father's death, with interest from his death, and the child died within the year.

So that I see not how any thing can be inferred from this case of *Needham* and Sir *H. Vernon*, to maintain that the £2000 in the present case should be payable on marriage, though without consent.

A third case insisted on, was *Semphill & Ux' v. Baily & Ux'*, Pre. in Ch. 562.

Gaskill had three daughters, *Sarah*, *Elizabeth*, and *Rebecca*; the plaintiff proposed to marry *Sarah*, the eldest, in her father's lifetime, but the father declared if she did, he would not give her a groat, on which the marriage broke off; afterwards, the father by will devises his real and personal estate to his executors, on trust to raise £35 *per annum* for his daughter *Sarah's* maintenance, £35 *per annum* to his daughter *Elizabeth*, and if *Sarah* marry with the consent of his executors, he devises to her £1000, to be paid at her age of twenty-one or marriage, and three years after his death he gives certain lands to his said daughter for life, remainder to her first and other sons in tail. Then he gives £1000 to *Elizabeth* at twenty-one or marriage, and other lands to her *ut supra*; then to *Rebecca* £1000 in part of her portion; and if she marry with the consent of his executors, then other lands to her *ut supra*. *Sarah*, after his death, marries plaintiff without the consent of the executors, the plaintiff being of good family and fortune, and not inferior to her.

[402] By Lord *Lechmere*, and *King*, C. J., decreed the fortune not forfeited by marriage without consent of executors. *Dormer contra*: for here appeared no intention throughout the will to make it a forfeiture; it seems nothing but a loose inconsiderate way of expressing himself, and is only a cautionary provision, that the daughter should have consideration of the executors in marriage; but the will is not coherent; in *Sarah's* bequest the clause is inserted, in *Elizabeth's* omitted, in *Rebecca's* inserted between the devise of the money and the lands.

2. No devise over, though occasion is since given for it in his will, if it had been his intent; as where he devises if any daughter die without issue, &c., he would have added, or marry without consent, if that had been his intent, or at least he would have taken notice of it in the close of his will.

So that it is plain the two judges relied on this, that it did not appear to be plainly the testator's intention to make a forfeiture, and where the intent is not plain it would be hard to construe it so.

But it was further objected here is no devise over, as in the cases where this Court hath refused to decree the legacy when legatee did not marry with the consent required.

But if no devise over, here is what seems equivalent to it. It is true the £2000, if it be not raised, is not ordered to be raised for the benefit of another; but if it be not raised, it is ordered the estate should be exonerated from it, for the benefit of those in remainder or reversion, and if raised, it is ordered to be paid to them to whom the reversion or remainder shall belong.

What is not raised, and consequently not in *esse*, cannot properly be given over, but is it not tantamount to say it shall cease, and the premises discharged from it.

Why is it that this Court denies relief, if the condition is broken when there is a devise over? unless then the testator's intention is more apparent, that the legatee shall not have it, unless he perform the condition; but is not the intent equally apparent here? can words more strongly express that intention than to say, if my

daughter die before marriage, with such consent, her portion shall never be paid, unless to those in reversion or remainder ?

But here are words which yet demonstrate that more fully if possible ; for it is provided the portions shall not be paid till day of marriage with such consent as required.

It is allowed the money is not payable till marriage, and I have shewn that marriage with consent, being the time ap[403]-pointed, both must be performed ; this is in the nature of a condition precedent, and till performed the daughters cannot be entitled ; the interest and right to the portions does not vest in them.

It is a known and settled maxim of law, that if lands, or interest out of lands, are given on condition precedent, nothing vests till condition performed, no not although the condition at first was impossible, or after becomes so by the act of God or other unforeseen accident, Co. Lit. 206, 219.

And in this case *æquitas sequitur legem*. This was determined in *Lord Falkland v. Bertie*, 2 Vern. 333 ; 3 Ch. Ca. 182 ; Salk. 231. Mr. *Cary*, by will, devised to trustees on trust, for Mrs. *Willoughby*, his heir at law, in case she married Lord *Guildford* in three years after his decease, for her life, then to her first and other sons by Lord *Guildford* in tail male. She did not marry him, and though there were offers on her part, and many circumstances shewing inclination to perform, yet by Lord *Somers*, assisted by *Holt* and *Treby*, Chief Justices, all persons of consummate abilities in that profession, it was held equity could not relieve, and it was there said it would not be easy to find a precedent for relief in a court of equity, in case of a condition precedent.

It is true where recompence can be had, courts of equity have relieved against breaches of conditions precedent, as well as conditions subsequent (though that was not formerly done), and the reason seems as strong where compensation can be made ; but that is not to be done in the present case. So in case of *Creagh v. Wilson*, 2 Vern. 572 ; 1 Eq. Ca. Ab. 111. Devise of £200 to grand-daughter if she continued with executor till twenty-one, but if taken away by the father, who was a papist, or married without consent of the executor, but £10. She went to her father with the executor's consent, who married her to a papist. By Lord *Cowper* : she could not be relieved, for he looked upon this as a condition precedent.

It is true this was a marriage to a papist directly contrary to the testator's intent, but it shews how difficult it is to have relief in equity on breach of condition precedent.

But it is said, the civil law makes no difference between a condition precedent and subsequent.

But this rule must be understood with allowance, in some respect a condition subsequent by the civil law, resembles a condition precedent at common law ; for if a legacy be given on a condition subsequent by the common law the legatee [404] is entitled presently, but on breach of the condition it is forfeited and gone.

But by the civil law *conditio suspendit legatum*, and therefore the legatee could not take it till he had performed the condition.

But this was remedied in some degree by *lex Mutiana*, by which on caution given specially where the condition was in the negative not to break it he should have it in the mean time.

It is likewise a known maxim in the civil law, that a condition unlawfully impossible, or to do what would bring infamy, is void, and the legacy is absolute ; so whether the condition be subsequent or precedent, it is all one, and the effect is the same.

But there are conditions the civil law allows to be good, and then there is this difference between a condition subsequent and precedent ; if it be subsequent, though the party cannot have it before the condition performed, unless the caution be given pursuant to *lex Mutiana*, yet the interest vests, and if the party die before the condition performed, *transit in hæredem*, who on performance shall have it, *Legatum conditionale non perit licet gravatus* (the person who is to perform the condition) *moriatur pendente conditione*, Dig. Lib. 35, tit. 1, L. 65.

But if condition be precedent, it does not vest till performance ; and if the party dies before, it is lost. *Legata sub conditione relicta non statim sed cum conditio exstiterit, deberi incipiunt ; ideoque interim delegari non poterunt*, Dig. 35, tit. 1, L. 41.

So in all sorts of legacies, two times are considerable, the time when it becomes due, and the time when it is payable, *Dies cedit cum Pecunia incipit deberi* ; *dies venit cum peti potest ff de verb signif.*

And therefore, as *Domat* observes from the civil law, Lib. 4, tit. 2, all legacies are

pure, or absolute, or payable, upon a term, *i.e.* at a day future, or payable upon a condition performed; if the legacy be absolute, it is due and payable at the testator's death, if given at a day future, it is due at testator's death, but not demandable till time of payment; if given on condition, it is due and demandable when the condition performed. *Si legatum sit purum ex die mortis dies ejus cedit; sed ante diem peti non potest si sub conditione sit relictum, non prius dies legati cedit quam conditio fuerit impleta.*

[405] Now when a legacy is payable at a time uncertain, in the event that may or may not come (as in the present case, at day of marriage, with consent of the mother or trustees), the legacy is conditional, and consequently does not vest, nor can be transmitted till the condition performed. So in Dig. L. 36, tit. 2. L. 21, 22, if legacy be given to a person *cum pubes erit cum in familiam nupserit cum in magistratum inierit, &c., nisi tempus conditiove obligit neque res pertinere neque dies legati, cedere potest.* So Swin. part 4, s. 17, fol. 308, takes the difference where legacy is given at a day certain or time uncertain; in the first case, the legatee dying, his executor generally may recover the legacy when the time is come; but if the legacy is given to be paid at an uncertain time, as where the testator's daughter shall marry, if he die before her marriage, the legacy is utterly extinguished.

So if given when testator's son shall die, though it be certain he will die, yet if legatee die before the son, the legacy is extinguished as if it had been conditional.

And he adds it is not material whether the uncertainty be joined to the substance of the legacy or to the execution of it, for in both cases the legacy is reputed conditional. As, if I give A. £100 when my daughter shall marry, or give her an £100 to be paid when my daughter shall marry; for if A. die before her marriage, in either case the executor cannot demand it.

This seems a direct determination of the present point; for to be paid on marriage of the daughter, or on her marriage with consent of her mother, must receive the same construction when marriage with consent is mentioned as one entire act. So that according to the rules of the civil law the plaintiffs will not be entitled till marriage with consent of the mother or trustees.

Much less would it be fit for a Court of Equity to decree trustees to pay, contrary to the express words of the trust, and plain intention of the testator.

Their trust is not to pay till marriage with consent; shall they be obliged to act directly in opposition to the trust and pay the money on marriage without consent?

It is said a trust ought to be construed favourably, and it ought to be so to answer the design of him who created it, but never to thwart both his words and intention.

But it was earnestly insisted on that a clause to restrain [406] young women from marrying without consent of their mother or trustees was highly pernicious in its consequences, tending to discourage marriage, and promote a vicious course of life; but it hath hitherto been looked upon as a prudent and reasonable restraint, and it were happy if experience did not shew it was commonly necessary to prevent unequal and unfortunate matches.

I need not repeat what hath been cited by the counsel from the printed cases of *Fry v. Porter*, that such conditions continue children in that obedience law and nature oblige to.

The presumptuous disobedience of daughters highly merits such punishment, see *Jervois v. Duke*, 1 Vern. 19. Since it is the general sentiment of mankind that it is not only decent and prudent, but even the duty of children not to marry without the consent of parents.

The civil law made the marriage without the father's consent void, *nuptiæ consistere non possunt nisi consentiant omnes quorum in potestate sunt*, Dig. L. 23, tit. 2, L. 2.

And though this may be carrying it too far, yet *Grotius* agrees that *Filiorum officio conveniens est ut parentum consensum impetrent; nisi manifeste iniqua sit parentum voluntas*. *Grotius Jure Belli et Pacis*, L. 2, c. 5, s. 10.

So *Puff.* L. 6, ca. 2, p. 635, *Officium Pietatis et reverentiæ requirit ut consilium parent: adhibeant nec eorum voluntate reluctantur*.

So by custom of *London*, a daughter married without father's consent loses her orphan's share of his personal estate, *Foden v. Howlett*, 1 Vern. 354, unless her father be reconciled before his death.

So by the civil law, the father might devolve this trust to the mother, *si in arbitrio matris pater esse voluerit cui nuptum communis filia collocaretur*, Dig. 23, tit. 2, L. 62.

And it is used as an argument against the necessity of the fathers consent, because then the mothers would be equally necessary. For in nature *omnibus ex æquo parentibus idem Heres. &c.*, Dig. 32. tit. 2, note 25.

But it is said in this case the consent not only of the mother is required but if she be dead or married, that of the trustees, or the survivor, his executors administrators or assigns.

The present case is where the marriage was without the consent of the mother, but I see not why it should be thought [407] enormous or unreasonable for the father to devolve the like trust on a friend, and rely upon him to make an executor or administrator or otherwise to assign one who might be adequate to such a trust.

The father may make whom he will trustee or guardian to his children, nor was it ever thought a wanton exercise of power in a parent to do so.

To conclude this point, I am of opinion, that since it was Sir *Thomas A.*'s clear intention that the £2000 to be raised by this settlement should not be paid to his daughter till marriage with consent of the mother or trustees.

Since such intention is consonant to law and reason, just in itself, and fit to be observed, since no case in this Court hath been determined, where, under all the circumstances of the present case, portions have been decreed on marriage without the consent required, and the present case falls almost under all the circumstances where relief has been refused.

Since the daughters have a competent maintenance provided for their lives, though the portions intended if they married without consent should not belong to them.

I am of opinion that it is not agreeable to the rules of equity and conscience to decree the trustees to raise and pay the £2000 given by this settlement till their marriage with the consent of the mother.

I proceed to consider the second question, whether daughters will not be entitled to the additional portions of £2000 given by the will, although the marriage was without the mothers consent.

And it must be owned this question deserves a distinct consideration, for I think the £2000 by the will is but a personal legacy, and not monies to be raised out of land, for though there is a term of 500 years out of the *Norfolk* estate limited to the defendants *Wright* and *Kenrick*, on trust to raise £3100, yet when it is raised, it is appointed to be paid to his executrix, to be accounted as part of his personal estate, and to come in lieu of the like sum disbursed by him out of his personal estate, to discharge the debts and legacies charged on that *Norfolk* estate.

And then out of that £3100 and the rest of his personal estate those additional portions were to be paid. So that I can look upon it only as a personal legacy.

Here does not appear any devise over if the marriage be without consent, as in case of the portions by the settlement. [408] It is true the mother is made executrix and residuary legatee, but in the case of *Garrett v. Pritty*, 2 Vern. 293, where £3000 was decreed to his daughter, provided if she married without the consent of one, she should have but £500, and made his son executor and residuary legatee, it was held this was not a devise over, for it only sunk into the surplus of the personal estate.

In the case of *Amos v. Horner*, 1 Eq. Ca. Ab. 112, indeed it is said that a devise of the residue of personal estate was a devise over, but there appears no judgment in that case in the Register.

And *Semphill v. Baily*, Precedents in Chan. 562. It is said that a devise of the overplus would not do, and therefore it is at least doubtful that the making Lady *Aston* residuary legatee will not amount to a devise over.

Upon which at first I apprehended but little difference between this and the common case, where a pecuniary legacy is on condition not to marry without consent without any devise over.

But upon more mature consideration of the several clauses of the will, the manner of wording, and the true intent and meaning of the testator, I am of opinion that the additional portions must follow the original portions, and the plaintiffs cannot be entitled to them but on marriage with the consent required.

There is not a more settled nor a more just and equitable rule for the construction of wills than that the intent of the testator expressed by the words of the will should take place if it be consistent with the rules of law.

Now the intention of Sir *Thomas Aston* is most manifest that the additional portions should pursue the portions by the settlement, for first he gives this £2000 not only

as and for the augmentation of the portions provided by the settlement, but to be paid at such times and subject to such conditions provisos limitations and agreements as the original portions by the said settlement are made subject and liable to.

How then can the £2000 additional portion be paid at the same time with the original portion or subject to the same condition or limitation if it be paid on marriage, and the portion by the settlement is not paid till marriage with consent if it be paid before the other becomes payable?

How can it be an augmentation of portion by the settlement which is not yet payable and perhaps never will?

[409] These words (to be paid at the same time subject to the same condition) must be wholly rejected, and then no time of payment is limited, and consequently too would be payable presently on the death of the testator before marriage as well as before marriage with consent, or if they stand the Court must decree the payment before the time expressly limited for the payment, a thing that would be against conscience and I believe never was done by any court of equity.

2. Testator here goes further for there is a clause in the will that if any daughter die before the original portion becomes payable the £2000 shall not be paid to her executor or administrator, which strongly imports as fully as words can express that Sir T. A. never meant the portion by the will should be paid till the original portion was payable.

3. It may not be improper to take notice that by the will the additional £2000 is not in express words devised to the daughters (as in those cases generally where the proviso subsequent of marrying with consent has been held not sufficient to defeat it). But he wills that out of his personal estate shall be paid to his daughters at such times, which though it be equivalent in respect to the daughters having the money when payable; yet it seems as if Sir T. A. was cautious of using any words which might seem to give them the money till the time and condition on which it was payable are come.

But it may be objected, why may not this will be construed as an express devise of the £2000 to the daughters, and the subsequent words be regarded only as a direction for the time of payment; as where a sum of money is given to an infant to be paid at his age of twenty-one though he die before that age, it was an interest vested and shall be paid to his executor or administrator.

I own there were several cases to that purpose, and in some of them a nice distinction was made when the legacy was given at twenty-one or to be paid at twenty-one, Dyer, 59, in Marg. 2 Vent. 342. *Clobury v. Lampen*, cited in 2 Vern. 673. *Franklin v. Green*, 2 Vern. 137. *Cave v. Cave*, ib. 508.

But the truest ground to proceed on is to distinguish between the cases where an interest is vested in the legatee before the time of payment, and where not, for if an interest is vested it will go to the executor or administrator otherwise not.

Now I observed before the civil law makes a difference [410] between a legacy given upon a term, and upon a condition, in case the legacy is given payable at a time certain it is *debitum in presenti* though *solvendum in futuro*.

But if it be given to be paid at a time uncertain in the event whether it will ever come or not, it is conditional and does not vest till condition performed, that is till the time of payment is come.

The cases before quoted from the civil law make this plain and I need not repeat them, the expressions of Swinb. part 4, s. 17, fo. 308, are full to this purpose, and I know no authority in the civil law books or in this Court to the contrary.

The rules of the civil law when consonant to reason and conscience, and not interfering with any maxim of the common law have frequently been followed by this Court not as they were rules of civil law, but as they were rules of reason and equity.

This being so it would be hard for this Court to decree the payment of a legacy upon the foundation of the civil law (which seems to be the ground why they determine a condition not to marry without consent to be only *in terrorem* where no devise over) in an instance where the civil law would not allow the legacy to be payable.

Since then it appears to be the full intention of the testator Sir T. A. that the additional portions by the will should not be paid till the payment of the original portions.

Since such intention is lawful and reasonable it being not only consonant to law, but prudent in the parent to augment the provision of a child upon its obedience in taking the consent required by her father in her marriage.

Since in this case there is a maintenance and provision given to the child though not so large, though she marry without consent.

Since there is no case in equity where a legacy given on marriage with consent hath been decreed on marriage without consent, and the civil law would disallow such legacy.

I am of opinion that the plaintiffs are not entitled to the additional portions any more than to those by the settlement.

Willes, C. J. I shall first endeavour to strip this case of the many clouds which have been thrown about it, many distinctions have been taken and many cases cited which [411] have no application to the present question. What has been said of penalties and forfeitures is out of the case. The question is, whether the interest of the daughters in these portions has become vested. It cannot be said to have been forfeited because the daughters may marry again with consent and so become entitled. So likewise what has been said with respect to parental authority is out of the case, and with it the objection that in certain events the consent of strangers might be necessary, for I think there would have been no difference if these portions had been given by a stranger instead of a father. These restrictions do not prevail by the authority of the person imposing them, but operate as conditions annexed to the gift, *cujus est dare ejus est disponere*.

The single question is, whether a man can give a sum of money to another when that other marries with the consent of a third person so that it shall not be payable until such marriage with consent.

Upon this, two points have been made.

1st, As to Sir *Thomas Aston's* intention.

2ndly, As to the legality of such intention.

To ascertain the intention we must look at the settlement and will together: and upon both the intention is perfectly clear.

As to the legality of the intention I will first consider the settlement. The intention being plain, nothing but a rule of law or equity equally plain shall prevail to set it aside. It was truly said by *Dyer*, as quoted by Lord C. J. *Treby*, in *Falkland v. Bertie*, 2 Vern. 337, that men's deeds and wills by which they settle their estates are the laws which private men are allowed to make, and that they are not to be altered even by the king in his courts of law or conscience.

The question as to the portions under the settlement must be decided according to the rules of common law relating to lands, for although the portions are to be considered as money with respect to the daughters they are to be considered as land with respect to the estate of the heir.

The distinction between pecuniary portions and portions out of land is settled in the cases of *Tournay v. Tournay*, Prec. in Ch. 290, and *Poulet v. Poulet*, 1 Vern. 204. In this case the marriage with consent must be considered either as a condition precedent or as a limitation of the time of pay-[412]-ment and more properly the latter; all the cases cited to the contrary stand upon particular reasons.

In the case of *Salisbury v. Bennet*, 2 Vern. 223, the Court went upon the ground of a dispensation by the father. In *King v. Withers*, of two events either of which was to entitle the daughter, one had happened.

It has been said that Courts of Equity have dispensed with conditions in cases of children's portions but that power has been exercised only where it was necessary to carry into execution the intention of parties, never to destroy it.

The question as to the portions under the will is more doubtful, but when properly examined will be found to be governed by the same rule. The civil law is of no authority in this kingdom further than it has been adopted and received. The authorities cited by the doctors are out of the *Roman* civil law only, and even from them it is not plain that the civil law would hold this restriction to be void. That law recognizes the distinction between a day certain, which may be ascertained by computation of time, and a time to be ascertained by the happening of a future event. In this case that future event is the payment of the original portions.

The rule that the condition shall be considered as *in terrorem* only where there is no devise over, is too well established to be now shaken, but to make that rule intelligible, it must not be considered as a principle of equity, but as a rule which equity has adopted, to ascertain the testator's intention. A limitation over is one evidence

of intention, but that intention may be as strongly proved by other means, as in this case by the expressions used by the testator himself.

In the case of *Paget v. Haywood*, indeed, it was held, that a devise over to the residuary devisee was as if there had been no devise over at all, but that was contrary to *Amos v. Horner*, 1 Eq. Ca. Abr. 112, which case, though it at first went off for want of parties, appears by the calendar to have afterwards come on again, and that a decree was made. It is not to be found in the Register's Book, and probably was not drawn up, because it was against the plaintiff; but I have been told by the author of *Equity Cases Abridged*, that he had that case from a gentleman who then attended this Court, and took it at the bar.

It has been said, that the will, as it refers to the settle-[413]-ment, ought to be construed as if all the words of the settlement were repeated in it; if that were so, there would be a clear devise over to the remainder-man, but I do not think that all the words of the settlement are to be introduced into the will, but such words only as will have the same effect in the will as the words in the settlement have upon the money to arise out of the real estate.

I would submit to the Court whether, as Lady *Aston* is residuary devisee, and consequently may have an interest in refusing her consent, it might not be proper to send it to the *Master* to enquire whether she has exercised her power with impartiality, and had reason for refusing her consent.

Lee, C. J. I entirely agree that this is a condition annexed to the portion and precedent. If so, the question is whether it is a good one.

There are but three sorts of conditions which are void by our law: 1st, Those which are repugnant. 2dly, Those which are impossible. 3dly, Those which are *mala in se*, or *mala prohibita*, by our law.

That conditions in restraint of marriage do not fall under this last description is clear from many authorities, Stat. 4 & 5 Ph. & Mary. The custom of *London*, Vaughan, 333. 1 Rol. Abr. 418. *Fry v. Porter*, 1 Mod. 300. The civil law, if repugnant to the principles of the English law, is of no weight, 1 Hales, Pl. Cor. c. 3. If this Court considered the condition as unlawful, how could it ever give effect to it, as in *Stratton v. Grymes*, 2 Vern. 357.

It is said that there is but little difference between a condition precedent and subsequent, but I think that there is a great difference. To dispense with a condition precedent would be to give away a man's estate contrary to his express direction. A condition describing the qualification of the daughters who are to take, is in its nature a condition precedent. It was so held by Lord *Cowper*, in *Creagh v. Wilson*, 2 Vern. 572. In *Needham v. Vernon*, Lord *Nottingham* considered the portions as vested. The case of *Semphill v. Bailly* was decided upon the particular penning and construction of the will, but I am inclined to be of opinion against that decree, because it was a case of a condition precedent. Upon the particular penning and expressions of this deed, I am of opinion that these portions never vested, if so, all the cases in which it has been decided that portions shall sink into the estate upon the party's dying before the time of payment, are authorities for the defendants.

[414] As to the portions under the will, it is to be observed, that the case of *Bellasis v. Ermine*, Ch. Ca. 22, was decided upon a plea, and the Court said that they would not defeat the portion, which shews that they took the condition to be subsequent, and not precedent. In *Aston v. Aston*, 2 Vern. 452, and *Garrett v. Pritty*, 2 Vern. 293, the conditions were subsequent.

Taking this to be in the nature of a condition precedent, or as fixing the time of payment, I think that these portions are not payable.

June 5, 1738.—*Lord Chancellor*. I think myself extremely obliged to my Lords the Judges for their learned advice and assistance in this case, the right to which I esteem one of the greatest privileges belonging to the person who presides in this Court. As I concur with them in opinion upon the several points in the cause, the great pains they have taken might have excused me from spending more of the time of the Court by entering into the argument of it; but as this is a cause of great expectation, and it is of great consequence in itself, and as the decree which I shall pronounce will be contrary to that of his Honour the *Master of the Rolls*, for whose judgment I have the utmost deference, I will on this occasion lay my thoughts before you at large, though at the same time I am sensible that it will be impossible to do it without repeating many things which have been already said in a much better manner.

The case has been fully stated, and the general questions arising upon it are two.

1. Whether the original portions provided by Sir *Thomas Aston's* settlement are become due and payable to the plaintiffs ?

2. Whether the additional portions given by the will are become due and payable ?

I shall follow the same method which has been taken by my Lords the Judges, and begin with the first question, the determination whereof depends on the declaration of the trust of the term of 1000 years, the words of which, so far as it relates to the point in judgment, are plain.

"That in case Sir *T. Aston* shall happen to have one or more son or sons by his wife living at the time of his death, and more daughters than one living at that time, or who shall in his lifetime be married with his consent, then it shall and may be lawful for the said trustees, by and out of the rents and profits of the premises, and by such interest, [415] produce, and encrease as shall be made of the same, or by such mortgage or leasing thereof, or of any part thereof, or such ways and means as to them shall seem meet, to raise, levy, and secure, for and as the portion of every such respective daughter the sum of £2000, and after such respective sum of £2000 shall be so received and raised, shall and may pay to every such daughter the sum of £2000 at the respective days of their marriage with the consent of my Lady *Aston*, his wife, if she shall be then living, and not married to a second husband, or if she be dead or married again, then with the consent of the trustees or survivor of them, or the executors, administrators, or assigns of the survivor."

"And also by and out of the rents and profits of the premises yearly to pay such daughters the respective yearly sums of £50 a-piece till their age of eighteen, and after that age until their respective marriage, with such consent as aforesaid, and during the life and until the second marriage of Dame *Catherine*, the yearly sum of £70 a-piece, and after the respective marriages of such daughters with such consent as aforesaid, or after the decease or second marriage of Dame *Catherine*, then the yearly sum of £100 until their respective marriages or deaths, which shall first happen."

These being the words of the declaration of trust, the proper considerations arising thereupon are,

1. What is the genuine meaning and construction of the words ?

2. What appears from them to have been the intention of Sir *T. Aston*, the maker of this settlement. And

3. Whether there is any rule of law or equity that will excuse the want of such a consent to the marriages of these ladies, as the words express, or will make *marriage* alone without such consent sufficient to give a right to demand the payment of these portions.

1. As to the construction of the words, though there may be some incorrectness and obscurity in other cases, which are put in different parts of this clause, yet, as to the event which has now happened, it is scarce possible to use expressions more precise and certain, one may turn, and shew a very plain thing in different lights, but no comment or exposition can make it plainer. It has been argued at the bar, as if the words—*with the consent of Dame Catherine*—created a condition, and much hath been said upon that head, but [416] I must own I have not sagacity enough to find out any *condition* in this sentence.

It is neither expressed in words of condition, neither in the nature of the thing doth it amount to one.

Where a gift is made, or the payment of a sum of money directed upon a condition, either precedent or subsequent, the thing is first given or the payment directed to be made, and the condition is collaterally annexed to it ; for instance, suppose it had been expressed in this case, *to be paid to every such daughter at the respective days of their marriage, if, or provided such marriage be with the consent of Dame Catherine*, there, or any other phrase of the like kind would have made a condition, but here is no gift or direction for the payment, save only upon the happening of this fact or event.

It is only a limitation or appointment of payment at an uncertain time, and a marriage so qualified and circumstanced, *i.e. so consented to*, is to fix and determine that time.

This created a great difficulty on the parts of the plaintiffs, how to make a portion out of land become payable before a time or contingency, on which it is given, hath happened.

And indeed a hard task it was, but in order to support it, on the first argument it

was insisted, that these portions were to be considered as vested before the marriage or time of payment, which should happen by force of the precedent part of the clause, whereby the trustees are directed to raise and receive the money *for and as the portions of every such respective daughter*, which words were said to amount to a gift thereof to them antecedent to the time of payment, but for this there is no colour, either from the general reason of the thing, or from the frame of this particular settlement. Nothing has been more fixed in this Court ever since the case of *Poulet v. Poulet*, Pas. 1685, and afterwards affirmed in the House of Lords, than that portions charged upon land do not become vested till the time of payment arrives. And it is still plainer upon the frame of this settlement; because particular provisions are created by way of annuities, not out of the portions, or the interest of the portions, but out of the rents and profits of the estate, till the time of payment shall come, and if any of the daughters die before that time, *i.e. before marriage with such consent*, the sum intended for the portion is directed not to go to her representatives, but to cease, or if any part of it should have been raised, to be paid over to the immediate remainder-man.

[417] This proves that the meaning of the words—*for and as the portion of every such daughter*—is only to point out the general end and purpose for which the money is to be raised, subject still to the restrictions in the other part of the deed, whereof a construction is to be made upon the whole, and that this notion of making the portion to vest before the time of payment, is repugnant to the very declaration of the trust itself.

2. As to the intention of Sir T. Aston, the maker of the settlement, no one, who reads it over, can doubt of it; it meets one, and crosses one's way in every part of the deed. He was making a settlement of his whole estate that was in his power, and providing for all the contingencies that could be foreseen to happen in his family, he limits his land to his issue male in strict settlement, and after them to his daughters in tail successively, on condition that their husbands should take and bear the name and arms of Aston.

As he appears to have it thus in his view, that his daughters might one day enjoy the estate, and sustain the name and succession of his family, he in the next place provides for their immediate support, and for securing their marrying providently, which he does by giving them portions to be paid only in case they marry with his own consent during his lifetime, or with the consent of the persons whom he thought fit to entrust after his death, and in case they should not submit to his directions in that respect, by restraining them to lesser provisions for their maintenance. This submission to his will he has extended to all the females of his family, for he has limited part of the estate itself to his wife *during her widowhood*, which nobody doubts being effectual. To make this still plainer as to his daughters, he adds a clause, that if any of his daughters should die *before she should be married with such consent as aforesaid*, then the sum intended for her portion should not be raised, or if it was raised, should be paid to the person entitled to the estate subject to the term.

Let us suppose that any of his daughters had married in his lifetime, without his consent, was it his intention that she should have this portion notwithstanding such an act of disobedience? nobody can imagine it was.

Suppose any of the daughters should never marry at all, did he intend that she should have this portion, although she should live to be fourscore years old? most clearly not, but that she should be content with her annuity.

[418] Upon this head of intention it was urged by the plaintiff's counsel, that in the proviso for determining the trusts of this term, one of the contingencies put is, *If all the daughters and younger sons shall depart this life, the daughters before their respective marriages, and the younger sons before their respective ages of twenty-four years*, then the further execution of the trusts shall cease and determine, and from hence it was inferred, that because *marriage* is here mentioned generally, without adding the words—*with such consent as aforesaid*, therefore it was his intention, that if they *married at all*, the trust should not cease, but continue for their benefit.

But this inference is not warranted by law or reason; it is an affirmative proviso, and therefore cannot operate to alter the declaration of trust, which is the rule laid down.

It is a clause thrown in out of abundant caution, for, as the trusts for raising the portions in the case there put, could not arise, there was no need to determine it, and the present question is not on any cesser or determination of the trust, but whether

it can arise for the benefit of the plaintiffs in the event which hath happened ; besides, the trust could not arise on marriage without consent, because the annuities for maintenance, which make part of the trust of the same term were in that case to continue.

And as to the grantors intention it would be the most forced construction that ever was admitted in a court of justice to make his silence about *the consent of trustees* in one superfluous clause overrule his express and positive declaration, so often repeated in other clauses most material and necessary.

Some cases were put by the plaintiff's counsel in which they endeavoured to shew that it was impossible that this intention could take effect. As in case a daughter had married with Sir *T. Aston*'s consent in his lifetime and received no portion ; that under the strict words of this trust she could not be entitled to have a portion paid till she married again after his death with the consent of the trustees ; but there is no ground to say this upon the clause now immediately under consideration, for the portion is to be paid *at the respective days of marriage, with such consent as aforesaid* ; and one species of *consent* before mentioned, is that of Sir *T. Aston* himself in his lifetime, and consequently whenever he died the day of payment would be past and the money demandable immediately.

[419] But if that were less clear yet a marriage with his consent, in his lifetime, would undoubtedly be a dispensation with this restriction by his own authority.

It was further supposed that if my Lady *Aston* or the trustees should become lunatic, what then was to be done ? But that would be a dispensation of the want of consent by the act of God, or else as in other cases of such accidents befalling trustees, that discretion which the author of the trust lodged in them would devolve upon this Court. But all this is mere refinement ; and the answer to the whole of it is, that difficulties, which may by possibilities, arise in doubtful cases, afford no argument why the evident intention of parties should not in plain cases have its effect ; and the rule laid down, Co. Litt. 147 a, is right, *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba expressa facienda est.*

To this reasoning from the intention, a further and more general answer was offered, that this Court construes the intent of the party in annexing such conditions or restrictions to portions to be only by way of terror, and not that they should have their absolute effect, where the portions are not given over.

This answer assumes too much, it takes it for granted, that these portions are not given over in any case of marriage without consent, which together with the general notions of such clauses being *in terrorem*, shall be examined in their proper place. Let it suffice at present to say, that I have been hitherto treating of the real and actual intention of Sir *T. Aston* ; and if that plainly appears, as I think it doth from his words, then no artificial rule of interpretation, no power of any Court can make that not to be his intention, which in fact was so, however it may overrule it.

But whether it can overrule it or not, comes now to be considered under the next head, which is—

3. Whether there is any rule of law or equity, that will excuse the want of such a consent to the marriage of these daughters, as the words of the trust express, or will make marriage alone without such a consent sufficient to give a right to demand the payment of these portions.

That there is no such rule of the common law of England, is admitted ; but it hath been contended that this is a case arising upon a trust for a term of years, and therefore only cognizable in equity, and that it is a rule in equity that such conditions or clauses in restraint of marriage annexed to a [420] portion not given over upon the breach of them, are to be construed merely *in terrorem*, and the party becomes entitled to it upon marriage, though without consent.

Under this head I will first consider whether these portions are given over by the declaration of this trust in case the daughters do not marry with consent, for if they are, then by the admission of the plaintiff's own counsel, they cannot recover them.

And in the next place, supposing they are not given over, whether there be any such rule of equity as hath been contended for.

As to the first of these two points, I think the portions are by the words and intention of the parties to the settlement effectually given over by the clause which provides, *that if any of the daughters shall die before she shall be married with such consent as aforesaid, then the sum intended for her portion shall cease, and the premises be exonerated therefrom, or if raised, or so far as the same shall be raised, shall remain,*

and be payable to such person to whom the remainder expectant on the term, shall for the time being belong, the funeral charges of such daughter being first satisfied by such person.

It has been said, that this is not a disposition over in case of a breach of restriction or condition (as it hath been called) by marrying without consent, but to take place only upon the daughter's dying before marriage, with such consent; but I cannot discern any difference between these two as to the present question, for whether it be considered in the one light or the other, it amounts to a disposition of the money. Another way, in case the daughter doth not, by marrying with consent qualify herself to receive it, and shews the intention that in that event she should be content with her annuity during her life.

It hath been further objected that the direction that, in case the sum be not raised, the premises shall be exonerated therefrom, is no disposition over to effectuate this restriction, because the charge is only to sink into the inheritance where it would naturally fall and rest, if never raisable, and in this respect is like the case of a legacy given over on the breach of such a condition to the residuary legatee.

I own I do not see the force of this reasoning, for if it is expressly directed to go over to the person entitled to the inheritance, then the grantor in such a settlement has as much shewn his intention that another person should take a benefit [421] by such an act of disobedience in his daughter, as if it had been given to a third person, and though he could not have the individual person in view to whom it might come, yet it must be some body of his name and blood, or at furthest his heir at law, for whom persons are presumed to have a kindness extending to remote generations.

This distinguishes the present case from that of *Paget v. Hayward*, determined by his Honour the *Master of the Rolls*, Mich. 1733. which however was a new resolution different from that of *Amos v. Horner*, before Sir *John Trevor*, in 1699, and going much further than that of *Garrett v. Pritty*, before my Lord *Somers*, 2 Vern. 293, where the legacy was only left *tacitly* to fall into the surplus, without being expressly given to the residuary legatee: but however this might have been, if it had rested upon the case put, of the portion not being raised, it becomes much stronger when considered upon the other case expressed in the deeds of the money *being raised*, or *in part raised*, which is given over to the next remainder-man for the time being.

This stands clear of all the objections of leaving or directing it to fall into the inheritance, which has been called the common mass, where the rule of law or equity would throw it, for it is an express gift to a person who might be but tenant for life, or have only some particular estate, and might not have been entitled to the principal money; if it had fallen into the inheritance, and Sir *T. Aston* has prescribed the terms whereon he intended the remainder-man should receive it, *viz.* on payment of the daughter's funeral expences, so that he had it in his contemplation, that as she would have only an annuity during life, she might not leave enough to bury her.

This appeared so plain, that no way was found out at the bar to avoid it: but by saying that it was impossible any part of the portion could be received or raised before the marriage of the daughter, because this Court would not permit the trustees to enter or to mortgage, or sell, the term before the portions become payable.

I agree this Court would not permit them so to do, till one of the portions at least become payable, but it is as plain Sir *T. Aston* thought otherwise, because in the settlement he has directed the portions to be raised *by rents and profits, and by such interest produce and increase as should be made or raised by the same or by mortgage or leasing*, so that he had it in his thought that his trustees might receive the [422] profits, probably during the minority of his son, and place them out at interest, to make a fund for these portions: but whether this intention could take effect upon the settlement or not, it is clear it might upon the codicil, which must be taken into the consideration of this trust, as it is part thereof, and arises out of the power reserved in the deed; by the codicil he has appointed all the profits of his *Cheshire* estate (except what was limited to his wife for her widowhood), until his son should attain twenty-five, over and above what he allots for his maintenance, to be applied toward raising these portions, subject to the same contingencies and restrictions as are mentioned in the settlement, for after having recited the settlement, the words are, *for the better raising the portions in and by the said indenture of release appointed to be raised according as the same are therein and thereby appointed to be raised and paid.*

But there may happen one case, even upon the deed, in which part of a portion may

rightfully be raised before it is payable, and that is, if one of the daughters should happen to marry with consent, and it should be thought fit to raise her portion by sale, it might not be possible to sell only just so much land as would raise the exact sum of £2000, then there would be a surplus, which must be laid up and improved at interest, towards the portion of some other daughter, and if that should never become payable to any daughter, the immediate remainder-man would become entitled to it by virtue of this disposition over.

But admitting here was clearly no disposition over, it remains to be considered whether there is any rule of equity that such conditions or clauses in restraint of marriage annexed to a *portion* not given over, upon the breach of them are to be construed merely *in terrorem*, and that the party becomes entitled to it upon marriage, though without consent.

I own this is the first time I ever heard of such a general rule concerning portions, for I always took it to relate only to legacies.

The original jurisdiction of legacies being by the constitution of this kingdom vested in the Ecclesiastical Courts, the rule of judging concerning them must be by their law, which is the canon and civil law so far as they are here received.

What is the rule of the civil law upon this point as received and practised in their Courts appears to me very un-[423]-certain upon what I have heard from the learned doctors who argued this case, for I do not find any one precedent or determination produced by them out of those Courts; therefore the most ancient and best evidence of it, which I have yet heard of arises out of a book of the common law, *Moor*, 857. In *Pigot's* case cited by Justice *Winch*, where a legacy being given to a daughter on condition of marriage with consent of her mother, she married without such consent, and notwithstanding that, had a sentence in the Spiritual Court for her legacy.

As to the quotations produced out of the books of the *Roman* law, they are of no authority here if the rules laid down in them are not shewn to have been received; and they admit of so many distinctions and allow so many limitations under which certain suspensions or restraints of marriage may be good, that it is difficult to infer any general doctrine from them, neither have I heard any authority from that law that a condition of marriage with the consent of a *parent* was void; but all the cases put are of marrying with the *consent* of some stranger, Just. Justit. L. 1, tit. 10, *De Nuptiis* has these words:—"Justas nuptias inter se cives Romani contrahunt qui secundum præcepta legum coeunt; dum tamen si filii familiarum sint, consensum habeant parentum quorum in potestate sunt. Nam hoc fieri debere, et civilis et naturalis ratio suadet in tantum ut jussu parentis procedere debeat."

That this law not only extended to the father but to the mother also after his death, appears from the *Code*, lib. 5, tit. 4, *De Nuptiis* leg. 1, "Cum de nuptiis puellæ quaeritur, nec inter Tutorem et matrem et propinquos de eligendo futuro marito convenit: arbitrium præsidis provinciae necessarium est."

Upon this text law *Gothofredus* has a gloss:—"Matris arbitrium quaeritur in eligendo filiæ marito; and he follows it with this citation:—"Rogatus sum ut confirmarem nuptias puellæ facerem inquam sed mater puellæ non adest et tu scis ad nuptias contrahendas voluntatem ejus necessariam."

Mr. *Swinburne* himself abounds in limitations to his general rule, part 4, C. 12, at the end of which he admits it to be a good limitation when the prohibition of marriage is not made *conditionally* by the word *if*, but by other words or adverbs of time, which (if allowed) would come very near to the present case, even although it had been of a personal legacy.

[424] But taking it that by the civil law such a condition or restriction of marrying with the consent of the mother when annexed to a legacy is void, and that the reason why precedents of the Spiritual Courts are not produced is, that legacies have generally been sued for in Courts of Equity; then the fact, how far that rule of the civil law has been received in *England*, must be sought after in Courts of Equity, and that will stand thus, that where the legacy is not given over upon a breach or contravention of the restriction, it is considered as being inserted *in terrorem*, or in other words, void; but where it is given over it is valid.

This then is the limitation under which this rule of the civil law has been received and practised in *England*, in the case of legacies.

But what ground is there from hence to say (as it has been urged at the bar) that

this is become a general rule of equity as to portions especially such portions as are in question upon this part of the case ?

There will appear to be no ground at all for it when two things are considered.

1st. The particular reason for which this doctrine was admitted in the case of legacies.

2nd. The nature of these portions and the difference between them and legacies.

1st. The particular reason why the rule of the civil law (thus expounded or qualified), was admitted in the case of legacies was to preserve an uniformity of judgments.

The Spiritual Court had the original jurisdiction of legacies. This Court held plea of them only as incident to an account of assets, in like manner as they do of a debt by bond sued for here against an executor. Therefore as in the case of a bond debt, this Court must judge of the duty and of the breach of the condition by the same rules as the court of common law, which in that case had the original jurisdiction, would have done : so in the case of legacies, it was necessary that they should judge by the same rule as the Spiritual Court would have done ; because, otherwise it would give the party a liberty to vary the right of the demand by going into either Court, and by electing his Court to elect what judgment he would have.

But then this Court did as all Courts must do, declare and expound what the rule of that law was, by which they were to judge ; and as the *Roman* civil law allowed dispositions over to pious uses or in favour of liberty to be good [425] to effectuate such a condition or restriction ; so this Court expounded it in such a manner as to allow of any disposition over whatsoever, and with this exposition received the rule.

This is what has been hitherto understood as the ground of this doctrine, and as to the general foundation of its being introduced in order to preserve an uniformity of judgments it was fully laid down, almost in the same words I have delivered it, by his Honour the *Master of the Rolls*, in the case of *Davies and Gardner*, which was solemnly determined after time taken for deliberation in Trin. Term, 1721.

2ndly. Consider next the nature of these portions and the difference between them and legacies.

As to the nature of these portions, they arise out of land and make part of the trust of a term of years carved out of the inheritance for that purpose ; they are in effect part of the land itself, for it may be sold during the term for the raising of them ; and if they are raised by any other method when that purpose is performed the term itself will in the consideration of this Court, attend upon and become part of the inheritance.

These portions are also created by deed and not by will ; have nothing in them testamentary.

The consequence resulting from hence is, that they never were or could be the subject of ecclesiastical jurisdiction or governed by the rules of the civil law, which proves that the original ground of admitting those rules in legatory cases, I mean the preserving an uniformity of determination, totally fails here.

Further, as they make part of the trust of a term conveyed out of a real estate for that purpose they are subject to the same rules of property as the land out of which they are derived, that is, the rules of the common law of *England* and the equity naturally arising upon those rules.

Æquitas sequitur legem is the allowed general maxim of this Court ; the meaning of which is, that wherever equity places the trust or beneficial interest in any thing, it is (generally speaking) governed by the like rules as the legal property in that thing would be governed by.

And this is to be understood respectively according to the different laws to which the constitution of this kingdom subjects that kind of property which happens to be in question. If it is a legatory or testamentary matter the king's ecclesiastical law ; if a maritime matter the Admiralty law ; if a matter concerning a real estate the common law of the land.

[426] On this ground it is that limitations of trusts of terms of years, conditions, and contingencies annexed to them, springing trusts to arise upon the same term, are always professed to be governed by the same rules as the like limitations of the term itself would be at common law.

Now the Common Law has no such notion as that of making a condition or restriction of marrying with the consent of another to be void, but allows them all to be good.

Whilst the law of tenures in chivalry subsisted, if the ward married without consent of the lord, or did not accept such marriage as he proposed, if not disparaging, heavy penalties were inflicted.

An estate may be limited to a woman *dum sola et innupta manserit* ; And *Swinburne* himself mentions a case of a grant by the king to his sister to hold so long as she continued unmarried, which was adjudged good.

If an infant under the care of this Court marries without leave of the Court, it is an established rule to commit the person concerned in it as for a contempt.

So doth the Court of Aldermen, in the case of Orphans, by the custom of *London*, which has frequently received the allowance of the courts of law on writs of *habeas corpus*.

Nay, the custom of *London* goes farther, for if the daughter of a freeman marries in his lifetime against his consent, unless he is reconciled to her before his death, she loses her orphanage part by the custom. This is laid down by my Lord Chancellor *Jefferys* (who had been *Recorder* of the City), in the case of *Foden v. Howlett*, 1 Vern. 354, and he adds, that it would be unreasonable to take the custom to be otherwise.

The reason of this comes up very aptly to the case in question, the rather because that custom is generally taken to be a remain of the old law, whereon the writ, *De rationabili parte bonorum* was grounded, from which an argument was drawn in favour of the plaintiffs in this cause.

To go one step further ; the common law is so clear in this, that it must be admitted as a thing beyond dispute, that if Sir *T. Aston*, instead of vesting this term in trustees for raising these sums of money, had granted the legal estate of the term, or of several terms, in the land, to the daughters themselves, to hold as joint tenants or tenants in common, and had made such term or terms respectively to commence *on marriage with consent*, in the same words as this trust is [427] conceived, in that case if they had not married with such consent, the term or terms never could have arisen, or if he had made the legal estate of such term or terms determinable respectively *on marriage without consent*, it must have determined, and this Court could never have relieved them against it ; this was the unanimous resolution in *Fry v. Porter*, 1 Ch. Ca. 138 ; 1 Mod. 300.

Let any one then shew me a reason why Sir *T. Aston* might not do the same thing, why he had not the same power over the trust of the term, or any part of it, which he undoubtedly had over the term itself ?

Thus stands the common law of *England* upon this question, by the rules whereof, and the equity arising upon those rules, interests out of land are to be governed ; for so it is laid down by my Lord *Hale* in that case of *Fry v. Porter*, where he says, *that estates governable by the law of this kingdom, without relation to another forum, ought not to be influenced by another law*.

It hath not been pretended, that if any of the daughters had married in Sir *T. Aston's* lifetime, without his consent, she could under this trust have been entitled to a portion, or that this Court could have given her any relief ; and it will be difficult to shew any sound reason why those who marry without the consent of his substitutes after his death should be in a better case.

In treating of the particular nature of these portions, I have already shewn the most considerable distinction between them and personal legacies, but there is another material difference constantly allowed by this Court, which I have already taken no notice of for another purpose. If a personal legacy or portion be given by will to a daughter, payable at her age of twenty-one or day of marriage, which shall first happen, if she dies before twenty-one without being married, it shall go to her executor or administrator, but in a like case a portion charged upon land so limited shall not be raised, but shall sink into the estate. The reason of this is, that the civil law and the rule of the Spiritual Court makes such a legacy transmissible, and therefore this Court follows that rule in a legatary case for the sake of uniformity of judgments ; but in the other case the civil law has no influence, and the common law would hold, that a sum of money so granted never became due, and equity in that case following the common law, this Court will not decree such a portion to be raised out of land.

[428] I am sensible that another reason has often been given for this difference, I mean the general favour extended to heirs at law ; but I take this to be the true one.

I should now, in the next place, consider the cases which have been quoted at the bar on either side, but those have already been so fully stated and observed upon, and the distinctions arising upon them so clearly taken by my Lords the Judges who have argued before me, that to enter into the particulars would be only to repeat what they have said in a worse manner ; thus much it is necessary to say, that I think none of

them come up to the present case, not one of them is directly founded on this principle, that a condition or restriction, of *marrying with consent*, annexed to a portion to be raised out of lands under the trust of a term of years, carved out of the inheritance for that purpose, is to be deemed merely *in terrorem* or void, which is the point of this decree.

All the precedents cited go upon some other ground which avoids that point. Either the Court has distinguished upon the particular penning of the deed or will, or has found out a different meaning by construction, or else they have held that the father in his lifetime had dispensed with the condition, or that the proof amounted to sufficient evidence of a consent, as when some of the trustees consented, though others did not, or some misbehaviour was imputed to the trustee whose consent was required, which subjected his power to the controul of this Court; and in two of the cases they decreed the money to be paid, on giving security to refund upon breach of the condition, but in none of them have they directly set aside the clause, or expunged it out of the deed till the present case.

The plaintiffs' counsel relied upon three cases as authorities in point, those were *Fleming v. Waldgrave*, 1 Ch. Ca. 58, *Needham v. Vernon*, Reports in Chancery of Lord Nottingham's time, 62, and *Aston v. Aston*, 2 Vern. 452.

As to *Fleming v. Waldgrave*, it seems by the state of the case to be a settlement of a leasehold estate, which if so, was a mere personalty, and the condition was against marrying *contrary to the consent or liking of Sir Edward Waldgrave and his lady*, which if they had *neither approved nor disapproved the match* could not be said to have happened, and besides the Court declared it was not in the power of Sir Edward Waldgrave and his lady to have disposed of this lease otherwise than for the benefit of *Thomasin Copledike*, [429] which imports as if there was something in the deed that made them construe the intention to be, that in case of such a marriage the trustees should settle it to her separate use; and supposing this resolution to have turned on any of these grounds it does not come near the present case.

As to the case of *Needham v. Vernon*, it must be admitted to be the decree of a very great and learned Chancellor, but I own it appears to me to be rather an award than a judgment of a court of justice proceeding by strict rules between adverse parties; and in this light my Lord Nottingham himself seems by his own report of it to have understood it, when he says, *But to avoid questions I decreed the portions to be paid to the plaintiffs, they giving security by recognizance, with sureties not to marry without consent of the trustees*. This amounts to a declaration that he intended rather to decline the question than to determine it, and must have been founded on some acquiescence, or its not being opposed by the defendants, for either the plaintiffs were entitled to the money or not; if they were entitled to it they ought not to have been obliged to give security for their own money, if they were not entitled, their bill ought regularly to have been dismissed.

As to the reasoning in that case I must be excused from laying any manner of weight upon it, for it proceeds on this ground that the portions were vested, and if the daughters had died unmarried would have gone to their executors or administrators, which is a plain mistake, and contrary to all the rules and determinations of this Court touching portions charged upon land.

The case of *Aston v. Aston* is an award of the like kind with that of *Needham v. Vernon*; for the decree was for payment of the portions upon giving security to refund in case the condition should afterwards be broken; and my Lord Keeper Wright held, that although the condition of marrying with consent was a condition subsequent, yet the Court could not relieve against the forfeiture, by reason of the devise over, although it was a hard condition, no time being limited, but it extended to a marriage at any time even after the age of twenty-one.

It must be admitted that as no case which comes up to that now in judgment hath been produced on the part of the plaintiffs, so neither hath any case in point been produced on the defendants part; the reason of which may have been, that it hath been the *general received opinion*, that in cases [430] of portions to be raised out of land, this Court could not give any relief against such conditions of marrying with consent; but the opinion of my Lord Harcourt in the case of *King v. Withers* is express and full, "That the portion in question in that cause not being a personal legacy, but to be raised out of land, it must have the same consideration as a devise of land would have, in which case it is certain that the condition could not have been dispensed with, but

"must have had its effect." Prec. in Ch. 350; Rep. of Cas. in Eq. 26; Cas. in Eq. Ab. 112.

I come now to the 2nd general question, which is, whether the additional portions given to the plaintiffs by Sir T. Aston's will are become due and payable.

It must be admitted that these are pecuniary legacies, for they are given in part out of that which was originally personal estate; and as to the residue out of a fund which is declared and made to be so by the testator's will.

The consequence of this is, that they will fall under and be governed by the same rules with mere personal legacies as to the effect and operation of clauses in restraint of marriage unless there be any thing in the frame of this will, and the intention of the testator to create a distinction.

The gift is expressed only by the direction to pay, and the words are: *to be for the augmentation of their portions provided for them in and by the said in part recited indenture tripartite to be paid them at such times, and subject to such conditions, provisos, limitations and agreements as their original portions are in and by the said indenture tripartite, made subject and liable to.*

What are those times of payment by the deed? The respective days of their marriage with the consent of my Lady Aston, if living.

Here it becomes material again to consider whether these words do amount to a condition, or only constitute a qualified time of payment; for if the latter be the sense and effect of these words (as I strongly incline to think it is) I do not see how the legacy can be payable before the time of payment is come.

I think this is in a manner admitted by Mr. Swinburne in the passage which hath been already referred to out of part 4th of his book, cap. 12, where he says, "The ninth limitation is, when the prohibition is not made conditionally by this word, *if* (as I *make thee my executor if thou dost not marry*); but by other words or adverbs of time: as when [431] the testator willeth that his daughter or wife shall be executrix, or have the use of his goods, so long as she shall remain unmarried."

But it is not necessary to rely upon this, because I am of opinion that these legacies given by the will are so connected, and as it were incorporated with the portions provided by the settlement both in the frame of the will, and in the manifest intention of the testator that it is impossible to separate them without doing violence to both.

This makes the case very particular, and takes it out of all the rules which have been laid down touching legacies given by will, independent of any deed or other instrument.

The testator first declares that they shall be for the augmentation of their portions provided for them by the settlement.

This strongly points out his intention that the one should attend upon and accompany the other, and it will be hard to shew how the daughters can become entitled to the *augmentation*, if they cannot have *the thing to be augmented*. He then goes on, *to be paid them at such times, and subject to such conditions, provisos, limitations and agreements, as their original portions are in and by the said indenture tripartite, made subject and liable to.*

This still carries on the same view, and makes all the conditions and restrictions in the deed, whereupon so much observation hath been made, and which I will not repeat, operate with equal force upon the additional portions, as upon the original ones.

But what in my apprehension puts this beyond all doubt, is the next clause. *And in case any of my said daughters happen to die before her or their original portion becomes payable, then my will is that the said £2000 shall not be paid to the executors or administrators of such of them so dying.*

From hence it appears that the testator had it in his contemplation that possibly some of his daughters might die before she should be entitled to the payment of her original portion, in which case his will was that neither should her additional portion be paid, and it seems more peculiarly to have reference to that clause in the settlement, whereby it is provided, *That if any of the daughters should die before she should be married with such consent as aforesaid, then the sum intended for her portion should cease, or if raised, should [432] be payable to such person to whom the remainder expectant on the term should for the time being belong.*

It looks as if the testator, or at least the drawer of the will was apprehensive that if he had vested this disposition merely upon the nature of these personal legacies, some different rule or construction might take place upon them from what might be allowed

upon the portions by the settlement ; and therefore he inserted this clause to unite and consolidate them together, and can any one say it was not in the power of the testator to do this ?

Suppose he had expressed himself thus : " My will is, that if any of my daughters shall not become entitled to her original portion by the deed, she shall receive no benefit whatsoever from the additional portion by my will." Could any Court of Justice have said that such a clause should not have its effect ? and I am of opinion he has done the same thing by the present clause.

It would be mere playing with words to object that the negative, the exclusion of payment is laid upon the executors or administrators of such daughter, and not upon the daughter herself ; for the case here put is of a daughter dying before her original portion becomes payable, and therefore consistency required that the direction not to pay should be to the executors or administrators.

Suppose Mrs. *Hervey* had died before any decree obtained for the payment of her portion ; it must be admitted, that upon the supposition of her original portion not being due, her husband, although he had taken administration to her could never have recovered the additional one, but this clause would have barred him. If this be clear, surely it cannot be maintained that a legacy which cannot be transmitted to the executor or administrator of the legatee is now vested, nay actually become payable.

Upon this head of the additional portions, a question was started by my Lord Chief Justice of the Common Pleas, whether a difference may not arise between them and the original portions on account of my Lady *Aston* (whose consent to the marriage is required) being the residuary legatee in the will, and consequently to profit by refusing that consent.

The only use his Lordship made of this was to suggest a doubt if an enquiry might not be directed before a Master whether there was sufficient reason for my Lady *Aston* to refuse her consent or not.

This difference was hinted at from the bar, and a citation [433] was produced from the civil law to support it, *Legatum in aliena potestate ponit potest ; in hæredis non potest.* Dig. Lib. 30, L. 43, s. 2. The Gloss asks, *Cur non ? Hæres præsumitur nunquam velle obligari.*

But this is not the rule of the law of England ; and many cases have been adjudged where the consent of the residuary legatee or some person capable of receiving benefit by the forfeiture has been made necessary.

I admit that if some unreasonableness or misbehaviour had been proved upon the defendant my Lady *Aston*, or even alleged in the bill, and not fully answered, that might have been a ground for such a direction, but without some such misbehaviour the Court cannot controul her ; she is the person who stands entrusted by the testator, on whose personal discretion he has relied ; and without some abuse the Court cannot take it out of her hands and assume it to themselves.

In the present case there is not only no such proof or charge, but the contrary fully appears to the Court. The defendant has stated the fact by her answer, and that answer is not replied to. It must therefore be taken to be true, and has been read as evidence in the cause.

As to the plaintiffs, Mr. *Hervey*, and his wife, she swears that she fully acquainted them both that if her daughter married without her consent she would not be entitled to any portion. That she expressly refused to give her consent for this reason, that Mr. *Hervey* was not able to make a suitable provision either for his wife or their children, and no proposal was ever made for settling any provision at all ; and therefore she thought she could not in justice or conscience, consent to the marriage, she knowing it to be contrary to the trust reposed in her by her husband, Sir *T. Aston*, who had often declared that his daughters' fortunes should not be raised or paid, unless it was to advance them in marriage.

As to the other plaintiff, Mrs. *Clutton*, the defendant swears that she was fully made acquainted with the terms and conditions on which the portions were given, and that after the original decree, and before she attained her age of twenty-one, she intermarried with Mr. *Clutton* without the defendant's consent, or even her privity.

This being the fact not disputed, but agreed between the parties, my Lady *Aston* appears so far from being guilty of any breach of the trust, that her behaviour has [434] exactly pursued the terms of the trust, and the intent of the donor.

This leaves no room for a presumption of misbehaviour, and makes me very doubtful

whether to direct such an inquiry would not be a direction contrary to the evidence in the cause, and might not create some inconsistency in the decree between the determination of the Court upon the original and additional portions.

However, after having thus stated the circumstances relating to this point, I shall before I come to pronounce my decree, desire the opinion and advice of my lords the judges, whether any such direction ought to be given; and I shall be very open, nay, inclined if possible, to find room for such an inquiry, in case they shall be of opinion that it may be ordered consistently with justice, and the course of the Court.

I have now done with those arguments which appear to me necessary to be considered, in order to the determination of the merits of this cause; but the counsel for the plaintiffs having had recourse to some auxiliary arguments, which may be thought spacious and popular, for that reason only, I will just touch upon them. Of this kind is what was said concerning the general policy and convenience of the Roman law, in making void all such conditions with a view to encourage marriage, and promote the propagation and encrease of the people; the reason whereof was said to extend to all countries: but arguments of this kind are not to be admitted in the decision of private rights, further than the law of the land doth admit them; and as to the case of the Romans, they had no such institution in the time of the commonwealth, for the *Lex Julia et Papia Poppæa*, which was the original law upon this point, was made in the reign of *Augustus*, not from reasons drawn from the general policy of that state, but upon a particular occasion. Great numbers of people had perished in the civil war between *Cæsar* and *Pompey*, and the following troubles; many citizens had been driven away by proscriptions, and others had deserted Rome, and the violent and unsettled state of things had discouraged marriage, insomuch that at the election of consuls, none were found in the whole city equal to that dignity, who were married and had children, a circumstance always allowed to give a preference in the competition for that high office, the consequence of this was, that the election fell on *Papius Mutilus et Quintus Poppæus*, two unmarried men, which [436] was such a novelty, and shewed the want of people in such a strong light, that it gave rise to this law during their consulship. The history of this matter is fully related in *Gravina's Origines Juris Civilis*, lib. 3, cap. 36, de *Leg Julia et Papia Poppæa*, where he has these remarkable words, "*legem hanc non tam ratio quam necessitas expressit ab Octavio Augusto.*"

It was urged further, that laying the Roman law, and the policy of that government quite out of the case, yet the general reason of the thing, and the public good of every state requires it. But to this argument, I beg leave to oppose the general reason and policy of the common law of *England*, which has been always esteemed to be perfectly well calculated to support the public good of this country, and when topics of convenience and inconvenience are pressed, it is material to take notice that as much inconvenience may ensue from encouraging improvident matches as from restraining particular ones, especially in these times, when clandestine marriages are become one of the growing evils introductive of much calamity and ruin in families, and complained of by considerate men, as highly wanting a remedy. Let any one compare the mischiefs which have arisen from disagreeable matches forced upon young persons in consequence of restrictions of this kind, with those mischiefs which have been produced by clandestine marriages contracted without the consent of parents and guardians, and then let him determine into which scale the argument of public good ought to be cast, I do not say this with regard to the present parties, this marriage was with a person of great quality and worth, but still the general reasoning is the same.

Another argument of the like sort was drawn from the natural right of children to a provision from their parents, and the relief which this Court gives in many cases in that kind beyond what the law would afford, but I can see no consequence to be drawn from hence to the present cause, because it must still be admitted, that the parent is judge of the *quantum* of the provision, the terms on which he will give it, and by the law of *England* may, if he thinks fit, absolutely disinherit a child. In this case, Sir *T. Aston* might have revoked this whole settlement by virtue of his power of revocation, and by the settlement he has declared that the annuities thereby charged on his estate, were the main-[436]tenance he judged proper for his daughters till they married in the manner he intended they should do, so that he has not left them entirely without provision, but has limited and restrained it, as he had an undoubted power to do.

But after all, this argument as it is used to take off the force of such clauses in restraint of marriage, seems to be misapplied for the rule of the civil law for making them

void, and the rule of this Court for construing them to be *in terrorem*, is not applied particularly to portions provided by parents for children, but to personal legacies in general given by any person whatsoever: this puts all the reasoning, or rather colouring, which has been drawn at the bar from the natural right of children to be provided for by their parents, from the unreasonableness of extending the parental authority, and from the many hardships suggested on these heads, out of the case; it must be allowed that, if such restrictions annexed by a father to a sum of money charged on the trust of a term, are to be made void by this Court, they must be equally so when annexed by a collateral relation or a stranger, who was under no obligation at all to make any provision for the person who happens to be the object of his bounty.

Against all these general arguments, there is one general objection that has great weight with me; it was used long ago by my Lord *Dyer*, and is clearly and strongly expressed by my Lord Chief Justice *Treby*, in the case of *Falkland and Bertie*, 2 Vern. 337, wherein those other great men, my Lord *Somers*, and my Lord Chief Justice *Holt*, entirely concurred with him. Men's deeds and wills (says he) "by which they settle their estates, are the laws that private men are allowed to make, and they are not to be altered even by the King in his courts of law or conscience; we must take them as we find them."

I do not say this in order to intimate any opinion or inclination to depart or vary from the decisions of this Court, relating to conditions or clauses, requiring the consent of guardians or trustees to marriages, in some whereof, even conditions precedent annexed to mere personal legacies have been construed to be only *in terrorem*. So far as the rules are fixed and settled, I will adhere to them, but I am not for carrying them further, and for these reasons I concur in opinion with my lords the judges, that neither the original portions nor the additional portions are yet become due or payable.

[437] But before I proceed to pronounce my decree, I desire to hear the sentiments of my lords the judges, as to directing the inquiry touching which my Lord Chief Justice of the Common Pleas expressed his doubt.

"After this the three judges (particularly my Lord Chief Justice *Willes*) did *seriatim* declare their opinions that, considering my Lady *Aston's* answer was not replied to, and therefore must be taken as proof, and the several facts and circumstances appearing in the cause, there was no ground or warrant to give such a direction, and the Lord Chancellor declared his concurrence in opinion with them."

Lord Chancellor. The consequence of the whole is, that my direction must be thus, I do in the first place declare that neither the original portions provided by the settlement nor the additional portions given by the will, are become due and payable to the plaintiffs, or either of them, and therefore order and decree, that the order made by his Honour the *Master of the Rolls*, on the 5th of Nov. 1736, be reversed, and that the several annuities or yearly sums of £70 *per ann.* provided for the plaintiffs, Mrs. *Hervey* and Mrs. *Clutton*, by the said settlement, be from time to time paid according to the decree made on the hearing of this cause, to the plaintiffs Mr. *Hervey* and his wife, and Mrs. *Clutton* respectively.

The liberty given by the decree to apply to the Court for raising the portions whenever they shall become payable, and for further directions, will continue of course.

(1) The statement of this case is taken from papers in Lord *Hardwicke's* collection. The arguments of counsel, and the judgment of *Lee*, C. J., and *Willes*, J., from the Lord Chancellor's Note-book. The judgments of the *Master of the Rolls*, Mr. Justice *Comyns*, and of Lord *Hardwicke*, from manuscript reports found in the collection of Lord *Hardwicke*, the latter of which is corrected by himself.

(2) With respect to legacies of personal estate, conditions in restraint of marriage are void, whether they be precedent or subsequent, unless there be a devise over, in which case the devise over will take effect, *Reynish v. Martin*, 1 Wils. 130; 3 Atk. 330, S. C. *Jervois v. Duke*, 1 Vern. 20. *Pulling v. Reddy*, 1 Wils. 21. *Wheeler v. Bingham*, 3 Atk. 364. *Hemmings v. Munkley*, 1 Bro. Cha. Ca. 304. *Underwood v. Morris*, 2 Atk. 184, *contra*, the authority of which has been since questioned, see *Hemmings v. Munkley*, 1 Bro. Ch. Ca. 304. *Scott v. Tyler*, 2 Bro. Ch. Ca. 432. And see *Hargrave's Jurisconsult Exercitationes*, 2 Vol. 255. *Malcolm v. O'Callaghan*, 2 Mad. 354.

To this rule there seem to be exceptions, as if the condition be precedent, and operates only up to the age of twenty-one, *Stackpole v. Beaumont*, 3 Ves. 89 (but this decision seems to be extra judicial, as it is apprehended that there was no condition

annexed to the gift, but the party to whom the legacy was given, did not put herself in a situation to answer the description of the person to take; and see 3 Ves. 97. See *Scott v. Tyler*, 2 Bro. Ch. Ca. 432). Or in the cases of alternative bequests, where the condition is likewise precedent, *Gillett v. Wray*, 1 P. Wms. 284. *Scott v. Tyler*, D. per Lord *Thurlow*, Dicken's Reports, 722. But see *Hicks v. Pendarvis*, 2 Eq. Ca. Abr. 212. pl. 1. *Bellasis v. Ermine*, Ch. Ca. 22. It is otherwise where the condition is subsequent. *Garrett v. Pritty*, 2 Vern. 293. But a general residuary devise is not a sufficient devise over. *Parker v. Parker*, 2 Freem. 59. *Semphill v. Bayley*, Pre. in Ch. 562. *Garrett v. Pritty*, 2 Vern. 294. *Pagett v. Heywood*, cited in this case. *Amos v. Horner*, contra, denied by Sir *Joseph Jekyl*, but asserted by *Willes*, C. J., to be an authority. The devise over must either be a special bequest on the event of not observing the condition, or tantamount to a special bequest, as by specially directing the legacy to sink into the residue. *Wheeler v. Bingham*, 3 Atk. 364. *Lloyd v. Branton*, 3 Mer. 108. As to the difference between a condition precedent and subsequent, in respect of the vesting of a legacy, see *Atkins v. Hiccocks*, ante, p. 114, and the notes to that case.

And where conditions of forfeiture are annexed to legacies, on marriage without consent, a Court of Equity has put a construction most favourable to prevent a forfeiture, per Lord *Hardwicke*, in *Daly v. Desbouverie*, post, and dispenses with a strict execution of the condition; as where consent is given conditionally on a proper settlement being made, which is offered to be made, but is not made until after the marriage; *Bostock v. Ireton*, Finch, 234. *Daly v. Desbouverie*, post; Or where the father imposes the condition of the consent of trustees, and a marriage takes place in his lifetime, with his consent or subsequent approbation; *Wheeler v. Warner*, 1 Sim. & Stu. 311. *Farmer v. Compton*, 1 Ch. Rep. 1. *Campbell v. Lord Netterville*, cited in 2 Ves. 534. *Parnell v. Lyon*, 1 Ves. & Bea. 479. And see *D'Aguilar v. Drinkwater*, 2 Ves. & Bea. 234. *Clarke v. Berkeley*, 2 Vern. 720. *Smith v. Cowdery*, 2 Sim. & Stu. 358; Or where there has been a general permission to contract marriage as the party thinks fit, and a subsequent approbation of a marriage contracted under such general permission, *Pollock v. Croft*, 1 Mer. Rep. 181; Or where the condition becomes impossible, as where the consent must be of two, and one dies, *Peyton v. Bury*, 2 P. Wms. 626. *Jones v. Earl of Suffolk*, 1 Bro. Ch. Ca. 529; Or where one trustee has given his consent, the other having refused to act, *Worthington v. Evans*, 1 Sim. & Stu. 165. And it relieves where consent is withheld from a fraudulent or an unreasonable cause, *Mesgrett v. Mesgrett*, 2 Vern. 580. *Merry v. Ryves*, 1 Eden's Rep. 1; Or where a breach of the condition has been occasioned not by the fault of the person upon whom the condition is imposed, *O'Callaghan v. Cooper*, 5 Ves. 117. And see *Clarke v. Parker*, 19 Ves. 17, D. per Lord *Eldon*; Or where consent is given, and retracted upon improper grounds, *Lord Strange v. Smith*, Ambl. 264; But for a reasonable cause, consent may be retracted, *Dashwood v. Lord Bulkeley*, 10 Ves. 230. And see *Clarke v. Parker*, 19 Ves. 17.

It seems, however, that where the consent of all the trustees is required, that the consent of the major part is not sufficient. *Clarke v. Parker*, ib. D. per Lord *Eldon*: But what is stated by Lord *Eldon*, proceeded upon the ground that there was no case which decided that the consent of the major part of the trustees was sufficient, but see *Escott v. Escott*, and *Ventriss v. Glidd*, cited in this case, where it was held that the consent of one trustee was sufficient, the consent of two being required by the will. Such conditions do not extend to the case of a widow, *Hutcheson v. Hammond*, 3 Bro. C. C. 145. *Crommelin v. Crommelin*, 3 Ves. 227.

But these rules do not apply to lands, or interests arising out of lands; for it is a known and settled maxim of law, that if lands, or interests out of lands, are given on condition precedent, nothing vests till the condition be performed; Vide this case, *Bertie v. Lord Falkland*, 3 Ch. Ca. 130. *Fry v. Porter*, 1 Mod. 300. *Reynish v. Martin*, 3 Atk. 332. *Randall v. Payne*, 1 Bro. Ch. Ca. 55. *Duffield v. Elwes*, 1 Sim. & Stu. 239. *Long v. Ricketts*, 2 Sim. & Stu. 179. And where the condition is subsequent, if it be a condition in restraint of marriage without consent, the breach of the condition operates, by divesting the estate, which was before vested. 1 Roll. Abr. 418, pl. 6. *Fry v. Porter*, 1 Mod. 300. And see *Popham v. Bampffield*, 1 Vern. 83; But in order to work a forfeiture against an heir at law, he must have notice of the devise, *Burleton v. Humfrey*, Amb. 258.

[438] JOHN COTON, *Plaintiff*; (1) and SIMON LUTTEREL and JUDITH MARIA his Wife, Sir JOHN and Lady CHESSHYRE and Sir ROBERT LAWLEY, *Defendants*.

June 6th and 7th, 1738. 1 Atk. 451.

Upon a bill brought to impeach a settlement as obtained by the fraud and imposition of Lady *Chesshyre* and to which bill both Lady *Chesshyre* and her husband who was a trustee under the settlement were parties; Held, that both Lady *Chesshyre* and her husband were competent witnesses in support of the settlement, as at the hearing of the cause no decree could be made against her, being not interested in the event of the suit; nor could any decree be made against him so as to affect him with costs; and even if his wife had been guilty of a fraud, he being innocent and deriving no benefit from the fraud, could not be made to pay costs.

Thomas Coton being seised, as tenant in tail of certain estates, with a remainder to the plaintiff, suffered a recovery of them in the month of June 1731, and on the 23rd of October 1731, conveyed all those estates to Sir *Robert Lawley* and Sir *John Chesshyre* to the use of himself and the heirs of his body, remainder to *John Coton*, his uncle, for life, remainder to trustees to preserve, &c., remainder to his first and other sons in tail, remainder to the defendant, *Judith Maria Lutterel*, his half sister, by his mother's side, for life; remainder to trustees to preserve, &c., remainder to her sons and daughters in tail; remainder to his own right heirs; and reserved to himself a power of revocation.

After the death of *Thomas Coton* and *John Coton*, without issue, the plaintiff who was *Thomas Coton*'s great uncle and heir at law, on the father's side, filed a bill for the purpose of setting aside the settlement of the 23d of October 1731, charging that it had been obtained by imposition and compulsion on the part of Lady *Chesshyre*, who being sister to *Thomas Coton*'s mother was aunt both to him and to *Judith Maria Lutterel*.

Lady *Chesshyre*, was made a defendant in that suit; and both she and her husband Sir *John Chesshyre* having been [439] examined on the part of the defendants, in support of that settlement, their evidence was objected to by Mr. *Fazakerley* upon the ground,—

1st. That Lady *Chesshyre* might be condemned in costs in the event of the charges against her being established, and, 2ndly, That Sir *John Chesshyre*, as a trustee named in the settlement, might be ordered to reconvey the estate; to which it was answered by the *Attorney-General* for the defendants as to the first point that no decree could be made against Lady *Chesshyre*, and that she therefore could not be ordered to pay costs. The case was compared to this; where a will was charged to have been obtained by fraud, and the witnesses are made parties. Upon the second point the case of *Tyrrell v. Holt* was relied upon, in which trustees of the whole estate though charged with fraud, were admitted by the Court of King's Bench, after solemn debate, to be examined in an issue directed out of the Court of Chancery to try the question of fraud.

Lord Chancellor. The reason why persons who at law are put into the *simulcum*, are yet admitted as witnesses, is, that they may not be made parties to a cause only to take off their evidence; but notwithstanding this, if there is a strong evidence against the *simulcum* man, that he is *particeps criminis*, the Court will exclude him from being a witness.

When this objection was first started, I must confess I was very doubtful, whether the depositions of Sir *John Chesshyre* and Lady *Chesshyre* ought to be read; but, upon the matters being fully discussed, I am of opinion that the objection goes only to their credit, and not their competency.

As to Lady *Chesshyre*, the objection depends upon these considerations, Whether she has been properly made a defendant: Now I will not say she has improperly been made a defendant, because it was necessary in order to a discovery; but it was improper she should be brought to a hearing, for she is no ways concerned in interest in the event of this suit, as she was barely an agent for Mrs. *Lutterel*, and consequently no decree can be made against her.

I will not say but there might be a case, where it might be necessary to bring such a person to hearing; as suppose *Lutterel* was out of the power of the Court, she might

on a proper bill be decreed to procure a re-conveyance. So if *Luttrell* had made a settlement without notice ; and so the [440] question had been with regard to a purchaser ; but that is not the case here.

This is a bill brought merely to have a re-conveyance from the person to whom it is alleged the estate is fraudulently and illegally conveyed.

But if there is no decree against *Lady Chesshyre*, how is it possible that costs should be given against her, for if she is no way concerned in interest there can be no decree.

Suppose then she had not been made a party, but only charged with fraud, her evidence might certainly have been read ; and the circumstance of her having been made a party when no decree can be made against her cannot make any difference.

The consequence of this is, that the objection goes only to her credit, and not to her competency.

The next consideration is as to *Sir John Chesshyre* ; and as I am of opinion that my *Lady Chesshyre's* deposition should be read, the reading his deposition is a consequence of it ; for it would be very strange to reject his testimony, when there is not the least colour to say, that he is concerned in the fraud ; and as to his being a trustee and defendant, no decree can be made against him as such, which will affect him with costs, or in which he will be interested.

I do not know any case in this Court, where a feme covert, who had been guilty of a fraud solely, without the husband, and where he has no benefit at all from it, had been made to pay costs, because the Court must see that the punishment will fall upon the innocent ; it would be extremely hard to say, that he should pay costs ; I know of no precedent, nor do I believe the Court would do it.

The depositions of *Sir John* and *Lady Chesshyre* read accordingly.

(1) The statement of this case is taken from *Lord Hardwicke's* Note-book. The judgment from *Atkyns*, with some addition from a manuscript Report.

[441] EDWARD TRELAWNEY, *Plaintiff* ; (1) and NATHANIEL BOOTH, Heir at Law and Administrator of ROBERT BOOTH, and Others, *Defendants*.

June 19th, 1738. 2 Atk. 307.

By will £4000 is given to *Robert Booth*, to be laid out in land for the use of him and his heirs, charged with several sums and annuities ; by a decree in Chancery, this sum was directed to be laid out in land, and in the mean time in the purchase of annuities in the names of the trustees ; *Robert Booth* borrows of the plaintiff £500, to be repaid in two or three months, and in a letter to the plaintiff, regrets that he had not been able to pay it, but was disappointed by a gentleman who promised to pay him some of the trust money. Upon a bill filed after his death against his representatives for the purpose of making the £4000 applicable to the payment of the debt ; it was held that the £4000 must be considered as real estate, and that the plaintiff's demand being a simple contract debt could not affect it, except by marshalling the assets. (See *Baden and Others v. Earl of Pembroke*, 2 Vern. 52, and *Whitwick's* case there cited. *Scudamore v. Scudamore*, Pre. in Ch. 543 ; *Edwards v. Lady Warwick*, 2 P. Wms. 171.)

Mrs. *Vere Booth*, by will, dated the 16th of May 1714, gave to *Robert Booth* £4000 to be laid out in land for the use of him and his heirs, and charged several annuities and sums of money thereon.

By a decree of the Court of Chancery of Feb. 23, 5 Geo. 1, this sum of money was directed to be laid out in land, and in the mean time in the purchase of annuities in the names of the trustees.

It appeared, that in December 1731, *Robert Booth* applied to the plaintiff to lend him £500, and that that sum was accordingly lent to him, upon his promising to repay it in two or three months. In several letters of a subsequent date he acknowledged the debt, and in one of June 24, 1732, expressed his regret that he had not been able to pay the money, and stated that he had been disappointed by a gentleman who promised to pay him part of the trust money.

Mr. *Robert Booth* being dead, this bill was filed for payment of the debt of £500

and interest out of his assets, and to have the £4000 which had been invested in South Sea Stock sold for that purpose.

[442] Mr. *Attorney-General* for the plaintiff; Mr. *Browne* for the defendant.

The *Lord Chancellor* decreed an account and satisfaction out of the assets, and declared that the testator's interest in the £4000 was not personal estate, but to be considered as real assets, and that the plaintiff's demand being by simple contract, could affect it only by circuitry, so far as the personal assets should happen to be exhausted by creditors, by judgment, or specialty, and referred to the cases of *Baden* and *Others* against the Earl of *Pembroke*, 2 Vern. 52, and *Whitwick's* case, cited there by the *Master of the Rolls*, and *Scudamore v. Scudamore*, Pre. in Ch. 543. *Edwards v. Countess of Warwick*, 2 P. Wms. 171.

(1) The whole of this case is taken from Lord *Hardwicke's* Note-book.

It is stated in 2 Atk. 307, as having been cited in the case of *Petty v. Barker*, June 2, 1742.

CATHERINE COOPER, in her own Right, and as Administratrix of her Sister PHILIPPA, Plaintiff; (1) and WILLIAM CLIFFORD MARTIN, and ELIZABETH his Wife, Defendants.

May 2d, 1737, and June 20th, 1738. 2 Atk. 2.

Where a testator, by his will, gives all his South Sea Stock, South Sea Annuities, and South Sea Bonds to his wife in trust that she should pay certain legacies therein mentioned, and all the rest and residue of his estate not before bequeathed, he gives to his wife; the legacies shall only be paid out of the South Sea Stock, South Sea Annuities, and South Sea Bonds, and shall not be considered as general legacies, payable out of the other assets of the testator. (See *Purse v. Snablin*, post, p. 470, and the cases there cited.)

John Martin, on the 1st September 1725, made his will as follows:—

"I give and bequeath unto my said wife all my South Sea Stock, South Sea Annuities, and South Sea Bonds in trust, that she, my said wife, her executors and administrators, shall pay unto my said nephew, *Charles Martin*, for his life, the yearly sum or annuity of £50 by four even and [443] quarterly payments, the first quarter to commence immediately from and after the time of my decease, and upon this further trust that my said wife shall pay unto my niece *Tripe* and her children the sum of £200, equally to be divided between them. To my niece *Southcot*, £100. To my niece *Hilson*, £100. To the youngest daughter of my nephew *John Martin*, £100. To my niece *Young*, £100. To my nephew *Thomas Martin*, £200, and to his daughter, £100. To Mrs. *Catherine Cooper*, jun. and her sister Mrs. *Philip Cooper*, £100 each. To my niece Mrs. *Elizabeth Langton*, £100. To my nephew *William Martin*, £50. To Mrs. *Susan Stole*, now living with me, £50. To my brother, *Charles Hobler*, and Mrs. *Baker*, £10 each. To the charity school of the parish of St. Paul, Covent Garden, £10; and to my three servants that now live with me, the sum of £5 each, and to my great nephew *William Clifford Martin* the sum of £1000; all which legacies beforementioned, my will is, shall be paid within six months after my executrix shall have made a final end, and received the purchase-money due to me arising out of the third part of the manor of *Machelney*, in the county of *Somerset*, pursuant to a contract made by my son *Charles Martin*, deceased, with Mr. *Richard Woodford*."

And the testator directs that the purchase-money shall be applied toward satisfying certain demands, which he enumerated; and all the rest and residue of his estate not already given and bequeathed, as well real as personal, he gave to his wife, whom he made executrix.

The S. S. Stock, S. S. Annuities, and S. S. Bonds amounted to £2400, of which £1590 was invested in S. S. Annuities to secure the £50 annuity. There remained, therefore, £810, together with the reversionary interest in the S. S. Annuities. *Philippa Martin* died, having by her will appointed *Elizabeth*, the wife of the defendant her executrix, who proved her will.

The bill was filed for payment of the two legacies given to the plaintiff and her sister *Philippa*.

The defendant, the executrix, admitted that she had received South Sea Stock, South Sea Annuities, and Bonds, and which together with £2000 Bank Stock, and other assets, would be more than sufficient to pay his debts and legacies, but insisted that neither the said Bank Stock, or any other part of the testator's personal estate, other than [444] the particular part thereof appropriated as a fund for that purpose, was liable to the plaintiff's demand.

This cause came on to be heard on the 2d of May 1737, when it appears from the *Lord Chancellor's* note, that it was ordered to stand over, with liberty for the plaintiff to amend his bill, but in what respect is not stated.

Mr. *Atkyns* reports (in vol. 2, p. 2, under the name of *Cook v. Martyn*) his Lordship to have said ; as the fund proves insufficient to pay the legacies, it is not the same case, as if the testator had said, I give such a sum out of an estate I am entitled to. But if the particular estate falls short of his expectations, will any body say, they shall not be paid out of the general assets.

The payment within six months is no more than a direction for the payment of the specific legacies, and does not make any alteration as to the fund.

The executrix, by her answer, confesses that she hath South Sea Bonds, South Sea Annuities, and other assets, sufficient to satisfy all the legacies, which is putting the same construction as is now contended for by the plaintiffs ; and though no confession of law can possibly hurt the party, unless the fact be right, yet it would be absurd, as the very fund the testator had then in contemplation was not equal to satisfy the legacies and annuity, if I was not to extend them to the other part of the personal estate, especially where there is a residue allowed by the executrix in her answer, after all debts and legacies are satisfied.

Praying general relief is sufficient, though the plaintiff should not be more explicit in the prayer of the bill ; and Mr. *Robins*, a very eminent counsel, used to say, general relief was the best prayer next to the Lord's Prayer.

The admission of assets by the executrix to one legatee, is an admission to all.

But as in this case, general relief is prayed in one part of the bill, and particular relief in another, it must stand over to be amended upon paying the costs of the day.

The cause coming on again to be heard on the 20th of June 1738.

Mr. *Fazakerley* and Mr. *Floyer*, for the plaintiffs, contended that the plaintiff's legacies were general legacies, affecting the whole estate ; that the direction to the executors as to the particular funds was not intended to affect the [445] rights of the legatees ; it gave to them these funds in trust to pay, they were trustees of the whole estate for the same purpose. That the total of the legacies given under that trust amounted to £2435, which was the full amount of the fund without making any provision for the annuity of £50.

Mr. *Attorney-General*, for the defendant, insisted that the legacies were not chargeable upon the general fund ; that the plaintiff had no more right to seek satisfaction out of any other fund than that particularly pointed out by the will, than the son had for his annuity of £50.

June 20, 1738. The *Lord Chancellor* declared that the plaintiff's legacies ought to be satisfied only out of the particular fund, consisting of South Sea Stock, South Sea Annuities, and South Sea Bonds, mentioned in the testator's will, and in case that fund should be deficient to satisfy all the legacies given thereout, those legatees ought to abate in proportion. (Reg. Lib. A. 1737, fol. 682.)

(1) The whole of this case is taken from Lord *Hardwicke's* Note-book, except what is stated to have been said by Lord *Hardwicke* when the cause first came on, which is taken from *Atkyns*, and does not appear in Lord *Hardwicke's* Note-book.

HENRY and JOHN HITCHCOCK, residuary Legatees in the Will of RICHARD PRATT, Plaintiffs; (1) and PETER BEARDSLEY, and the Executors of RICHARD PRATT, Defendants.

February 8th, 1737, and June 28th, 1738.

Where a father, upon the marriage of his daughter, gave a bill of exchange for £1200 as a marriage portion, and the husband agreed to settle it upon his daughter in three or four years after the marriage; the daughter and her husband having been lost at sea within three years after the marriage; it should seem that the representative of the husband had a better right to receive the £1200 than the representative of the daughter.

Upon the marriage of the testator, *Richard Pratt*, with the daughter of the defendant, *Peter Beardsley*, it was agreed that *Beardsley* should give his daughter £1200 as a marriage portion, and that *Pratt* should in three or four years after the marriage settle the £1200 on his daughter.

The marriage took effect, and in performance of the agreement, *Beardsley* gave *Pratt* a bill of exchange for £1200.

[446] *Pratt* and his wife, within three years after their marriage, embarked in the same vessel for *Corunna*. The vessel, with all the crew and passengers was lost on the voyage.

The defendant *Beardsley* took out letters of administration to his daughter.

The bill was brought by the residuary legatees of the husband, for payment of the sum of £1200 due on the bill of exchange.

Mr. Fazakerley was counsel for the plaintiffs.

Mr. Attorney-General and *Mr. Browne* for the defendant *Beardsley*, contended that by the agreement the £1200 must have been settled upon the wife after the husband's death, and that the husband being dead, the defendant, as representative of the wife, was therefore entitled.

A proposal having been made to divide the £1200, and no costs on either side, the cause was adjourned, and on the 28th of June following, a decree was taken by consent upon that foot. (Reg. Lib. A. 1737, fo. 567.)

The Lord Chancellor has added the following note:—Semble, that the husband having by the bill of exchange the legal right to the money, and not obliged to settle it on his wife within three or four years, and she dying within that time, the representative of the husband had the stronger right, and the rather because in order to make a trust arise for the wife, so as to give her representative any right to take away the legal interest, it should be shewn on their part that she survived. It is incumbent upon them to prove their equity to take away the legal property vested in the husband.

(1) This case is taken from Lord *Hardwicke's* Note-book.

[447] COTTERELL *versus* PURCHASE.(1)

June 30th, 1738. 1 Atk. 290.

On arguing a demurrer to a bill of review, what appears on the face of the decree can be read only, but after a demurrer overruled, a plaintiff may read any evidence as at a re-hearing. (See *Dashwood v. Lord Bulkeley*, 10 Ves. 230. *White v. Fussell*, 1 Ves. & Bea. 151.)

In a cause that came before the Court upon a bill of review to read some charges out of the original bill, the plaintiff offered to shew some errors in the decree. To this it was objected that no errors in the decree were cognizable, but what appeared on the face of the decree, and therefore any evidence of errors but from the decree itself was opposed.

Lord Chancellor. It is true, on arguing a demurrer to a bill of review, nothing can be read but what appears on the face of the decree; but after the demurrer

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is overruled, the plaintiffs are at liberty to read bill or answer, or any other evidence as at a re-hearing, the cause being now equally open ; to which purpose the case of *Jackson v. Francis* was cited by Mr. *Browne*. (Reg. Lib. A. 1737, fo. 557.)

(1) This case is taken from *Atkyns*. It appears from Lord *Hardwicke's* note, that the decree was varied in both the points upon which error was assigned, but no mention is made of the question stated by Mr. *Atkyns*.

[448] NATHANIEL DURANT, and ANN his Wife, Aunt and Administratrix of ANNE PRIESTWOOD Intestate, *Plaintiffs* ; (1) and THOMAS PRIESTWOOD, and CHARLOTTE ANNE PRIESTWOOD, a Nephew and Niece of the Intestate, and AMBROSE RHODES, and ELIZABETH his Wife, another Aunt of the Intestate, *Defendants*.

June 30th, 1738. 1 Atk. 454.

Aunts and nephews in equal degrees of kindred and equally entitled under the statute of Distributions. (*Lloyd v. Tench*, 2 Ves. 213.)

Ann Priestwood died intestate, leaving two Aunts, the plaintiff *Ann*, and the defendapt *Elizabeth*, and the defendants her nephew and niece, who were the children of a brother deceased.

The bill was for an account and distribution of the personal estate of the intestate, of which letters of administration had been granted to the plaintiff *Elizabeth*, who as one of the aunts claimed one fourth of the personal estate.

Mr. *Browne* for the plaintiffs contended, that an aunt was equally next of kin with nephews and nieces, being equally near in computation of degrees, and cited *Mentney v. Petty*, Pre. Ch. 593.

Mr. *Fazakerley* for the nephew and niece contended, that they, as representing their father, who was brother to the intestate, were entitled to the whole personal estate.

Lord *Chancellor*. I was of opinion that the aunts and nephew and niece of the intestate were in equal degree of kindred to the intestate, and decreed the distribution in fourths accordingly. *Page v. Cook*, at the Rolls, 24th June 1732. *Harwin* and *Whiting*, ib. 7th Feb. 1732. *Barrow v. Hopkins*, 3d May 1731, at the Rolls, all determined the same way. (Reg. Lib. A. 1737, fol. 761.)

(1) This case is taken from Lord *Hardwicke's* Note-book.

[449] RICHARD MASON, *Plaintiff* ; (1) and ROBERT GOODRICH and ELIZABETH PELL, Executors of RICHARD MASON an Infant, and Others, *Defendants*.

July 5th, 1738.

Sir R. Walpole having contracted with the guardian of an infant for the purchase of some timber and bark upon the infant's estate, a reference was made to the Master, in a cause for the administration of that estate, to see whether it would be for the benefit of the infant to carry the contract into effect ; the Master having reported that it would ; the contract was performed, and by a decree in the Court, the money arising from the sale of the timber and bark was ordered to be laid out in the purchase of land, in trust for the infant, but in the mean time to be invested in South Sea Stock, in the name of the guardian. The money having been laid out in South Sea Stock, and the infant having attained the age of seventeen, dies, and by his will disposes of his personal estate, but makes no mention of the South Sea Annuities : held, that the heir at law of the infant was entitled to the South Sea Annuities, and any interest or dividends that had accrued thereon. (Timber cut down by the guardian of an infant who has the fee, considered real estate, see *Tullit v. Tullit*, Amb. 370 ; but if the infant be tenant in tail, it is said to be considered personal estate, see S. C. and see Lord *Glenorchy v. Bosville*, Ca. temp. Talb. p. 15.)

Richard Mason having, when an infant, been seised in fee simple of an estate, which had descended to him from his father, a bill was filed to have the same administered under a decree of the Court.

By an order made in that cause, dated the 5th of December 1724, upon the application of Sir *R. Walpole*, who had contracted with the guardian of the infant for the purchase of a certain quantity of timber and bark upon the estate, it was referred to the Master to enquire whether it would be for the benefit of the infant's estate to have the contract performed, provided the money arising thereby was laid out in the purchase of lands, to be conveyed to the infant as the Court should direct, and the Master having by his report of the 29th of Jan. 1724, reported that it would be for the benefit of the infant, the same was ordered by an order of the 10th February 1724.

By the decree in that cause of the 19th of April 1725, it was amongst other things referred to the Master, to take an account of the money raised by sale of the timber and bark, and the same was directed to be invested in the purchase of [450] land, to be conveyed in trust for the plaintiff, the infant, as the Court should direct, and in the mean time the money was to be laid out in the South Sea Annuities for the benefit of the infant, in the name of *Frances Mason*, his mother and guardian.

The sum of £1000 was accordingly laid out in the purchase of £1085 South Sea Annuities, and the infant having attained the age of seventeen years died, having by will, which made no mention of this money, given one third of the surplus of his personal estate, after payment of his debts, legacies, and funeral expences, to the defendant *Pell*, one other third part for the separate use of his aunt, and the other for the use of *Mary Goodrich*, the wife of the defendant *Goodrich*, and appointed the defendants, *Goodrich* and *Pell*, executor and executrix of his will, and leaving the plaintiff his heir at law, who by the present bill claimed this sum in the South Sea Annuities as real estate.

Mr. *Browne* and Mr. *Fazakerley* for the plaintiff, insisted that the money having been directed to be laid out in land must be considered as land.

Mr. *Attorney-General* and Mr. *Murray* for the defendants contended, that the question must stand in the same state as it did whilst the infant was alive; that as soon as the timber was cut it was personal estate, and that a court of equity had no right to change the nature of the property.

The *Lord Chancellor* decreed that the plaintiff was entitled as heir at law, under the circumstances of this case, to the £1085 South Sea Annuities, or any addition thereupon, or any dividends which have accrued due for the same since the death of Sir *Richard Mason*, and to any other money arising on the contract for the timber sold to Sir *Robert Walpole*, or the bark thereof. (Reg. Lib. B. 1737, fol. 490.)

(1) This case is taken from Lord *Hardwicke's* Note-book.

[451] WILLIAM HILL, and MARY his Wife, and MARTHA, ELIZABETH, and CATHERINE, her Sisters, the Heirs at Law of MARY MAWLE, *Plaintiffs*; (1) and JOHN, JOSEPH, and DUKE MAWLE, WILLIAM DAVIS, and Others, *Defendants*.

July 8th, 1738.

A limitation by deed to the heirs of the body of *Mary Post*, and for default of such issue to the sons and heirs of *Joseph Mawle*, as tenants in common for ever, confers upon the sons of *Joseph Mawle* an estate for their respective lives only, as tenants in common.

By indentures of the 23d and 24th of February 1723, being the marriage settlement of *John Post* and *Mary Mawle*, certain lands were settled to the use of *John Post* for life, remainder to the wife *Mary Mawle* for life, and subject to a power for her during her intended marriage notwithstanding her coverture to revoke the uses, and declare any other uses, to the heirs of the body of the said *Mary*, and in default of such heirs, to the only proper use and behoof of the sons and heirs of *Joseph Mawle* her father, as tenants in common for ever, and to and for no other use, intent, or purpose whatsoever. *Mary*, after her marriage with *John Post*, by deed dated the 9th September 1724, revoked the uses of the said settlement, except the estate for life to *John Post*, and limited the estates to *Mary Godden* for a term of 1000 years, subject to redemption on payment of £400, and subject thereto to the uses of the deed of the 24th of February 1723. The defendants, the *Mawles*, who were sons of *Joseph Mawle*, and half brothers of *Mary*, the wife of *John Post*, having borrowed £200 of the defendant *Davis*, they

joined with *Godden* the original mortgagee in assigning the mortgage to *Davis*, to secure the sums of £400 and £200. *Mary Post* had an only child, *John Nash Post*, who survived his father and mother, but died an infant, without issue. The bill prayed a redemption. The plaintiffs claimed as her heirs at law, insisting that by the settlement of the 24th of February 1723, the defendants, the *Mawles*, were entitled to only estates for life in the premises, and by the bill prayed a redemption of the mortgages.

[452] The cause first came on upon the 23d of May 1728, when it was ordered to be restored back to the paper, and that the deeds and writings should be inspected in the hands of the mortgagee's clerk in Court, and should be produced at the hearing, and again came on upon the 8th, and was decided on the 10th of July 1738.

Mr. *Attorney-General* and Mr. *Fazakerley* for the plaintiffs.

The plaintiffs claim as heirs at law of *Mary Post*; the defendants claim under the last limitation in the deed of the 24th of February 1723; but under that deed they are entitled only to estates for life, for there are no words of limitation, for these words being in a deed, are to be construed strictly, and not as if they had been in a will. The word sons would only give an estate for life, and the word heirs is only a farther description of the same persons, and not a word of limitation added to the sons, for it is expressly said, heirs of the father. A limitation to a man and his successors does not carry a fee, 1 Leon. 2, 3. A limitation to one to hold to him for ever, or to a man *et hæredibus*, without the word *suis* or *hæredi* in the singular number, give only estates for life.

Mr. *Browne* for the defendants, the *Mawles*, contended that the construction ought to be as if the limitation had been to the sons of *Joseph Mawle* as tenants in common, with remainder to his right heirs.

July 10, 1738. The *Lord Chancellor* decreed that the defendants *John*, *Joseph*, and *Duke Mawle*, were entitled to the equity of redemption of the mortgaged premises as tenants in common for their respective lives; and that the reversion in fee thereof belonged to the plaintiffs, *Mary*, *Martha*, *Elizabeth*, and *Catherine*, as co-heirs of *John Nash Post*, by *Mary*, the wife of *John Post*, and directed a redemption of the mortgages by the defendants, the *Mawles*, the inheritance to remain subject to the original mortgage debt; but not to the additional £200; and in default of redemption the defendants, the *Mawles*, to be foreclosed as against the mortgagees, and the plaintiffs to be at liberty to redeem; and upon payment of both mortgages the mortgagees were to convey to the plaintiffs as the Master should direct; but in default, the bill so far as it seeks redemption against the defendants, the mortgagees, was to be dismissed with costs. But in case the plaintiffs should redeem, then it was ordered that the defendants, the *Mawles*, should repay to the plaintiffs [453] so much as they should have paid for principal and interest of the said £200, and also for the interest of the said £400 and their costs of the suit so far as the same relates to the said £200 and interest, and that their estates for life should stand a security for the same, till such repayment should be made; and that upon payment to the plaintiffs by the defendants, the *Mawles*, of so much as should have been so paid by the plaintiffs for the principal and interest of the said sum of £200 and the costs of the suit so far as relates to the said £200 together with interest for the same and upon payment of what should have been paid by plaintiffs for interest, upon the original mortgage, and one third of the principal and interest, and one third part of the costs of the mortgages, so far as the same relate to the original mortgage with interest for the whole money so paid by the plaintiffs; it was ordered that the plaintiffs should convey the mortgage term to trustees to attend on the freehold during the lives of the defendants, the *Mawles*, and afterwards to attend the inheritance, and in case the defendants, the *Mawles*, were to make default in payment of the money due to the plaintiffs then they were to be foreclosed as against the plaintiffs (Reg. Lib. A. 1737, fo. 790.)

(1) This case is taken from Lord *Hardwicke's* Note-book.

[454] Earl of THANET and Lord TUFTON, his Son, *Plaintiffs*; (1) and THOMAS PATTINSON and Others, Tenants of certain Manors, *Defendants*.

July 11, 1738.

Upon a bill brought by the Earl of *Thanet* and his son to establish their right as lords of a manor to an arbitrary fine upon the death of the late Earl and for the payment by the tenants of the fines which had been assessed;—issues were directed to try the custom; but upon a cross bill by the tenants of the manor to establish the custom that the fines were certain against the Earl of *Thanet* and his son, and the co-heirs of the late Earl, alleging that the co-heirs had entered upon the death of the late Earl, and claimed the fines, the cross bill was dismissed; the co-heirs being out of possession, and therefore not entitled to any fines; and an entry without being pursued by an ejectment not a sufficient reason for bringing the co-heirs before the court.

Cross bill by some of the customary tenants on behalf of themselves and the rest of the customary tenants against Lord *Thanet* and his son, and the co-heirs of the late earl.

The object of the original bill was to establish the right to an arbitrary fine not exceeding two years' value upon the death of the last admitting lord, and for payment by the tenants of these fines which had been assessed upon the death of the late Lord *Thanet*.

The cross bill by the tenants was to establish several customs and amongst others that those fines were certain, and was filed against the Earl of *Thanet* and his son, the plaintiffs, in the original bill who claimed under a recovery suffered by the late Earl, and against the co-heirs of the late Earl in the nature of an interpleading bill stating that upon the death of the late Earl, they had entered and claimed the fines.

The co-heirs by their answers admitted that soon after the late Earl's death, they and their agents caused entries to be made on the premises, and insisted that the general fine due on the said Earl's death was due to them, and submitted that the ancient customs relating to the payment of the said fines ought to be established and confirmed.

Mr. *Fazakerley*, for the plaintiffs in the original cause.

It the tenants insist upon it, the right to the fine must be [455] tried; but that must not be by a *Cumberland* jury; but in some other county where an impartial trial can be had, as in the case of the Duke of *Somerset v. France*, Fortes. 41. As to the cross cause the tenants have no right to raise the question between Lord *Thanet* and the co-heirs of the late lord. Lord *Thanet* is in possession, and is therefore entitled to the fines.

Mr. *Browne*, for the plaintiffs in the cross cause.

The object of the cross bill is to establish a custom.

The co-heirs have made a claim of which the tenants must take notice. The *dominus pro tempore* is entitled to the fine; but in order effectually to establish the custom all those who claim the inheritance must be parties. The co-heirs unless parties to the suit would not be bound by any decree against Lord *Thanet*.

July 11, 1738.—Lord *Chancellor*. The cross bill is improperly brought against the co-heirs. It is not properly a bill of interpleader because no offer is made to bring the fines into Court which is necessary in an interpleading bill: it is not sufficient to offer to pay what shall be decreed at the end of the cause.

Besides there is no colour to say that the co-heirs are entitled to this fine, for they can only be entitled to fines assessed by themselves after they have obtained possession; they cannot be entitled to this fine which was assessed by Lord *Thanet's* steward.

This is not a proper case for such a bill, for the *dominus pro tempore* is entitled to the fine whether in possession by right or not, and no one out of possession can claim it. A disseisor must admit the tenant and take the fine, for no one else can hold the court to assess it. The entry was never pursued by an ejectment, and is not therefore a sufficient reason for bringing the co-heirs before the Court, nor is it necessary for the purpose of establishing the custom that the co-heirs should be brought before the Court. The rule is to bring such only before the Court as appear to be owners of the inheritance as tenants for life and remainder-men, and not every one who claims a right and is out of possession.

The cross bill therefore must be dismissed, but without costs, because it might have been demurred to, which is a sufficient reason for refusing costs at the hearing.

His Lordship directed issues to try the custom as to the fines, to be tried at the bar of the Court of King's Bench by a *Middlesex* special jury.

[456] The issues directed were, whether by the custom of the manors of or any and which of them upon the death of the last admitting lord or lady of the said manors respectively, a reasonable fine to be assessed at the will of the lord or lady of the said manors for the time being not exceeding two years value be payable to such lord or lady by the respective tenants of the said several manors or any other and what fine; and whether such or any other and what fines were paid upon the death or alienation of any of the tenants. (Reg. Lib. A. 1737, fo. 728.)

(1) The statement of this case is taken from Lord *Hardwicke's* Note-book, and the judgment from a manuscript case.

By original Cause between SARAH LUCAS, an Infant Daughter of JOHN LUCAS, by his First Wife ELIZABETH, Plaintiff; (1) and ISABELLA LUCAS his Second Wife, Administratrix of her Daughter, ISABELLA, and the Executors of JOHN LUCAS, Defendants. And by cross Cause between ISABELLA LUCAS, Plaintiff; and SARAH LUCAS, an Infant, and the Executors of JOHN LUCAS, Defendants.

July 11th and 12th, 1738. 1 Atk. 270.

Mary Lucas in her last illness requested of her husband that her wearing apparel, gold watch, pearl necklace, rings, &c., in her possession, and used by her might be given to her daughter, and put into a friend's hand for her daughter's use, which the husband promised; and, after his wife's death, gave the said things to his daughter, and made an inventory, and locked them up in a strong chest, and gave the key to his wife's friend, and sent the things therein to her for his daughter's use, though the husband afterwards took some of the things into his possession again, that is not sufficient to invalidate the gift, which was perfect by the former act.

The plaintiff in the original cause by her bill called for an account of her father's personal estate, and payment of her [457] share thereof, and for the delivery to her of certain articles given to her by her father in his lifetime.

Elizabeth Lucas in her last illness, requested of *John Lucas* her husband, that her wearing apparel, gold watch, pearl necklace, rings, ornaments, and several pieces of plate, coins, and other things in her possession, and used by her, might be given to the plaintiff, and put into the hands of Mrs. *Dunster*, a friend, for the plaintiff's use, which *John Lucas* promised, and after her death he gave the said things to the plaintiff, and made an inventory and valuation of the same, to the amount of £187, 8s. 6d., and locked them in a strong chest, and after making three copies of the inventory, put one into the chest, and gave the key, with another copy to the said Mrs. *Dunster*, and the third to *James Lucas*, his brother: to the intent it might be known what was given, in the presence of several persons he sent the chest, with the things therein, to Mrs. *Dunster* for the plaintiff's use, and she accepted the same on the plaintiff's behalf.

John Lucas, after his first wife's death, by articles of the 26th of June 1734, between him of the first part, and *Holmes* and the defendant *Isabella* of the second part, reciting an intended marriage between him and *Isabella*, and that *Holmes* had agreed to pay him £2000, and that he had a daughter (the plaintiff), by a former wife; the said *Lucas* agrees, that if he should die in the lifetime of *Isabella*, and there should be any child between them, or that the plaintiff should be then living, that then *Isabella* should enjoy one-third of his personal estate, after payment of his debts and funeral expences, and her widow's chamber, according to the ancient custom of *London*, and that the children of such marriage, together with the plaintiff, if living, should enjoy one-third of his personal estate for their respective use, and that the provision made for *Isabella* was in full of her dower and thirds.

John Lucas in 1736 died, leaving *Isabella* his wife, and one only child by her,

Isabella the infant, and also his daughter the plaintiff, and by his will of the 10th of June 1736, directed that the surplus of his estate and effects, after his marriage contract was duly provided for, and all his personal estate, should be divided between his wife and daughters, the plaintiff, and *Isabella* the infant.

The defendant *Isabella* the widow, insists on £1000 South Sea Annuities, which the testator in his lifetime transferred to her, and as she says intended thereby to give to her [458] and by word of mouth declared that she should hold and enjoy them to her own use, and before the transfer promised often to transfer them to her own use, and gave instructions to an attorney to draw a deed to declare them to her own use, who accordingly vested it in trustees, in trust that they should transfer the same to defendant for her own use, but that the testator (on information that it would be better) transferred to the defendant, and assured her that such transfer would effectually secure them to her, and which he did as a further provision, and to make it equal to her fortune.

And as to the watch, pearl necklace, and other things claimed by the plaintiff, insists that the testator voluntarily, and of his own accord, sent for the chest, and disposed and altered the things therein as he thought fit, and that he made her a present of the snuff-box, and a pearl necklace out of the chest.

It appeared in evidence that the father had obtained possession of these articles under a promise to Mrs. *Dunster* to retain them for the use of the plaintiff, and that he had offered to give a bond or note for that purpose.

Mr. *Browne* for the plaintiff in the original cause, Mr. *Attorney-General* and Mr. *Fazakerley* for the defendant the widow, cited the case of Mrs. *Hungerford*, and the case upon *Lady Cowper's* will, and *Christ's Hospital v. Bridge*, 2 Vern. 683.

July 12, 1738.—*Lord Chancellor*. As to the first part of the bill, I am of opinion that the delivery by *John Lucas* of the things in a chest to Mrs. *Dunster* for the use of his daughter, who was the child left by the first wife, according, as he said, to the promise made to his wife in her lifetime, is a sufficient delivery, to vest the property in the daughter, and though he did afterwards take some of the things into his possession again, as the watch and necklace, that was not sufficient to invalidate the gift, which was made perfect by the former act.

As to the transfer by *John Lucas* of £1000 South Sea Annuities to his wife in her own name, I am of opinion this is not [459] a good transfer so as to affect the marriage articles, by making any alteration in the gross estate of the testator, the whole of which was liable by the marriage articles to be divided into such proportions which he could not voluntarily alter, and therefore this is as much a fraud on the articles, as it would be on the custom of the city of *London*, yet it is good as against the testator himself, and to be answered out of his testamentary share, if sufficient; and in this Court, gifts between husband and wife have often been supported (so *Slanning v. Style*, 3 P. Wms. 334. *Bletsowe v. Sawyer*, 1 Vern. 244. *Herbert v. Herbert*, Prec. in Ch. 44. *Moore v. Freeman*, Bunb. 205; and see *Bennet v. Davis*, 2 P. Wms. 316. And it is perfectly settled that a husband may, in this Court, be a trustee for the separate use of his wife, per Lord *Eldon*, *Rich v. Cockell*, 9 Ves. 374. See *Walter v. Hodge*, 2 Swanst. 105; and the cases there cited by Mr. *Swanston* in note), though the law does not allow the property to pass (see *Moyse v. Gyles*, 2 Vern. 385. *Beard v. Beard*, 3 Atk. 72; Litt. sect. 168; Co. Litt. 112 a). It was so determined in the case of Mrs. *Hungerford* and in *Lady Cowper's* case, before Sir *Joseph Jekyll*, where gifts from Lord *Cowper* in his lifetime were supported, and reckoned by this Court as part of the personal estate of *Lady Cowper*.

In the *Lord Chancellor's* Note-book is the following memorandum.

I was of opinion that the plaintiff was entitled to the jewels and other things delivered by the testator, her father, to Mrs. *Dunster*, for her benefit as a gift in his lifetime, and that the defendant, the widow, was not entitled to the £1000 South Sea Annuities, transferred to her by the testator, in prejudice of the marriage articles, but that she ought to have the same, or a satisfaction for them out of the testator's testamentary third of the estate, and decreed an account, with directions accordingly, and a distribution.

His Lordship declared that the jewels and other things given by the testator to the plaintiff, and delivered in a chest to Mrs. *Dunster*, for her benefit, are not to be considered as any part of the testator's personal estate, and that what should appear to be the clear personal estate, after payment of debts, should be divided into three

parts ; one-third to be retained by the defendant *Isabella* in her own right, by virtue of the marriage articles ; another third to be the testamentary part of testator ; and the remaining third in moieties, one to belong to the plaintiff, and the other to *Isabella*, the testator's daughter by his second wife.

And his Lordship declared, that the transfer of the £1000 South Sea Annuities, by the testator to his wife, ought not to take effect in prejudice to the marriage articles, but to be brought into the personal estate before the division be made, and that such transfer ought to be considered as a good gift against the testator, *John Lucas* himself, and that the defendant *Isabella*, the widow, ought to receive a satisfaction for the £1000 South Sea Annuities, out of the testator's [460] third or testamentary part of his personal estate, so far as that will extend. And doth therefore order that the testator's third part be applied in the first place, to make good to the defendant *Isabella* the value of the South Sea Annuities, and the dividends thereof from the death of the testator. The jewels, &c., his Lordship directed to be delivered to the defendant *James Lucas*, for the benefit of the plaintiff. (Reg. Lib. B. 1737, fo. 421, and see *Graham v. Londonderry*, 3 Atk. 392. See *Probert v. Clifford*, post.)

(1) This case with some additions from Lord *Hardwicke's* Note-book, is taken from *Atkyns*.

ELEANOR DAVENPORT, Widow, one of the Daughters of MARGARETTA FARMER, Widow, deceased, JOHN DAVENPORT her Son, and JAMES MITCHELL, PETER LODGE, and RICHARD CHESNEY, Executors of the said MARGARETTA FARMER, Plaintiffs ; (1) and JOHN OLDIS, JOHN BLAKE, RICHARD OWEN, and MARGARET LEE, Defendants.

July 12th, 1738. 1 Atk. 579.

A. devises lands to his wife for life, and after her decease to his son and daughter, *John* and *Margaret*, to be equally divided between them, and the several and respective issues of their bodies, and for want of such issue, to his wife in fee. This will not create a cross remainder, which can only be raised by an implication absolutely necessary, which is not the case here, for the words several and respective, effectually disjoin the title.(2)

John Owen, Esquire, being seised in fee of a messuage and lands in *Shropshire*, mortgaged the premises to *Griffith* [461] *Thomas* for £120, and being also seised in fee of a messuage in the possession of *Margaret Humphreys*, did by will devise the two messuages, with the lands belonging, to his wife, *Margaret Owen*, for her life, and after her decease, to his son and daughter, *John* and *Margaret Owen*, to be equally divided between them, and the several and respective heirs of their bodies, and for want of such issue, to *Margaret Owen*, his wife, in fee, and made her sole executrix : she proved the will, entered on the said messuages, and received the rents till her death in December 1726, having survived her son, *John Owen*, who died an infant unmarried.

The widow of the testator, after his death, married with *John Farmer*, the plaintiff's (*Eleanor's*) father, and having survived him, made her will, reciting her first husband's will, and devised one moiety of the said two messuages to *Mitchell*, *Lodge*, and *Chesney*, in trust for the separate use of the plaintiff, *Eleanor*, her daughter, during her life, and after her decease, to *John Davenport*, the son of *Eleanor*, for life, and after his decease, to the defendant, *Richard Owen*, in fee.

The defendant *Margaret*, the daughter of the testator, *John Owen*, married one *Lee* (who is since dead), and the defendant *Oldis*, having paid off *Thomas's* mortgage, took an assignment thereof ; and being willing to purchase the *Shropshire* estate of *Lee*, and the defendant *Margaret*, his wife, they by indentures of lease and release in 1732, between them and *Oldis*, in consideration of the sum therein mentioned, granted to him the said premises, and suffered a recovery, and he insists that he has a right to enjoy the same, as standing in the place of *Margaret Lee*, on whom, upon the death of *John Owen*, her brother, the estate descended by survivorship, and that she became entitled thereto by a cross remainder under the testator's will.

The question was, whether upon the death of *John Owen*, the son, his moiety of

the premises came to his sister by survivorship under the testator's will, or whether the remainder in fee to the testator's widow immediately took effect as to that moiety.

The plaintiffs claimed the benefit of their several devises under the will of *Margaretta Farmer*, and brought their bill, in order that the plaintiff *Eleanor* may, on paying her share of the mortgage, have a conveyance of the moiety of the premises, and that she may be let into the receipt of one [462] moiety of the rent, and that a partition may be made of the said premises, and that she may be quieted in the possession of a moiety thereof in severalty for the plaintiff's benefit.

Mr. Attorney-General and Mr. Browne, for the plaintiffs, contended that there was no express limitation by way of cross remainder, and that the law did not allow of cross remainders by implication in deeds, that the words "several and respective heirs of their bodies" shewed that the testator did not intend, that the heirs of either one of them should take the whole, and that the limitation to the wife for want of such issue, must mean as each of them might die without issue, *reddendo singula singulis*, and cited the cases of *Gilbert v. Witty*, Gro. Jac. 655, and *Comber v. Hill*, 2 Stra. 969, *Williams v. Browne*, 2 Stra. 996, *Windham's case*, 5 Co. 7, *Huntley's case*, Dyer, 326, and 1 And. 21.

Mr. Chute, for the defendants, cited *Holmes v. Meynell*, 4 Leon. 14, pl. 51, 2 Jo. 172, and Raym. 45, and observed that it could not be supposed, that the testator intended to give the inheritance to his wife till after the failure of all his own issue, and that in *Comber v. Hill*, the great distinction relied upon was, that the devisees in tail, and the remainder-man, were all grandchildren, and that in *Williams v. Browne*, the cross remainders were between three.

July 17, 1738.—Lord Chancellor. I am of opinion that the will in this case is not so penned as to create a cross remainder, which, as it is never favoured by the law, can only be raised by an implication absolutely necessary, and that is not the present case, for here the words "several and respective," effectually disjoin the title; his Lordship for this purpose, cited the case of *Comber v. Hill*, in the King's Bench, H. T. 7 Geo. 2, 1733.(3) (4)

[463] The only instance wherein this case differs is, that in the case of *Comber v. Hill* (Barnard, B. R. 367; 2 Str. 969), all the devisees were grandchildren, in equal degree to the testator, and in this case the devise over was to the wife, who could not claim as heir at law, but yet the presumption of kindness was as strong in favour of a wife, and then this does not differ from the reason of that case.

In the case of *Holmes v. Meynell*, T. Raym. 425, a great stress was laid upon the word "they"; in case they happened to die, then he devised all the premises: nor can there be any case cited, where cross remainders have been adjudged to arise merely upon these words, "in default of such issue," and therefore his Lordship declared, that the plaintiffs, *Eleanor Davenport*, *John Davenport*, and the defendant *Richard Owen*, are entitled to the equity of redemption of a moiety of the premises, on payment of a moiety of the principal and interest on the said mortgage, and that in case either of the plaintiffs, or the defendant *Richard Owen*, should redeem the said premises, then he decreed that a commission should issue, to divide the premises into moieties, one moiety to go to the plaintiffs *Eleanor* and *John Davenport*, and the defendant *Owen*, according to their interest therein, and the other moiety to the defendant *Oldis*, and, after such partition made, he directed proper conveyances to be executed by the several parties. (Reg. Lib. A. 1737, fol. 783.)

Lord Hardwicke has added the following memorandum to his note of this case.

On considering the case of *Comber v. Hill* [2 Stra. 969], and *Williams v. Browne* [2 Stra. 996], I was of opinion, that there were no cross remainders, and decreed a moiety to the plaintiffs *Eleanor* and *John*.

(1) The statement of this case, and Lord Hardwicke's judgment are taken from *Atkyns*, the arguments of counsel from Lord Hardwicke's Note-book. The statement of the will by Mr. *Atkyns*, exactly corresponds with the will as it is stated in Lord Hardwicke's Note-book.

(2) Lord Hardwicke founded his decision in this case upon *Comber v. Hill*, 2 Str. 969; S. G. Cases temp. Hardwicke, 22, and *Williams v. Browne*, ib. 996; two previous cases which had been decided by the Judges of the King's Bench when Lord Hardwicke was Chief Justice, which had expressly decided the point. But it is now considered that the word "respective" does not disjoin the title. See *Phipard v. Mansfield*,

C. v.—33*

Cowp. 797. *Wright v. Holford*, ib. 31. *Atherton v. Pye*, 4 T. R. 710. *Watson v. Foxon*, 2 East. Rep. 43, and Mr. Saunders's note to *Cook v. Gerrard*, 1 Saund. 185, and see *Green v. Stephens*, 17 Ves. 79.

(3) *John Holden*, being seized of several lands in fee, devised to his son *Richard*, for his life, with remainder to his issue in tail male, and after his death without issue, he devised the premises among his three grandchildren in this manner, to his grandson *Richard* and *Elizabeth* his grand-daughter, as tenants in common, and to the heirs of their respective bodies, and for default of such issue, the remainder to his grand-daughter *Anne Holden*, in fee; *Anne* married, and afterwards *Elizabeth* died without issue of her body: the question was, whether *Richard Holden* and *Elizabeth* took an estate in common, with cross remainders to the heirs of their bodies, for then the estate could not vest in *Anne*, but upon failure of issue of both their bodies; or whether this was an estate in common, with remainders to the heirs of their bodies generally, for in that case, one moiety of the estate would vest in *Anne*, who had the remainder in fee, immediately upon the death of either of them without issue. The Court were of opinion, that no cross remainders were created by this devise, but that by the death of *Elizabeth* her moiety went over to *Anne*.

(4) 2 Stra. 969; *S. C. Williams v. Browne*, 2 Stra. 996. It seems to have been considered according to some *dicta* in the old cases, that cross remainders could only arise by *implication* between two. See *Gilbert v. Witty*, Cro. Jac. 655. *Cole v. Livingston*, 1 Vent. 224. But that doctrine is exploded; though to raise cross remainders between more than two, it should seem, requires stronger implication than to raise them between two, *Pery v. White*, Cowp. 777. *Phipard v. Mansfield*, Cowp. 797. *Atherton v. Pye*, 4 Durn. & East. 710. *Harg. & Butler's Co. Litt. b. n. 1.* and the cases there cited. Though cross remainders can never be created by implication in a deed (see *Cole v. Livingston*, 1 Vent. 224), yet they may arise by implication in the construction of executory trusts or marriage articles, *Marryat v. Townly*, 1 Ves. 105. *Twisden v. Lock*, Amb. 663.

[464] OLIVER v. TAYLOR.(1)

July 13th, 1738. 1 Atk. 474.

A common recovery suffered in the Court of Common Pleas will not pass copyhold lands, otherwise as to customary freeholds.

If lands are copyhold, a common recovery suffered in the Court of Common Pleas will not pass such lands, but if lands are customary freeholds, and pass by surrender in a borough court, yet a recovery in the Common Pleas of such lands may be good. The case of *Baker v. Wase*, in Lord Macclesfield's time, is cited.

(1) This case is taken from *Atkyns*. It appears from the Lord Chancellor's note of this case, that the plaintiff, claiming as issue in tail under the will of *Richard Tregear*, prayed to be admitted to certain customary tenements within the borough of *Launceston*; that the defendants insisted upon a common recovery suffered in the Court of Common Pleas to bar the entail, but which the plaintiff contended could not operate on copyhold lands. Upon the hearing, the Lord Chancellor directed three issues to be tried:—1st. Whether the lands in question were copyhold or customary freehold. 2d. Whether by virtue of the custom of the borough or otherwise, such lands are capable of being entailed. 3d. If such lands could be entailed, then whether such entail could be barred by surrender or recovery in the court of the borough, or by a common recovery suffered in the Court of Common Pleas at *Westminster*, or by which of those methods. (Reg. Lib. B. 1737, fol. 483.)

It appears that all these issues were found for the plaintiff, and that upon the cause coming on again on the 10th of November 1739, a decree was made according to the prayer of the bill.

It appears by the Register's Book, that the jury found that the lands comprised in the said surrender are customary freehold lands, and by virtue of the custom of *Dunhaved*, otherwise *Launceston*, the said customary freehold lands are capable of being entailed, and that such entail can be barred only by surrender in the court of the borough of *Dunhaved*, otherwise *Launceston*, and not by common recovery in the court of Common Pleas at *Westminster*, and his Lordship directed an account of the

rents and profits of the said customary lands, and what was coming on that account to be paid to the plaintiff, and ordered that possession be delivered of the said customary premises, and that he should be admitted as tenant thereof, according to the custom of the borough. (Reg. Lib. B. 1739, fol. 48.)

[465] LOMAX v. HOLMDEN and Others.(1)

Appeal from the Rolls.

July 18th, 1738.

A court of equity does not compel a purchaser specifically to perform his contract for the purchase of an estate, where the goodness of the title depends upon difficult and doubtful points of law.(2)

The object of the bill in this cause was to compel a specific performance of an agreement entered into by the defendants, *Marriott* and *Buck*, for the purchase of a certain estate called *Bovington Bury*.

Upon a reference to see whether a good title could be made, the Master made a special report, stating that the testator by his will of the 26th December 1685, after the payment of his debts and legacies, devised all the residue of his lands, comprising the premises in question, to his two sons, *Joshua* and *Thomas*, and their heirs, equally to be divided between them, to hold to his two sons respectively for their lives, without impeachment of waste, and then to their first and other sons in tail; and if both his said sons should die without issue male, or such issue male should die before he or they attained the age of twenty-one years, or had issue male of their body or bodies, then he devised the said hereditaments to his daughter *Elizabeth*, and to his grandchild *Henry Appleton*, and to their heirs, equally to be divided between them. *Thomas Lomax*, one of the sons of the testator, for the purpose of discontinuing all estates tail, before issue born, made a feoffment to *Francis King* of the premises in question, to the use of himself and his heirs, and then contracted with the defendant *Marriott* for the sale [466] of the estate and died, having devised the purchase money, or if the purchase could not be completed, the estate to his nephew the plaintiff.

Upon this statement of the case, the Master of the Rolls was of opinion that the title was good; that there were no cross remainders by implication; that the remainders over were not vested but contingent remainders, and consequently destroyed by the feoffment, and accordingly that there was a good estate in fee in *Thomas Lomax*, and decreed a specific performance of the agreement.

From this decree the defendants appealed to the Lord Chancellor.

Mr. Browne, *Mr. Weldon*, and *Mr. Clarke* for the defendants.

The first question is, whether there are not cross remainders between the sons; if there are, it is clear that a good title cannot be made. Another question will be, whether the title is so clearly good that the Court will compel a purchaser to take it.

As to the first, the question arises between tenants in tail, therefore there may be cross remainders by implication; the testator intended to prefer all his male to any of his female issue; the devise over to the daughters is only in case both his sons should die without issue, which implies, that if either of his sons left an issue male, he should have the estate. The case of *Holmes v. Meynell*, Raym. 452, was not so strong as this.

Secondly, This is not such a title as a purchaser can be compelled to take. An infant, the child of the testator's daughter, claims this estate, and he cannot be bound till he comes of age. It is sufficient if the case is far from being clear.

Mr. Attorney-General, *Mr. Fazakerley*, and *Mr. Floyer* for the plaintiff.

The testator has expressly given estates for life to his sons, and estates tail to his grandsons. The words, "if both sons die without issue male," cannot be construed to be words of limitation, but descriptive of the sons before mentioned, and cannot be construed so as to enlarge the estate of the father.

That this is the true construction appears from the words following:—"If such issue male should die before they have attained twenty-one, or had issue male of their bodies." In *Holmes v. Meynell*, there was the word "issue." In *Comber* [467] v. *Hill*, 2 Stra. 969, the Court shewed an inclination not to favour cross remainders.

It is said that if the question be only doubtful, the purchaser ought not to be com-

pelled to accept the title; but if the Court determines now that the purchaser need not complete his purchase, it will in effect determine that the estate shall never be sold.

July 18, 1738.—*Lord Chancellor*. The single question is, whether in this case I ought to compel the purchaser to proceed in his purchase, and accept a title depending upon many doubtful questions of law.

These questions depend upon the construction of the will, and the operation of the feoffment. The first question is, whether there is an estate-tail by implication in the sons.

It has been held that an implication should not enlarge an express estate, but in that case there was no other but an estate for life. Here the devise begins with words of inheritance, "them and their heirs." But if there be an estate tail in the sons, the next question will be, whether there are cross remainders to them by implication; for if there are, the feoffment will be no bar, the remainders being vested. There are some strong cases of such remainders between children, founded upon the supposed intent, and the word both is very material. But whether there be cross remainders or not, the next question will be, whether the remainders to the daughters are vested or contingent; for if vested, these are not barred by the feoffment. If the words had been, "if my sons shall die without issue," the remainder over would be vested, but the words "before twenty-one, and without issue," create the doubt: a Court of Law would be strongly inclined against construing these remainders to be contingent after an estate tail before given, for such a construction would put all the remainders in the power of the tenant for life.

It is not necessary for me to determine these points, I am inclined to think with his Honour upon the whole, that there are no cross remainders, but contrary to his opinion as to the last remainders being contingent, and consequently on the operation of the feoffment, but I give no opinion, because I think that in such a case as this, the Court ought not to compel a purchaser to accept a title depending upon such reasonable doubts.

If these had been only doubts which the Court could have cleared, or if the doubts had depended upon facts which [468] might have been ascertained, or if there had been long terms which might have protected the purchaser, I should not have thought it sufficient to have let him off, but as it is discretionary in the Court to decree specific performances, I think that this is a case in which it ought not to be done. The consequence is not that the estate will never be sold, but that it will not be sold for so much.

To the note of this case, Lord *Hardwicke* has added the following memorandum:—

As to the point of cross remainders, I was inclined to be of the same opinion with the *Master of the Rolls*, that there were none; but as to the question whether the feoffment had barred the remainders to *Elizabeth*, the testators daughter, and his grandson *Henry Appleton*, I inclined to think that the remainder was vested, and consequently not barred by the feoffment, but I did not give any absolute conclusive opinion upon those points of law, but thought them so doubtful that it being discretionary in the court whether to execute contracts specifically; it was unreasonable to compel the purchaser to proceed and pay his purchase money, when the title was liable to so much doubt on difficult and intricate points of law, which might admit of great variety of opinion.

The parties acquiesced in this opinion, and by consent of *Buck*, the purchaser, and *Marriott*, his trustee, and of the plaintiffs in the cross cause; the cross bill, as against *Buck* and *Marriott*, was dismissed without costs.

The decree is, his Lordship doth declare, that he is of opinion, that it is not reasonable on the circumstances of this cause, to compel the purchaser to complete his purchase, and by the consent of the defendant *Buck*, the purchaser, and the defendant *Marriott*, his trustee, and also by consent of the clerk in Court of *Holmden* and *Buck*, the plaintiffs in the cross cause, his Lordship doth order that the cross bill, as to defendants *Buck* and *Marriott*, be dismissed without costs, without prejudice to any proceedings to be had by any of the parties to these suits, either in these causes or by way of new bill for an execution of the trusts in the will of the said *Caleb Lomax*, and it is ordered that *Buck* take back the sum of £20 deposited by him with the Register. Reg. Lib. B. 1737, fol. 489.

(1) The statement of this case, and the arguments of counsel are taken from Lord *Hardwicke's* Note-book, the judgment from a manuscript report.

(2) And it seems now that though in the judgment of the Court, the better opinion is, that a title can be made, yet if there is [a considerable] a rational doubt, the Court has not attached so much credit to its own opinion as to compel a purchaser to take the title, but leaves the parties to law, per *Lord Eldon, Stapylton v. Scott*, 16 Ves. 274; and see *Shapland v. Smith*, 1 Bro. C. C. 75. *Denne v. Cooper*, 1 Ves. jun. 565. *Sheffield v. Lord Mulgrave*, 2 Ves. jun. 529. *Rose v. Calland*, 5 Ves. 188. *Lowes v. Lush*, 14 Ves. 547, and see *Biscoe v. Perkins*, 1 Ves. & Bea. 485.

[469] *Ex parte* LE COMPTE.(1)

August 1st, 1738. 1 Atk. 251.

C. in 1720, gave £300 for an annuity of £30 *per ann.* for her life, payable out of a persons estate, who becomes a bankrupt in 1738. Commissioners directed to settle the value of her life, and *C.* to be admitted a creditor for such valuation, and the arrears of her annuity, and not for the whole £300.

In the year 1720, the petitioner gave £300 for an annuity of £30 *per annum*, for her life, payable out of the estate of the person who is now a bankrupt, which he not being able to pay her by reason of the commission, she petitioned to be admitted a creditor for the whole £300.

Lord Chancellor ordered, that it be referred to the commissioners to settle the value of her life, and that she be admitted a creditor for such valuation, and the arrears of her annuity, it being unreasonable she should have the whole £300 when she had enjoyed the annuity eighteen years.(2)

(1) This case is taken from *Atkyns*. It does not appear in *Lord Hardwicke's* Notebook.

(2) *Ex parte Belton*, 1 Atk. 252. *Ex parte Artis*, 2 Ves. 490. *Perkins v. Kempland*, 2 Black. 1106. *Wyllie v. Wilkes*, Doug. 501. See *Fletcher v. Bathurst*, 7 Vin. 71, pl. 4. *Cotterel v. Hooke*, Doug. 93. *Ex parte James*, 5 Ves. 708. *Ex parte Whitehead*, 1 Meriv. Rep. 127. But by 6 Geo. 4, c. 16, s. 54, it is enacted, that any annuity creditor of any bankrupt by whatever assurance the same be secured, and whether there were or not any arrears of such annuity due at the bankruptcy, shall be entitled to prove for the value of such annuity, which value the commissioners shall ascertain, regard being had to the original price given for the said annuity, deducting therefrom such diminution in the value thereof as shall have been caused by the lapse of time since the grant thereof to the date of the commission, and see the 56th sect. of the same act, as to the proof of contingent debts.

[470] *PURSE v. SNABLIN*:—ROBERT PURSE, *Plaintiff*; (1) and ROBERT SNABLIN and ANN SNABLIN, now the Wife of CHARLES TOWNSEND, *Infants, Defendants*. ROBERT SNABLIN, an Infant, *Plaintiff*; and ROBERT PURSE, RICHARD WARD and ANNA MARIA his Wife, FAIRBEARD SWYNBURNE, and SUSANNAH his Wife, and ANN SNABLIN, the Infant, *Defendants*.

Appeal from the Rolls.

June 17th, and 12th October, 1738. 1 Atk. 414.

Robert Rowland, by his will, after stating that he intends to dispose of his estate, gives his real estate and two several legacies to his nephew, *Robert Snablin*, and then gives to his niece *Anna Maria Snablin*, £3000, also to his niece *Ann Snablin*, £5000 in the Old Annuity Stock of the South Sea Company; *Item*, To his niece *S. Swynburne*, £3000 in the New Annuity Stock of the South Sea Company; *Item*, To his cousin *Robert Purse*, £5000 in the Old Annuity Stock of the South Sea Company; and after other bequests, gives the residue of his real and personal estate to his nephew *Robert Snablin*, and appoints *Robert Purse*, his executor; at the times of making his will and of his death, the testator was possessed of only one sum of £5000 in the Old Annuity Stock of the South Sea Company; held that the two legacies of

£5000 in the Old South Sea Annuity Stock are not specific legacies in the strict sense of the term, but are separate and distinct legacies, to be made good out of the personal assets of the testator. (2)

Robert Rowland, on the 23rd of February 1734, made his will in the words following :—

[471] “ I *Robert Rowland* being weak in body, but of sound mind, do hereby make my will, and dispose of my estate in manner following, *viz.* first I give and devise to my nephew, *Robert Snablin*, and his heirs, all my freehold and copyhold estates, situate in the *Isle of Ely, Friday-street, London*, and in or near *Five Foot Lane*, in *Surry*. or any where else. And I give to my said nephew *Robert*, £2500 in the Bank Stock, and £1500 in the East India Stock.

Item, I give to my niece *Anna Maria Snablin*, £3000.

Item, I give to my niece *Ann Snablin*, £5000 in the Old Annuity Stock of the South Sea Company.

Item, I give to my niece *Susannah Swynburne*, £3000 in the New Annuity Stock of the South Sea Company.

Item, I give to my cousin *Robert Purse*, £5000 in the Old Annuity Stock of the South Sea Company.

Item, I give to my servants, *Joseph Ambrose* and *Sarah Spratley* £30 a-piece, and I give to Mr. *Wenham* and his wife, of *Ely*, £5 a-piece ; the rest and residue of my estate both real and personal, I give, devise, and bequeath to my [472] said nephew, *Robert Snablin*, his heirs, executors and administrators, and I make and appoint my said cousin *Robert Purse* full and sole executor of this my will.”

The testator died in the month of March 1734, and at the time of making his will and of his death was possessed of the sum of £5000 in the Old Annuity Stock of the South Sea Company and no more.

In Trinity Term 1735, *Robert Purse* filed a bill against *Robert Snablin* and *Ann Townsend*, then *Ann Snablin*, claiming his legacy of £5000 Old South Sea Annuities.

Ann Snablin by her answer also claimed her legacy of £5000 Old South Sea Annuities. *Robert Snablin* by his answer insisted, that only one sum of £5000 Old South Sea Annuities was payable, being the whole of what the testator was possessed of in that fund.

Robert Snablin also filed a cross bill for the direction of the Court as to these legacies.

A decree having been made at the *Rolls*, for the purpose of taking the necessary accounts ; the Master, reported that the personal estate of the testator was sufficient to pay all the specific and other legacies.

These causes coming on again upon the Master's report, his Honour, on the 22nd of December 1737, delivered his judgment as follows.

The single question in this case is, whether two sums of £5000 are devised. How would this be in a devise of lands at common law, for some argument may be drawn from laws by parity of reason, although they do not actually govern the case. It is said *arguendo* in *Plowden, Paramore v. Yardley*, that where the same lands are devised in two persons, the last devise is a revocation of the first ; but that is not law, for in *Cro. El. 9*, and *Yelv. 209*, it is said that they are joint tenants, and so I take it that they are, and not tenants in common, for the intent is that they should both take the whole.

The intent is the same in lands and in personalty. Where the same thing is given in two clauses, it is the same thing as if it had been given in one, for a will is an instantaneous act.

But the case before us is to be judged by the Ecclesiastical law which governs in legacies, and which is a compound of the civil and canon law under the allowance of the common law, for it binds not, either as civil or as canon law.

We need not, I think, go any further than *Swinburne*, who is a very good authority to determine this point. See [473] *Swinb. 4th ed. 454* ; *Domat, Dr. Strahan's ed. 191*, and the cases there cited.

It is objected that the testator does not say my South Sea Annuities, but joining the subject matter, he says the same thing. In the preamble of the will he says, I devise my estate in manner following, and the words, I give, necessarily imply something which he had to give, and in all the other devises it turns out to be so.

As to its being to be made good out of the residuum ; *Swinb. 137*, is in point for the defendant.

Perhaps at the time he made his will, he intended to purchase more stock ; and if he

had done it, it would have been good for both, but as he has not done it, the consequence is, that he either altered or did not complete his intention. I admit, that upon the face of the will a supposition arises that he had stock to satisfy both devises, but the fact being otherwise controuls that supposition. It is a strange notion to suppose a legacy partly specific, and partly pecuniary. If the testator thought that he had two sums of £5000 South Sea Annuities, and in fact had but one, it is plain from *Swinburne*, that one only passes; and can any one conceive that he would have devised as he has done in this case, if he had known that he had but one, and did not intend to purchase more?

In *Ashton v. Ashton*, Lord Talbot, went upon the nature of the legacy which he held to be clearly specific.

In *Partridge v. Partridge*, the question was whether a sale of the stock was an ademption of the legacy, and the legacy was held not to be specific, for this reason; because it was impossible to take a specific £1000 out of a mass of £1600, and Lord Talbot said that there were some things so specific that they can be satisfied by nothing else; but stocks though specific, are not so, and accordingly decreed it no ademption.

In all other parts of the will he has given nothing but what he had. He must be considered as having done so in this, and all the authorities agree that the legatees must divide it between them.

His Honour decreed that but one £5000 old South Sea Annuities passed by the will, and that the £5000 old South Sea Annuities, which the testator had at the time of his death, and the interest grown due since his death must be divided between *Robert Purse* and *Ann Snablin*, and directed the necessary transfers.

[474] From this part of the decree, *Robert Purse* and *Ann Snablin*, now the wife of *Charles Townsend*, jointly appealed, claiming to have £5000 old South Sea Annuities, each made good to them out of the testator's personal estate.

Mr. Attorney-General, Mr. Fazakerley, and Mr. Clarke for the appellants.

There are two questions,

First, What the testator's intention really was?

Secondly, Whether that intention can take effect?

The intention is clear that each legatee should have £5000! Each bequest begins with the introductory word, Item. It is the same as if he had said, I give to each of them, *Ann Snablin* and *Robert Purse* £5000 old South Sea Annuities. But it is said that this intention, however plain, cannot take effect, because the testator was not possessed of that which he affects to give. But he does not pretend that he was possessed of it; he does not give my South Sea Stock, but £5000 South Sea Stock generally. A legacy of £5000 in money is good, although the testator does not leave one shilling in specie. Lands pass by a will, but a will of personal estate is only a direction to the executor in what manner to dispose of the personal estate, the whole of which is vested in him. Here he has directed him to transfer £5000 South Sea Annuities to each of the legatees. Testators frequently give rings, and the executor is bound to procure them.

If the testator had had no stock at all, there would have been no question. The testator might have intended to purchase more stock in his lifetime, why may not the executor do it for him? A devise of quantity is never held to be specific, *Swinb.* part 3, sect. 5, because the executor may go to the market and buy it.

So it is of things consisting in number, although some part be extant amongst the testator's goods, *Swinb.* part 7, sect. 10.

Mr. Idle and Mr. Wilbraham for *Townsend* and his wife, late *Ann Snablin*.

The two legatees cannot be joint tenants of the £5000 South Sea Stock, of which the testator was possessed, because the legacy is not specific; and the only case in which two legatees are considered as joint tenants is where the thing given is single and specific; and where there cannot be two of the same kind, *Cro. El.* 9, *Yelv.* 209, *Cro. Jac.* 290. If a testator having two daughters gives £500 in jewels to [475] one, and £500 in jewels to the other, and has only £500 worth of jewels, must not jewels be purchased for the other?

Mr. Browne, Mr. Hamilton, Mr. Waller and Mr. Murray for the defendant *Robert Snablin*.

It is clear that the testator intended to give the particular stock which he had and no more, and that these legacies are specific. He begins his will by declaring his intention to dispose of his estate not to give any thing which he had not. It is said that he

does not use the words *my stock*, but the word *my* is not used in any of the other bequests of stock.

If the estate had been deficient to pay all the legacies, could the pecuniary legatees have insisted upon this £5000 stock being applied to pay them ; but if the first bequest to *Ann Snablin* is specific, the other to *Robert Purse* must be so too, for they are in the same words. If the assets should not extend to pay both, which is to keep the specific thing, and which to abate ? Money in stock is only a particular sum, lent upon a particular security, it is like a bequest of money in a particular place. If the testator intended to confer a benefit to a particular amount, and not to give a specific part of his property vested in a particular stock, why should he wish the money given to be invested in stock, which is of so fluctuating a value, and which not being settled, the legatee might immediately reconvert into money. If the testator had no South Sea stock, the case would have been different, because there would be no room to suppose that the testator had made a mistake. The cases in *Swinburne* are of things consisting only of quantity without any expression pointing out any thing specific. In *Ashton v. Ashton*, 22 Nov. 1735, the testator gave £6000 South Sea Annuities to his executor, in trust that he should sell and dispose of the same, as soon as might be after his decease.

The testator had only £5350, and it was held that the sum should not be made up by the executor ; the *Lord Chancellor* saying that it was plainly the testator's intention to give only the stock which he had.

In *Partridge v. Partridge*, 27th November 1736, Lord *Talbot* declared that there was a difference between the cases where the testator had, and where he had not the thing given, that in the latter case the executor must purchase.

Oct. 28, 1738.—*Lord Chancellor*. The general question upon this appeal is whether the two legacies of £5000 in the old South [476] Sea Annuities, the one given to the testator's niece, *Ann Snablin*, and the other to his cousin, *Robert Purse*, are to be considered as gifts of the same sum or quantity of £5000 in South Sea Annuities, or of different sums or quantities in that fund.

If they are to be taken as gifts of the same sum or quantity of South Sea Annuities, then it has not been disputed at the bar on either side, but that the consequential direction given by the decree which has been made at the *Rolls*, for dividing that sum equally between the plaintiff *Purse*, and the defendant *Ann Snablin* is right ; but if these two legacies are to be taken as distinct gifts of two several sums or quantities of £5000 in old South Sea Annuities, then the foundation of this decree totally fails.

In order to determine this question, the first and principal thing to be taken into consideration is the *intention of the testator* expressed in his will.

And of this I can conceive no doubt. He has declared his mind in plain words, "that he gives £5000 in the old Annuity Stock of the South Sea Company to the one, and afterwards that he gives £5000 in the old Annuity Stock of the South Sea Company to the other."

Did the testator intend to give that entire sum to *Ann Snablin* the first legatee when he wrote or dictated that clause which stands prior in his will ? I believe this will not be denied. How *then* can it be disputed whether when he wrote or dictated the second clause he did not mean the same thing by the very same words ?

To avoid the force of this, two different ways of arguing have been used on the side of the residuary legatee which happen to be inconsistent with each other.

The first was, that the testator being possessed of no more than £5000 old South Sea Annuities, intended only to dispose of what he had, and either mistook the quantity he was possessed of, or else had forgot that he had given it away by the former clause ; but when a man has expressed himself in his will in plain words *mistake* or *ignorance* of the nature of his estate, or of the circumstances of his affairs, is never to be presumed, if by any construction a reasonable consistent meaning can be found out.

Here the difference is so great between the quantity whereof he was possessed, and what is given, that it is highly improbable, nay almost impossible, that a man whose circumstances lay in so narrow a compass as the testators [477] appear to have done, could be so widely mistaken. Indeed, if a man devises certain lands by a particular description, or gives any other particular specific thing as his own, which he hath not, that is clearly a mistake, or perhaps a mark of insanity, or that he designed to amuse, or put a jest upon the legatee ; as it is said in the digest, *magis derisorium est quam utile legatum. Dig. De le gatiset fidei commissis, Lib. 1, leg. 71.* But this is never said but from necessity, and where there is no possibility of avoiding it.

As the testator is not to be charged with *mistake* or *ignorance* of his circumstances, neither shall he with *forgetfulness* of himself or his own acts, unless from the necessity of the case. Thus when he gives the same land by name, or the same individual chattel twice over in his will, it is difficult to account for it but from *forgetfulness*; but no case, authority, or opinion has been produced where that has been held upon a legacy consisting in quantity or number only. But if in any such case that might be admitted, yet to do it here would be the greatest strain that ever was made. The latter legacy follows so close upon the heels of the former, scarce two lines of the will intervening, that there is hardly room for a possibility of his forgetting the first. A man of *understanding* and *memory* sufficient to make a testament, as this person must be allowed to be by his will being proved, cannot be presumed so soon to have forgot it.

The other answer offered was that the testator *intended* by the second clause to give the very same £5000 South Sea Annuities to *Robert Purse*, which by the first he had given to *Ann Snablin*, in order to make them joint tenants, that the one might take one moiety, and the other the other moiety.

This (as I said before) is inconsistent with the other way of accounting for it, for *mistake* of the quantity, or *forgetfulness* of the former bequest, do *both* of them exclude any actual intention to divide the same sum of £5000 South Sea Annuities between them; the supposition of such an intention makes him know what he was doing, and yet makes him guilty of the greatest absurdity of all.

Would any man who had just before given the whole sum to one person, and then immediately change his mind so as to intend to give one-half of it to another person, have expressed that by giving the whole to the last? It is next to an impossibility that he should; he would either have varied [478] the first clause, or else had his will transcribed over again, or else have said, my will is, that *Robert Purse* shall have one-half of the £5000 old South Sea Annuities, which I have before given to *Ann Snablin*, or have used some expression to that effect.

This is one of those things which are so obvious that the fact, and the natural turn and operation of any man's mind speak it plainer than any argument or comment can do.

After having said thus much, I shall take it clearly to have been the testator's intention to give the full quantity of £5000 old South Sea Annuities to *Robert Purse*, and then the next consideration will be, whether, upon the words of this bequest such intention can have effect.

Now there can be no rule or principle more certain in the construction of wills that such exposition ought to be made, as that every clause, nay, every word contained in them shall have effect and be fulfilled if that can be attained consistently with the rules of law.

Let it be enquired then what rule of law stands in the way in the present case.

Nothing can be more free and unrestrained than that power which a man has to dispose of his personal estate; it is larger than that which the law of *England* gives him over his real estate; for as it enures not as a grant or conveyance of the thing, but as a direction to the executor how to administer his effects after his death, he may give even that which he is not possessed of at the time of making his will, and dispose of it in what shape he pleases.

But to this it is objected, that both at the time of making his will, and at the time of his death he had no more than £5000 old Annuity Stock, and the will must be understood relatively to what he had at the one period or the other, and therefore both the legatees can only have that sum divided between them.

It was observed in the argument of this case that the testator has not in either clause described the Annuities by the word *my* or any other word denoting either a property or possession of those Annuities in himself, and therefore did not intend so to confine it, and though this observation was treated as being of little weight, and certainly in many cases is too slight to deserve any stress, yet as this case is circumstanced, it may be considerable.

The civil law lays great stress on the use or omission of this word in legacies, *Dig. de legatis et fidei commissis, lib. 3, [479] l. 71. De verbo suum; cum suæ ancillæ sive servi in testamento scribuntur, his designari videntur quos Paterfamilias suorum numero habuit. Eadem in omnibus rebus quas suas quis legaverit dicenda sunt.*

This is followed by other texts to the same purpose, and so is *Domat Eng. Tr. vol. 2, p. 159.*

Not that the use of this or that particular word is necessary, for if by any description, intimation, or hint in the will, it appears that the testator intended to give only out of the particular fund or quantity whereof he was or should be possessed at his death, that may confine it; but where nothing of that sort appears, but his words are express, that the legatee shall have the goods bequeathed, it may take effect as an injunction to his executor to purchase or procure those goods for the legatee, at least so far as they are not found among his assets, which is a *proper will*, because it is a direction in what manner he would have his personal estate administered and applied after his death.

It was said indeed by the counsel for the residuary legatee, that this will is penned in as strict a manner as if it had been said *my old Annuities*, but it is introduced with the words *I dispose of my estate*; but that does not by any means amount to the same as describing *the thing* particularly given by the word *my*; because whether the legacy is to take effect out of the specific *goods* whereof the testator is possessed, or by purchase of the executor out of his assets at large, it is equally, both in reason and propriety of speech, a *disposition* of his estate.

The consequences from hence is, that these legacies to *Ann Snablin* and *Robert Purse* may very consistently with the rules of law take effect as directions to the executor to purchase so much old South Sea Annuities, in order to perform them, so far as the quantity he had was deficient.

For this there are many authorities in the books of civil law, which in cases of mere personal legacies, as this is, so far as that law has been received and allowed in *England* must be the rule, *Swinb. part 7, sect. 24*, the last in the book, has these words; where the legacy is *general*, or *consisteth in quantity*, as when the testator doth bequeath a horse or an ox, not this horse or that ox, or when he bequeaths certain quarters of wheat or other grain, not this or that grain lying in such a barn or garner, this kind of legacy cannot perish, though all the testators cattle do [480] perish, and all his corn be consumed, and therefore the legatary may recover his legacy.

This passage seems to suppose that testator once had the thing bequeathed, but in another place, he in terms excludes that; *part 3, sect. 6, page 179 of the last edition*; he says, concerning goods, if the testator do bequeath any such thing in general terms, as a horse or an ox, although he has neither horse nor ox *at the time of his testament made, neither yet at the time of his death*, the legacy is not therefore void, but the executor is bound to deliver a horse or an ox.

In sect. 5 of the same part, p. 173, he puts a much stronger case than any of these where the same point of law is affirmed.

He says not only that thing may be devised or bequeathed by the testator which is truly extant, or hath an apparent being at the time of making the will, or the death of the testator, but that thing also which is not in *rerum natura* whilst the testator liveth; therefore it is lawful for the testator to bequeath the corn which shall be sown, or grow in such a soil after his death, or the lambs which shall come of his flock of sheep the next year, depasturing in such a field; but if there shall be no such corn growing in that soil, nor any lambs arising out of that flock, then the legacy is of no effect, because no such thing at all is extant as was bequeathed; but if the testator devise a certain quantity of grain, or number of lambs, as for the purpose, twenty quarters of corn, or twenty lambs, and doth will and devise that the same shall be paid out of the corn which shall grow in such a field, or arise out of his sheep depasturing in such a ground, *though not so much or no corn there grew, or not any or not so many lambs there arise*; yet nevertheless the executor is compelled by law to pay the whole legacies entirely, because the mention of the soil and of the flock was rather by way of demonstration than by way of condition; rather shewing how or by what means the legacy might be paid, than whether it should be paid at all. With these opinions agrees, *Domat. vol. 2, lib. 4, of Legacies, tit. 2, sect. 3, No. 18, 19, and 21*.

The whole of this is grounded upon express texts in the civil law relating to legacies consisting of quantity or number, many of which are put in the Digest, lib. 33, tit. 6, *De Tritico, Vino, vel Oleo legatis leg. 3. Si cui vinum sit lega[481]-tum centum amphorarum, cum nullum vinum (testator) reliquisset: vinum hæredem empturum et præstaturum*.

Domat in observing upon this text, says, if the legacy were of a certain quantity of corn without determining whence it should be taken, the quantity would be due although there were no corn in the inheritance, in the same manner as a legacy of

a sum of money which would be equally due whether there were any money in the succession or not.

To the same purpose, *Mysingerus* in his *Apotelesma* or *Scholia* upon *Justinian's Institutes*, Lib. 2, tit. 20. *De legatis, sect. Si Generaliter. Venio ad legatum tertii generis earum scilicet rerum quæ numero pondere mensurave limitantur. Et si quidem tale legatum sit, puta aliquod pondus olei, aut olei boni, non adjecta qualitate prosus specificata, hoc est optimi; tunc hæredis est electio non legatarii.*—Et valet ejusmodi legatum, etsi nihil earum rerum testator reliquerit, teneturque hæres aliunde emere et legatario offerre—Communicabilis enim qualitas, quæ in hujusmodi rebus est, tale legatum conservat. *Nisi forte testator de rebus propriis senserit, ut qui dixerit, Vini mei amphoras decem, vel frumenti MEI viginti corbes Titio do, lego. Tum enim non alia vel vina vel frumenta debentur, quam quæ in defuncti patrimonio reperiuntur.*

Here by the way you may observe that great stress is laid on the distinction between the testator's leaving or bequeathing the *quantity* generally, and his restraining it to, and describing it as being *his own* by the word *my*.

But what I chiefly cite this author for is that he lays down the reason of the determinations upon legacies of this kind with peculiar clearness. That the communicableness of things of this nature, whereby he means their being vendible and the subject of traffic and generally to be had at a market price, supports such legacies.

Why may not the same rules hold as to stocks? They are indeed a new kind of property introduced amongst us in the last age, but then men's wills and instruments are always to be construed according to the condition and circumstances of times and things, under which they are made; and stocks are as changeable and fluctuating; one parcel of stock as like and as equal to another; they are as much the subject of traffic, and as easy to be bought at market by an executor to enable him to perform the will, as any [482] of the *species* mentioned in the books, which I have cited.

Indeed if the surplus of the estate over and above the particular legacies would not have held out to purchase sufficient to make up these legacies, that might have been a strong objection. But the case is entirely delivered from this difficulty by the *Master's report*, which expressly certifies that the *personal estate left by the testator at his death was more than sufficient to make good all the specific and other legacies given by his will*.

If that be so surely all his legacies ought to be satisfied. Suppose the testator had given £5000 in money to *Robert Purse*, and had died possessed of no ready money, but had left sufficient in South Sea Annuities to answer it, the South Sea Annuities must undoubtedly have been turned into money to make good that pecuniary legacy; and let any man shew me a substantial reason why in like manner his money or other assets should not be turned into South Sea Annuities to make good these legacies of annuities.

Another objection, and that principally relied on, was, that the bequest to *Robert Purse* is a *specific legacy*; and therefore, if the thing given be not found amongst the assets the legacy fails.

In order to examine this objection to the bottom, it is necessary to consider and settle the notion of a *specific legacy*.

Now it seems to me that there are two kinds of testamentary gifts that pass with us under the name of *specific legacies*.

The first of a particular individual chattel or thing specially described and distinguished from all others of the same kind: as, *my grey horse*, *my signet with arms*, &c.

The other is, when some goods of a particular *kind* or *species* are given which the executor may pay or satisfy by delivering the like quantity or value of that *kind* or *species* to the legatee, as a horse, or an ox, such a quantity of wheat, or such a number of sheep, &c.

The first of these is what is *strictly* and most commonly meant by the term *specific legacy*, though perhaps that term considered *critically* and according to the *original force* of the words may not be very correct, for it is more properly an *individual legacy*; this is confessed by *Mysingerus*, in the book and section already mentioned which is cited by Mr. *Swinburne* in his *Margin*.; but I [483] consulted the original book and the words are:—*Species jurisconsultis est quod Individuum Dialectici appellant, ut Davus, Bucephalus*.

The lawyers call that a *species* which logicians call an *Individuum*, and the like

observation is made by *Vinnius*, in his commentary on the same text of the Institutions, lib. 2, *De legatis* tit. 20, sect. *Si generaliter* :

It must be admitted that if *such a gift* be made, and the thing be not to be found, the legacy fails ; or if it be given in one part of the will to *A.* and in another to *B.* they must take it between them, unless the latter clause imports a revocation of the former ; for it was truly said, that those cases of construing the two legatees to be *joint tenants* are where the thing given is individual and single ; and there cannot be two of them. In these cases also if the *thing* be disposed of by the testator or perish in his lifetime, it is an ademption of the legacy, and the executor is not bound to supply it.

To affirm that this gift of £5000 in Old South Sea Annuity Stock to *Robert Purse* is a *specific legacy* in this sense is merely to beg the question, and take the matter in dispute for granted ; for it is the same thing as to say that it is a legacy of the individual sum of £5000 Old South Sea Annuities whereof the testator was possessed which is the very point to be proved. In order to determine that, you must first settle what is the true construction of the words of the will, and what was the intention of the testator, out of all which it must result, whether it be a *specific legacy* in this sense or not. But to set out with saying that it is a *specific legacy* is beginning at the wrong end. It is to begin with the conclusion without establishing the premises from whence that conclusion is to be inferred.

But by what I have already said upon the penning of this will and the apparent intention of the testator, I think I have shewn that this gift is not confined to the same individual sum of Old South Sea Annuities whereof the testator was possessed and consequently that it cannot be a *specific legacy* in this first sense of the *term*.

The other sort of *specific legacy* which I mentioned, is when goods of a particular kind or species are given which the executor may pay or satisfy by delivering the like quantity or value of that *kind* or *species* to the legatee, as [484] a horse, or an ox, such a quantity of wheat, or such a number of sheep, &c.

Now so far as a legacy thus described is a *specific legacy*, the bequest now in question is certainly such, but this is of a more liberal and loose nature, and not confined to this or that individual thing ; in short it is a legacy consisting in quantity, measure, or value only, and has not the qualities or consequences which belong to the other sort of legacies, of particular individual things.

If it had been a legacy of a particular individual thing, and the testator never had, either in property or possession any such thing, the legacy had been void ; or in case he had it, and after making his will had sold it, and bought another of the like kind this had been an ademption of the legacy ; and that so bought afterwards would not have passed unless there had been something particular indicating his intention for that purpose.

But neither of these consequences will hold as to stocks, as has been determined ; and for this purpose the case of *Partridge v. Partridge*, decreed by my Lord *Talbot*, 27th Nov. 1736, is an authority in point.

In that case the testator by his will gave £1000 capital South Sea Stock to his wife for her life with power to dispose of it amongst such of his children as she should think fit. At the time of making his will, he had £1800 capital stock of which he afterwards sold £1600 which reduced it to £200 ; and afterwards he purchased as much more as made it up £1600 ; the testator died in July 1733 ; but in the June before the act of Parliament for investing three fourths of the capital stock of the South Sea Company into Annuities took place.

The questions were two :—

1st. Whether the act of Parliament should operate to make an ademption, *pro tanto*, but that created no difficulty, because being no personal act of the testator it imported no intention. The second was, whether the sale by the testator himself of £1600 stock, part of the £1800 did not amount to an ademption, *pro tanto*.

After argument, my Lord *Talbot* was of opinion that this also was no ademption, and according to a report which I have seen of this case, he said, that it was not the particular stock whereof he was then possessed, which the testator gave, but the devise was descriptive of the nature or kind of the thing he gave.

[485] *That if a man being possessed of stock bequeaths it, and afterwards sells out part and dies without purchasing any more stock, this might be looked upon as an ademption, pro tanto ; but if at the time of the will made the testator had no such stock this would be a direction to his executors to purchase so much stock for the legatee.*

In consequence of this declaration he decreed the £1000 South Sea Stock to be made good to the legatee.

The latter part of this opinion is an authority in point, that if in the case now in judgment, the testator had had no Old South Sea Annuities at all, the executor would have been obliged, out of the gross of the estate, to purchase a sufficient quantity, and transfer them to the legatee, that if instead of giving him £5000 Old South Sea Annuities he had given him £5000 in South Sea Stock or in any other stock of which he had not one shilling, the executor must in like manner, have purchased it for the legatee, all this was admitted in arguing this case at the bar; and for my own part I cannot see a shadow of difference in reason, between the two cases, supposing the objections of *mistake* and *forgetfulness* are already answered.

I come now to consider some particular objections, which were made on the part of the residuary legatee, *viz.*

That it appears by the Master's report, that in other legacies of stock, the testator has given sums exactly equal to what he was possessed of, and from thence it was inferred, that he intended in this instance to give only the £5000 old annuities which he had.

But I think this rather turns the other way, for it shews he was perfectly conversant of the circumstances of his estate, and that he who was so exact as to his other stocks was not likely to mistake so widely in this. It is indeed possible that he might intend to purchase a further quantity of South Sea Annuities in his lifetime, but as this is only conjecture, I do not think that his not having done it will defeat his intention, and make his will vain.

It was also objected, that one of the bequests of £5000, in South Sea Annuities, is a specific legacy, and it is uncertain which shall have that benefit, and that it is absurd that the same words shall in one instance make a specific legacy and in another a general one.

But I am of opinion that the foundation of this objection fails, and that neither of these legacies are *specific* in the strict sense of the *term*, which I first stated to you. When the [486] testator gave away £10,000 in old South Sea Annuities to two different persons, in sums of £5000 a-piece to each, I can see no reason to think that he had in view, or intended to restrain one of those sums to the individual stock which he had more than the other; thus much indeed may fairly be presumed, that he intended so much of that fund as he should die possessed of should immediately upon his death be applied in satisfaction thereof as far as it would go; but there doth not appear to me any more ground to say that he intended his own £5000 Old Annuities for one of them, preferably to the other, in the present case, than there would have been if he had given in one and the same clause £10,000 Old South Sea Annuities, to be equally divided between them. Suppose the testator had given £5000 in money to *Ann Snablin*, and afterwards £5000 in money to *Robert Purse*, and had left only £5000 in ready money at his death, it could not have been pretended that one of the legatees should have had that individual sum of money rather than the other, though the executor in administering the assets ought to have applied the ready money in payment of the legacies, before he had sold any profitable part of the estate for that purpose. Thus I think it will be in the case of any other legacy consisting in quantity or number, where not the whole but only part of the quantity or number is found amongst the assets; and therefore I apprehend that the executor ought to apply so much Old South Sea Annuities as the testator left at his death, in part of satisfaction of these legacies, in equal proportion.

Another objection was, that the testator giving £5000 in the *Old Annuity Stock of the South Sea Company*, was like a man giving a sum of money lying in such a chest, or due from a certain person, that therefore it is *demonstratio loci* annexed to the body or substance of the legacy, and if the testator did not leave it, then the legacy fails, according to the distinction of the civilians already taken notice of.

But that distinction is here misapplied, for the words of the will, in the *Old Annuity Stock of the South Sea Company*, are no *demonstration of place*, but make the description of the thing given. Old South Sea Annuities are a peculiar *species* of property, and can be no where else but in the South Sea Company, but £5000 in those Annuities is no *individual* of that *species*.

It was objected further, that no particular reason appeared, or could be suggested, why the testator should give [487] a legacy of £5000 South Sea Annuities to *Robert Purse*, and intend that they should be purchased for him. No purpose could be answered by it which would not have been answered as well by giving him so much money, and

as no trust was *created*, it would be in his power to sell the Annuities as soon as bought, and turn them into money. That this differed it from cases of legacies of provisions, or jewels, or cattle, where some particular use or convenience might be served.

Admitting all these observations to be true, yet I think they create no objection, for it is not necessary in construing bequests to be able to account for the testator's reasons in making them; but if a conjecture is to be made, I take his intention to have been (what was mentioned by Mr. *Clarke* at the bar) to make his niece, *Ann Snablin*, and his cousin, *Robert Purse*, exactly equal, for as he had given £5000 Old South Sea Annuities to the former, there was no other way of attaining an exact equality between them but by giving the like quantity of the same fund to the latter. No particular sum of money would have done it, by reason of the uncertainty what might have been the value of the Annuities at his death; but one sum of £5000 Old South Sea Annuities will always be equal to another sum of £5000 Old South Sea Annuities at the same point of time.

There is one objection still behind, and that I suspect of the greatest weight with the parties, that if the construction I have made prevails, there will be little or no surplus left for the residuary legatee.

This is a fact which doth not judicially appear to me, for the Master reports the estate to be *more* than sufficient to answer all the legacies; but if this fact had appeared, it had been of no force, for in the exposition of wills with us, *particular legatees* are always preferred to the residuary legatee, though that might be otherwise in the Roman law, where the *hæres institutus* was considered in some measure as our law doth an heir by descent, as sitting in the place of his ancestor; but generally speaking, in wills here in *England* residuary bequests are intended only as *sweeping gleaming* clauses, to take up anything that may have been omitted out of the special dispositions, and the will now in question carries the strongest indication of such an intention that possibly can be, for the testator has given all his real estate by name to his residuary legatee, and has also given him large personal legacies of £2500 Bank Stock, and £1500 East India Stock, which looks as if he intended to specify [488] the provision he designed him, and not leave it to pass by the residuary bequest. Upon the whole, therefore, my opinion is, that these two bequests of £5000, in the Old Annuity Stock of the South Sea Company, ought to be considered as distinct legacies of different sums or quantities of those Annuities, and that the defendant *Ann Snablin*, and the plaintiff *Robert Purse*, are each of them entitled to have the £5000 of the capital of that fund made good to them out of the testator's assets.

But before I conclude, it is proper to add one thing by way of caution, lest the consequence of this opinion should be carried further than it will bear. I do not intend, neither have I, in any part of what I have said, laid it down as an invariable rule, that in all cases of bequests of stock, they are to be considered as general legacies of quantities or sums, in like manner as pecuniary legacies and other gifts of that nature are. No; it must be always understood that they are to be considered and judged by the particular penning of the will, and the circumstances of the several cases; therefore, if there be any thing shewing or pointing out that the testator intended to confine his gift to such stock as he had, or should have at the time of his death, it will be so confined, and such circumstances will turn the scale the other way that the testator's intention may be complied with. For this reason, I perfectly agree with the resolution in the case of *Ashton v. Ashton*, which was decreed by Lord *Talbot*, 24th November 1735. The testator gave to trustees the sum of £6000 South Sea Annuity Stock, on trust that they should sell and dispose of the same as soon as might be after his decease, and apply the money in purchasing lands, to be settled according to the directions of his will; at the time of making his will the testator had but £5350 South Sea Annuities, and it was adjudged that it must be taken as it was, and should not be made up. And certainly upon the strongest reason in the world, for here was a plain intention to give only what he was possessed of, and the difference between the round sum of £6000 stock, mentioned in his will, and the broken sum which in fact he had, was such a misapprehension or mistake as a man might naturally fall into; besides, the trust was to sell or dispose of it as soon as might be after his decease, and it would have been highly absurd to suppose that the testator intended to direct his executor to lay out his money in buying stock, in order to sell again, and turn it into money again immediately.

Thus much I thought it necessary to say, in order to pre-[489]-vent too large and general inferences being drawn from this determination.

The consequences of the whole is, that so much of the decree as relates to the two legacies of £5000, in Old South Sea Annuities, must be reversed, and a new direction given.

I declare that the said defendant, *Ann Snablin*, now the wife of *Charles Townsend*, and the plaintiff, *Robert Purse*, are each of them entitled by virtue of the testator's will to have £5000 Old South Sea Annuities made good to them out of the testator's personal estate, and that the £5000 Old South Sea Annuities whereof he died possessed ought, in the first place, to be applied proportionally toward the satisfaction thereof. And therefore I decree, that the plaintiff *Robert Purse* do transfer one moiety of the said £5000 Old South Sea Annuities whereof the testator died possessed, and pay one moiety of the dividends grown due thereupon since the testator's death to the said *Charles Townsend*, and *Ann* his wife, and that the said *Robert Purse* do retain the other moiety of the said £5000 Old South Sea Annuities, and the other moiety of the said dividends to his own use. And I further order that the defendant *Robert Purse* do, with the approbation of the Master, lay out a sufficient part of the said testator's personal estate in purchase of £5000 Old South Sea Annuities, and that one moiety of the Annuities to be purchased be transferred to the said *Charles Townsend*, and *Ann* his wife, and the other moiety thereof to the defendant *Robert Purse*, and let the Master compute how much the dividends of £5000 Old South Sea Annuities from the end of one year after the testator's death would have amounted unto, and let one moiety of the amount of such dividend be paid by the said *Robert Purse* to the said *Charles Townsend*, and *Ann* his wife, and the other moiety thereof be retained by the said *Robert Purse* out of the testator's personal estate.

The rest of the order on the Master's report must stand. (The decree of the *Master of the Rolls* is found in the Register's Book. The reversal of that decree is not to be found in the Register, but in some subsequent orders, grounded upon that reversal, in the same cause, the recital of the *Lord Chancellor's* decree is to be found, which corresponds with the decree here stated.

(1) The statement of this case, and the arguments of counsel, are taken from the papers in the cause, and *Lord Hardwicke's* Note-book; the judgment of the *Master of the Rolls* from a manuscript report, and that of *Lord Hardwicke* from a manuscript in his lordship's handwriting.

(2) The Court leans against considering legacies specific because of the consequences, per *Lord Hardwicke*, *Ellis v. Walker*, Amb. 310. *Chaworth v. Beech*, 4 Ves. 565, sometimes pressing hard upon the specific legatee, who finds nothing to answer the description, sometimes upon other legatees in case of a deficiency; unless the intention to make them specific be clearly expressed; as where the sum of £6000 South Sea Stock was given to trustees to sell and apply the money arising therefrom in the purchase of lands to be settled according to the directions of the will; *Ashton v. Ashton*, Cases Temp. Talb. 152; S. C. 3 P. Wms. 384. [Sir Wm. Grant is reported to have said that *Ashton v. Ashton* had been overruled by modern decisions, *Wilson v. Brownsmith*, 9 Ves. 180, but it seems there is no decision which has overruled that case, and it has been supported by *Lord Hardwicke* in the present case, who said it would be highly absurd to suppose that the testator intended to direct his executor to lay out his money in buying stock in order to sell again and turn it again into money immediately; and it has been supported in *Simmons v. Vallance*, 4 Bro. C. C. 345.] Or where there is a devise of lands to trustees to sell for a given sum, and to divide the sum arising from the sale, amongst different legatees, *Page v. Leapingwell*, 18 Ves. 463; or where there is a bequest of £2000 the balance due to the testator from his partner, if the testator did not draw it out of trade before he died, *Ellis v. Walker*, Amb. 309, and see *Cooper v. Martin*, ante, p. 442. Or where there is a bequest of a debt or a security, *Lord Castleton v. Fanshaw*, 1 Eq. Ca. Ab. 298, pl. 2. *Drinkwater v. Falconer*, 2 Ves. 623. *Ashburner v. Macquire*, 2 Bro. C. C. 108. *Chaworth v. Beech*, 4 Ves. 555. *Innes v. Johnson*, ib. 568; but the gift of a sum due on a given security, or in a particular fund, is a general legacy called a demonstrative legacy, as merely pointing out the fund out of which it is to be paid, *Savile v. Blacket*, 1 P. Wms. 777. *Attorney-General v. Parkin*, Amb. 566, which though considered as a slender distinction by *Lord Thurlow* in *Ashburner v. Macquire*, 2 Bro. C. C. 111, has been sanctioned by subsequent decisions, *Roberts v. Pocock*, 4 Ves. 150. *Kirby v. Potter*, ib. 748. *Wilson v. Brownsmith*, 9 Ves. 180, and see *Gillaume v. Adderley*, 15 Ves. 384. *Smith v. Fitzgerald*, 3 Ves. & Bea. 2. *Mann v. Copland*, 2 Madd. Rep.

223. *Fowler v. Willoughby*, 2 Sim. & Stu. Rep. 355. A legacy of £2000 4 per cent. Bank Annuities is not specific, *Wilson v. Brownsmith*, 9 Ves. 180. *Webster v. Hale*, 8 Ves. 410. But a legacy of "my stock," "in my stock," or "part of my stock," or of "stock standing in my name," is a specific legacy, *Ashburner v. Macquire*, 2 Bro. C. C. 108. *Kirby v. Potter*, D. Lord Alvanley, 4 Ves. 748. *Barton v. Cooke*, 5 Ves. 461. *Evans v. Tripp*, 6 Madd. 91; though a legacy of £1000 out of my Reduced Bank Annuities 3 per cent. within one month after my decease, *Kirby v. Potter*, 4 Ves. 478; and a legacy of all my stocks, which I may be possessed of at the time of my decease, *Parrott v. Worsfold*, 1 Jac. & Walk. Rep. 594, or the bequest of £50 for a ring, *Apreece v. Apreece*, 1 Ves. & Bea. Rep. 364, are general legacies. A legacy may be a general legacy attended with an appropriation upon part of the property, per Lord Alvanley, D., *Raymond v. Brodbelt*, 5 Ves. 206, and see *Acton v. Acton*, 1 Meriv. 178.

[490] GOODERE v. LAKE.(1)

October 16th, 1738. Amb. 584.

Where by a decree further directions and costs, but no directions as to interest are reserved; yet the Court upon the cause coming on upon the equity reserved has power to give interest. (So *Sammes v. Rickman*, 2 Ves. jun. 36, and see *Creuze v. Hunter*, 4 Bro. C. C. 318; S. C. 2 Ves. jun. 157.)

Question, Whether the Court had power to give interest, it not being reserved by the decree, but there was a reservation of further directions and costs.

Lord Chancellor, was clear of opinion, that the Court had such a power, by reason of the further directions reserved. And it was so done in the case of the *Hudson's Bay Company v. Sir Stephen Evance*, under the like reservation in the decree.

Court ordered Sir Bibye Lake to pay interest for the *Hudson's Bay Stock*.

(1) This case is taken from Ambler's Reports. It appears from Lord Hardwicke's Note-book, that the question between the parties, which arose upon exceptions to the Masters report, was whether certain quantities of stock of the *Hudson's Bay Company*, which were standing in the name of *Thomas Lake*, at the time of his death, to whom the defendant, Sir Bibye Lake, was executor, were his own property, or were held by him in trust for Sir Stephen Evance and William Hales, bankrupts, of whom John Goodere and Thomas Gibson, were the surviving assignees. An issue having been directed to try this question, it was found by the verdict, that the stock was the property of Sir Stephen Evance and William Hales, and the cause coming on upon the equity reserved, it was prayed that the stock might be transferred, the dividends accounted for, and interest paid upon the money received by way of dividends.

By the decree, all further directions were reserved, but there was no particular reservation of interest. Sir Bibye Lake denied the trust, and pleaded the statute of Limitations.

The decree, on further directions, directed Sir Bibye Lake to pay interest from the time of the decree, on the sums that had been received before that time for dividends on the stock, and interest from the time of six months after they were received, for sums received for dividends since the decree. (Reg. Lib. (A) 1737, fol. 654.)

[491] ATTORNEY-GENERAL v. SPEED:—ATTORNEY-GENERAL at the Relation of PETER HYNDE, Plaintiff; (1) and JOSEPH SPEED, Executor of SAMUEL WRIGHT, JANE GLEGG, and Others, Executors of THOMAS GLEGG, Another of the Executors of SAMUEL WRIGHT, Defendants.

October 22nd or 25th, 1738. 1 Atk. 356.

Where a testator left his personal estate to certain charities, but directed that the charities should be performed at the discretion of the executors, the qualifications and characters of the objects of the charities to be well considered by his executors. Held that the executors could not divide the objects of the charities into three parts, each nominating a third; and that a list or nomination made by one of the executors, who was since dead, of some of the objects of the charity, was invalid.

Samuel Wright, by his will, dated the 22nd of August 1735, gave to six Nonconformist ministers of good life and conversation, but not worth £200;

To six honest, sober clergymen of temperate and moderate charitable principles ;
To their dissenting brethren that are not worth £200, or provided with a living ;

To forty decayed families that are come to poverty purely by losses unavoidable ;

To forty poor widows upwards of fifty years of age, and not worth £40 ;

To forty poor maidens whose parents formerly lived well, and are come to decay ;

To twenty poor boys, to clothe and put out to apprentice, certain legacies ; and directed that it might be observed that all the above charities should be performed at the discretion of his executors, their qualifications being duly weighed and considered ; and gave the overplus of his personal estate to the widows or poor orphans of poor Nonconformist ministers, not being at the time of the distribution worth £100, and being upwards of fifty years of age ; and directed the said overplus to be paid in such proportions, and to such members only, be the same more or less, as his executors should judge meet ; and he appointed *Thomas Glegg*, *Joseph Paice*, and *Joseph Speed*, executors of his will, with directions to [492] consider well the characters of the persons to whom they disposed of the said charities.

After the testator's death, the three executors agreed amongst themselves, that each should nominate one-third of the objects of the charity. *Paice* made out and signed a list of the objects whom he intended to nominate, and acquainted many of them that they should be sharers in the charity, but died before any distribution was made. Evidence was given, that shortly afterwards, *Paice* being likely to die, the two other executors promised him, that in the event of his death, his list should be honoured, and repeated the same promise upon an application being made to them after his death ; this however was denied by the answer of the surviving executor.

The information prayed for an account of the personal estate of the testator, and directions for the performance of the charities, and to establish the agreement ; and that the objects contained in *Paice's* list might be admitted.

Mr. Attorney-General, *Mr. Broune*, and *Mr. Clarke*, and *Mr. Murray*, for the plaintiffs, contended that the power given to the executors would not survive, that the trustees had in fact executed their trust before *Paice's* death, for that the objects having been ascertained by the list, the payment of the legacies was consequential. That the method adopted was the only one by which the testator's intentions could be carried into effect, for that it was not likely that all the executors would agree upon every object.

Mr. Chute and *Mr. Fazakerley*, for the surviving executors, insisted that the power was vested in the surviving executors, and cited *Cooker v. Fuge*, 29th of April 1719, before Lord *Macclesfield*, and *Lamb v. Fenwick*, 8th of July 1727, before Sir *Joseph Jekyll*, that the executors had no power under the will to make the agreement, and that it was never executed.

24th or 25th of October, 1738.—*Lord Chancellor*. I am of opinion, that the executors, as taking the whole personal estate, out of which the charities were to issue, had an authority coupled with an interest, as executors have been always held to have in the case of legacies ; and therefore the power of nominating the several persons who were to partake of the charity, is continued to the survivor of them.

But though this is such an authority coupled with an interest as would survive, yet it is so far a trust, that in case [493] of misbehaviour the Court may interpose, for it must be allowed, that the Court has a particular free and extensive jurisdiction in the case of a charity, and not confined to the proper or formal methods of proceeding requisite in other cases.

I am of opinion, that the executors could not divide the charities into three parts, and each executor nominate a third absolutely, because the determination of the property of every object was left by the testator to the direction of all the executors, and so much of the information as seeks a specific performance of a pretended agreement to that purpose, was dismissed with costs, to be paid by the relators.

N.B. This was said to be the first instance of such a direction.

The decree directed the necessary accounts to be taken, and that the *Master* should enquire which of the legacies given to any charitable use had been paid, and to what persons, and that *Speed*, the surviving executor, should forthwith pay and distribute such as remained unsatisfied to proper objects, pursuant to the directions of the testator's will. And as to the surplus of the said testator's personal estate, it was ordered that the same should be paid by the defendant *Speed*, to such widows or poor orphans of Non-Conformist Ministers as fall within the description mentioned in the testator's will, and as to so much

of the information as relates to the establishing the nomination or list signed by the said *Joseph Paice*, it was ordered that the same should be dismissed with costs, the rest of the costs to be paid out of the testator's estate, except the costs relating to the enquiry of the said *Thomas Glegg's* assets, the consideration of which was reserved. (Reg. Lib. A. 1738, fo. 55.)

(1) The statement of this case, and the arguments of counsel are taken from Lord *Hardwicke's* Note-book, the judgment from *Atkyns*.

[494] NUGENT v. GIFFORD (1):—The Personal Representatives of WILLIAM KNIGHT, *Plaintiffs*; and the Daughters and Heirs of RICHARD BILLING, the Personal Representatives of RICHARD ARUNDEL, and the Personal Representatives of WILLIAM LONGUEVILLE, *Defendants*.

November 3d, 6th, and 13th, 1738. 1 Atk. 463.

Sir *Richard Billings* being entitled to a sum of money due upon mortgage, by will makes his son sole executor and residuary legatee, and dies in the month of October 1716. In September 1718, the executor assigns the money due upon mortgage to *William Knight*, for the purpose of satisfying his own debt. Held, the assignee having no notice of any debt due to the testator, it was a good alienation against the creditors of the testator, though it was an assignment of an equitable interest in the assets, and though the assignee had notice that it was part of the testator's assets. (2)

By a mortgage of 30th November 1711 certain premises were mortgaged by *Henry Gage*, to *William Longueville* and [495] *William Knight*, for £4500, of which it was declared that £3000 was the proper money of Sir *Richard Billings*.

In October 1716, Sir *Richard Billings* died, having appointed his son, *Richard Arundel*, otherwise *Billings*, his sole executor, and residuary legatee. *Richard Arundel* was personally indebted to *William Knight* upon several bonds, and by indenture of 13 September 1718, some of which were of dates prior to the death of Sir *Richard Billings*, between *Richard Arundel* and *William Knight*, after reciting the mortgage of 30th November 1711, and that *Richard Arundel* was executor to Sir *Richard Billings*, and was indebted to *William Knight* upon the said bonds for better securing the several sums due on those bonds, *Richard Arundel* assigns to *William Knight* the said sum of £3000 due upon the said mortgage, in trust, after payment of the sums due upon those bonds, and interest, for *Richard Arundel* and his executors.

The bill was filed for payment of these several bond debts out of the mortgage money, and if not, out of the testator's assets.

The daughters of *Richard Arundel* claimed as creditors against the estate of Sir *Richard Billings*, under the marriage article made upon the marriage of their father and mother, whereby Sir *Richard* covenanted to add £10,000 to their mother's portion of £5000, and which [496] £15,000 after the death of their father and mother, was to be divided between them. They insisted that the covenant had not been satisfied, and that there were no assets of Sir *Richard's* to satisfy the covenant, except the mortgage for £3000, and they insisted that the £3000 being the proper assets and effects of the said Sir *Richard Billings*, ought to be applied towards making good his covenant for placing out £15,000 for the benefit of the daughters of the marriage.

Upon the principal question as to the validity of the assignment of the mortgage money by the executors to *William Knight*, for payment of the bond debts, Mr. *Browne* and Mr. *Noel* for the plaintiff, contended that the executor having the controul over the equitable, as well as the legal assets of the testator, had the power of conveying a good title to the mortgage money to *William Knight*, and cited *Chamberlain v. Chamberlain*, 1 Ch. Ca. 256, and *Stiddolph v. Leigh*, 2 Vern. 75.

Mr. *Attorney-General* and Mr. *Fazakerley*, for the defendants, the daughters, admitted that the sale of a term by an executor was good, but insisted that in the present case, *William Knight* being a trustee of the mortgage, knew that the money was the property of the testator, and was subject to his debts, and that the executor was committing a *devastavit* in applying it to discharge a debt of his own. That the property being in trust, the assignment could only be of an equitable interest, and that of the two equities, that of the defendants ought to prevail, and cited *Crane v. Drake*, 2 Vern.

616, and *Hume v. Dubarry*, 27th Nov. 1723, cor. Lord *Macclesfield*, where an attorney pledged orders by way of security for his own debt, and *Pagett v. Hoskins*, Pre. in Ch. 431.

Nov. 13, 1738.—*Lord Chancellor*. The principal question is whether the defendants, who are to be considered as creditors, are entitled to follow the £3000 due upon the mortgage into the hands of the plaintiff, as assignee, in regard that it was originally the money of Sir *Richard Billings*, so as to prevent the plaintiff from having the benefit of the assignment, and to make the money liable as specific assets to the defendant's debt. I am of opinion that in this case the defendant is not entitled to follow the money as specific assets, but that the plaintiff is entitled to the benefit of the assignment, and the security made to him out of it.

By law, undoubtedly, the executor has power to dispose [497] of and alien all the assets of the testator, and when he has done so, no creditor of the testator can, in point of law, follow those assets, for the demand is not at law a lien or charge upon the assets, but is a demand against the executor in right of the testator in respect of the assets, and so is a personal demand.

It has been said that this Court goes further than the law in many cases, and will follow the assets of the testator into the hands of other persons besides the executor, and that therefore if an executor consents to a legacy, the debts not being paid, and the executor becomes insolvent, the Court will not suffer the legatees to run away with the legacy by collusion, but will see that the creditors are first satisfied; and that upon the same principle, if an executor makes a voluntary or collusive disposition of the assets, this Court will follow the assets, so that the creditors may have the benefit of them. But this is not the case where an executor disposes of the assets for a valuable consideration, unless there be some fraud or contrivance to defeat the creditors of their debt, for this Court must suffer such alienation to take place as well as the Courts of Law. If it were otherwise, great inconvenience would follow, for no one would venture to deal with an executor to buy any part of the personal estate, if this Court should lay hold of it in his hands for the payment of debts, the existence of which he had no means of ascertaining, for he cannot come into this Court to have an account taken.

It has been contended, that in the present case the assets thus assigned by the executor were not legal but equitable assets, the legal estate in the mortgage term being in the trustees, and the trust being equitable assets, nothing was purchased but an equity, and that he who only takes an equity, must take it, subject to such demands as it was liable to in the hands of him from whom he took it. That is a general rule, but it applies only where the charge or incumbrance lies upon the thing, and not upon the person only; for there is no difference between the power of an executor over legal or equitable assets, he may, in the same manner dispose of either, and it would be mischievous if the Court was to lay down a different rule as to each of them.

It has also been contended that in this case the assignee took the assignment of the £3000, with notice that it was part of the testator's assets, and that consequently it was [498] liable to his debts. But if that objection should prevail, it would hold in every case; for whether the assets be legal or equitable, any one who purchases the same from an executor, must know from whence his title comes.

It has also been objected that this assignment was not in consideration of money paid by the plaintiff, but of a debt contracted by the executor in the lifetime of the testator, and that it was a *devastavit* in the executor *eo instanti* that the assignment was made because it was applied to the payment of his own debt; and that to this the purchaser was a party. But there is no authority in this Court where it has been laid down as a general rule, that if an executor sell a term for years, or a chattel for money owing by himself that such sale shall be bad, or that chattels shall be affected in the hands of a purchaser with debts of the testator; and there is no difference between that and money paid down, if it be done *bona fide*, for if the money be paid down the executor may waste it or apply it to debts of his own, and even in satisfaction of that very debt which he owed to the person who bought it. Therefore I do not see that the consideration being a debt before due will make any difference, for a sum of money already due is as good a consideration in law and equity as money advanced at the time.

Two authorities have been much relied upon in this case, 1st, That of *Crane v. Drake*, 2 Vern. 616. But Lord *Cowper* held, that the defendant was assenting to, and contriving a *devastavit* to defeat the plaintiff of his debt, for there the defendant treated for a leasehold estate, having notice of a bond debt owing from the testator, and at the

same time discounted his own debts, which must be taken to be a contrivance to pay the purchasers debt instead of the plaintiffs, of which the purchaser had notice, but there is not the least suggestion of any notice to the purchaser in this case, that *Richard Bellings* owed any debt at all. That case therefore does not come up to the present, being grounded solely on the notice and collusion between the executor and the purchaser.

The other authority is that of *Pagett v. Hoskins*, Prec. Ch. 431; Gilb. Rep. 111, S. C., but neither does that case, in my opinion, come up to the present, for that was not an alienation of any particular chattel out of the testators personal estate to a purchaser for a valuable consideration; but the sum of £6000 was computed to be the widows share of [499] the personal estate, and was taken by the second husband as subject to the account, and with plain notice.

I am therefore of opinion that the alienation or disposition of part of the personal estate of Sir *Richard Bellings* was good, and that the plaintiff ought to have the benefit of it, and that the principal, interest, and costs of the bonds intended to be secured by the assignment must be satisfied out of it. (Reg. Lib. B. 1738, fol. 117.)

Lord *Hardwicke* to his note of this case has added the following memorandum:—

I decreed for the plaintiff the benefit of this assignment, and gave the reasons at large, and distinguished this case, from those of *Crane v. Drake*, and *Pagett v. Hoskins*, on the point of notice of the debts due from the testator.

In *Crane v. Drake*, the defendant *Drake*, the purchaser, expressly by his answer admitted notice of the plaintiffs debt before his purchase; and in the other case, Sir *Bennet Hoskins* took the assignment of the £6000, subject to an account, and took a collateral security to indemnify him against deficiencies in case his wife's share should not come out to be so much as £6000.

(1) The statement of this case, and the arguments of counsel are taken from Lord *Hardwicke's* Note-book, and the judgment from a manuscript report which is found to agree with another manuscript report, and with the report of Mr. *Atkyns*.

(2) So the assignment of a mortgage by three executors, as a security for the receivership of one who was likewise a residuary legatee, the other two not being interested, was held good against creditors, *Mead v. Lord Orrery* and Others, 3 Atk. 235. But of this case, in *Bonney v. Ridgard*, Lord *Kenyon* said, "if it had come before me, I should have decided it in direct opposition to that authority." Lord *Kenyon* had great difficulty in distinguishing *Mead v. Lord Orrery*, from *Bonney v. Ridgard*, 1 Cox's Cases, p. 146. It is apprehended that there were circumstances which distinguished *Mead v. Lord Orrery* from *Bonney v. Ridgard*. In *Mead v. Lord Orrery*, two of the executors who were not beneficially interested in the estate, joined in the assignment, and in the deed of assignment, there was a recital that the mortgage money was the proper money of that executor who was the residuary legatee. Neither of these circumstances occurred in *Bonney v. Ridgard*. See *Ewer v. Corbet*, 2 P. Wms. 148. *Elliot v. Merriman*, 2 Atk. 41. *Jthell v. Beane*, 1 Ves. 215. *Jacomb v. Harwood*, 2 Ves. 265.

If there be fraud on the part of the purchaser, as if the purchaser has notice of a debt owing from the testator; *Crane v. Drake*, 2 Vern. 616. *Pagett v. Hoskins*, Pre. in Ch. 431. Or where an executrix deposits bonds of the testator which were specifically bequeathed, not only to secure her own debt, but also to secure future advances to be made to her in the character of a trader; see *Scott v. Tyler*, 2 Dick. 712. *Macleod v. Drummond*, 17 Ves. 166.

Or if there be a specific bequest, and the purchaser has notice that there are no debts, or all the debts are paid; *D. Ewer v. Corbet*, 2 P. Wms. 148.

Or if there be even gross negligence on the part of the purchaser, as where an executor, who was a residuary legatee, within a month after the death of the testator, transferred certain stocks of the testator's to his banker's, as a security for a debt then due from him, and for future advances to be made on his own account, *Hill v. Simpson*, 7 Ves. 152, such dispositions are void; and see *Downes v. Power*, 2 Ba. & Be. 491.

But where executors deposited, from time to time, bonds of the testator, which were not specifically bequeathed, together with securities of their own, for advances made to them at the time of such deposit, the Court would not interfere at the instance of co-executors, who had not acted in the administration of the testator's affairs for a period of fourteen years, *Macleod v. Drummond*, 14 Ves. 353, and 17 Ves. 152.

And a pecuniary legatee may, in cases of fraud or gross negligence follow the assets

aliened by the executor, though he has not so strong a claim as a specific legatee, per *Sir William Grant*, 14 Ves. 354.

And the case of a residuary legatee is stronger than the case of a pecuniary legatee, per Lord *Eldon*, D. 17 Ves. 169.

In cases, however, even of fraud, where the party interested suffers a great length of time to elapse without prosecuting his right, a Court of Equity, in analogy to the Statute of Limitations, will not give relief, *Bonney v. Ridgard*, 1 Cox's Cases, 145. *Andrews v. Wrigley*, 4 Bro. C. C. 125; and see *Ray v. Ray*, Cooper's Ca. in Ch. 264. *Keane v. Roberts*, 4 Madd. 332.

[500] THOMAS HALL, Executor of ELIZABETH OADES, Plaintiff; (1) and STEPHEN and THOMAS TERRY, Executors of MICHAEL TERRY, Defendants.

Nov. 8th, 1738. 1 Atk. 502; 2 Eq. Ab. 550; 8 Vin. Ab. 383.

Michael Terry devises to his nephew and his heirs the moiety of an estate, subject to his, the testator's wife's life-estate, so as his nephew should, within one year after the estate should come to him, pay amongst other sums, to *Elizabeth Oades* £100, and charges the estate with the payment of the same; *Elizabeth Oades* dying in the lifetime of the wife; held that *Elizabeth's* representative was not entitled to the £100. (2)

Michael Terry, by his will, gave to his nephew, *Stephen Terry* and his heirs all that moiety of the manor of *Ilfield*, in the county of *Southampton*, and the advowson and right [501] of presentation, subject to the settlement made on the marriage of his wife (under which she became tenant for life, upon the testator's death), so as the said *Stephen Terry*, his heirs and assigns should and would, within the space of one year then next after the said manor and premises should remain, descend, or come to him or them, pay, or cause to be paid divers sums of money to divers persons thereafter named, and particularly to his executors, and to *Elizabeth Oades* and others, £100 each, and directed that the said manor and premises should be charged with the payment of the same; and after giving divers pecuniary legacies, gave and devised the rest and residue of his real and personal estate, his debts and legacies being first thereout allowed and discharged, to *Thomas Terry*, and to the said *Stephen Terry* whom he appointed his executors.

Elizabeth Oades died in the lifetime of the testator's widow, and the plaintiff, her executor, upon the widow's death, filed a bill praying payment of the legacy of £100 given by the testator's will to *Elizabeth Oades* out of his personal estate, or if that should be deficient, then that the same might be raised out of his real estate.

The defendants admitted assets, but insisted that the sum of £100 never was charged upon the personal estate, and that by the death of *Elizabeth Oades* in the lifetime of the testator's widow, it had sunk into the land for the benefit of the devisee.

Mr. *Chute*, Mr. *Fazakerley*, and Mr. *Henley*, for the plaintiffs, insisted that the sum of £100 given to *Elizabeth Oades*, was a vested interest in her, and transmissible by her in her lifetime, and therefore transmissible to her representatives, although she happened to die before the time of payment, which alone was postponed, and cited *King v. Withers*, Cas. temp. Talb. 117, afterwards affirmed in the House of Lords, 3 P. Wms. 414, and 4 Bro. P. C. 228. *Wilson v. Spencer*, 3 P. Wms. 172. *Whalley v. Cox*, 2 Eq. Cas. Abr. 549, pl. 29, in all which cases the legatees or persons to whom the money was left, died before the time of payment, and yet the money was ordered to be raised. They also cited *Innocent v. Taylor*, Finch. Rep., and *Buckley v. Stanlake*, cor. Lord *Macclesfield*, 1720, in which a man seised of a rectory devised it to his wife for life, remainder to his daughter, and her heirs; but if his daughter should die unmarried, then to his wife and her heirs, chargeable with two legacies of £100 each to two strangers. Both the [502] legatees died before the daughter, who afterwards herself died an infant, and unmarried. The testator's widow devised the rectory to trustees for the performance of her husband's will, and it was held that the representatives of the two legatees were entitled to the legacies. They also insisted that the sum of £100 was by the words, "his debts and legacies being first thereout discharged," made a charge upon the personal as well as the real estate, and that as the defendants admitted assets, it was at all events payable out of that fund.

Mr. Attorney-General and Mr. Browne, for the defendants, contended that the sum of £100 was not a legacy, but a charge solely upon the real estate, and given upon a contingency which had not happened. That the subsequent words of the will directing all his legacies to be paid out of his personal estate, did not affect this sum, because it was not a legacy, but that there were legacies given by the will which would satisfy those words. That the distinction between legacies payable out of the personal estate, and sums of money charged upon land, was clearly established. In the former case, this Court adopting the rule of the spiritual court, held that a legacy payable at a future day, was upon the death of the legatee before the day of payment, transmissible to his personal representative, but that in the latter case, the Court considering a charge of a sum of money upon a real estate as a condition annexed to the devise, held that the condition was discharged by the death of the person in whose favour the charge was made before the time limited for payment, and cited *Bright v. Norton* before Lord Talbot, where an estate was settled upon a father for life, remainder to trustees for a term of years, remainder to the eldest son in tail, and the trusts of the term were declared to be to raise and pay to the second son the sum of £1100 within six years after the father's death, with interest, in the mean time. The second son died in the father's lifetime, and Lord Talbot held, that no particular time for payment being fixed, but only six years after the father's death, the sum ought not to be raised. They also cited the *Duke of Chandos v. Talbot*, 2 P. Wms. 601. *Poulet v. Poulet*, 1 Vern. 204, 321. *Carler v. Bletsoe*, 2 Vern. 617. *Yates v. Phettiplace*, 2 Vern. 416, and *Prowse v. Abingdon*, ante, page 312.

Nov. 8th or 9th, 1738.—*Lord Chancellor*. There have been various determinations in cases of this nature, which are not easily reconcileable to each other, being grounded upon very minute [503] circumstances laid hold of to warrant them, which if thoroughly considered, would not perhaps appear to afford sufficient reasons for those judgments.

But the general rule of the Court seems now to be, that where a sum of money is charged upon lands, and the legatee dies before the time at which it is payable, it shall sink into the estate for the benefit of the heir or devisee. This was first settled in the case of *Poulet v. Poulet*, 2 Ventr. 366, and 1 Vern. 204, 321; but it has been attempted by various distinctions to shew that this case does not fall within that general rule.

1st. It has been contended that this sum is charged as well upon the personal as upon the real estate, but I do not think that the personal estate is at all affected by this sum. The residue of the personal estate is given to *Stephen* and *Thomas*, debts and legacies being first paid. Now this sum is not a legacy, nor is there any bequest of it as such; but there are several other sums mentioned in the will which properly answer that description, and are payable out of the personal estate, whereas the sum in question is charged wholly upon the real estate, and I should so have held if the question had arisen between *Stephen* and *Thomas*, whether *Thomas's* share of the personal estate should bear part of this burthen. But suppose this had been a charge upon both estates, yet upon the authorities of *Yates v. Phettiplace*, and *Duke of Chandos v. Talbot*, it would have partaken of the realty, so far as to fall into the land upon the death of the party for whom it was intended.

The second point contended for as taking this case out of the general rule was, that the postponement relates only to the time of payment, and cannot in any way be annexed to the substance of the legacy. But this distinction does not hold in cases of charges upon lands, and even if it did, I do not think that it would affect the present question, for in this case there is no gift, except by the words "so as he pay," and the subsequent words, "I will the premises shall be chargeable accordingly," which plainly refers to the former clause, so that here is no original gift, and a time afterwards appointed for payment, but the whole amounts to no more than a direction, that such a sum shall be paid, and if this sum had been to arise wholly out of the personal estate, I think that even in that case, it would not in the event which has happened, been transmissible, the time of payment being annexed to the substance of the gift.

The third point contended for was, that the bequest was [504] intended to vest immediately upon the testator's death, and that the reason for appointing the time of payment did not arise from the nature of the bequest, but solely from the circumstances of the estate chargeable with such payment. But if I were to lay any stress upon this objection, I should overthrow many cases which have been fully settled, for by all the late determinations it has been held, that whenever a sum of money is charged upon lands, whether by way of portion or legacy, payable at a future day, and

the person dies before the time of payment, it shall sink into the land, and not go to the representative of the person so dying.

I now come to the cases cited for the plaintiff. In the case of *King and Withers*, according to my recollection of it, the ground of the judgment was, that there were only two things requisite to vest the right—that is to say, the attaining the age of twenty-one and marriage, both which had actually taken place; and though the payment was subject to a contingency, yet it was expressly provided, that the sum charged should be paid whenever that contingency should happen. In the case of *Wilson v. Spencer*, 3 P. Wms. 172, the legacy was absolutely vested, though the testator had given a year for the payment of it. The circumstances of the case of *Whalley v. Cox* are not sufficiently agreed upon for me to make it the ground of my determination. In the case of *Buckley v. Stanlake* the devise of the wife was expressly to the use of the husband's will, which induced the Court to make a more equitable construction in favour of his bequests. The case of *Innocent v. Taylor* is of no authority, the book from which it is cited not containing Lord Nottingham's own reports. I agree, indeed, that there are several cases about the time at which that of *Innocent v. Taylor* is said to have been decided, which are in favour of the doctrine contended for on behalf of the plaintiff, but being antecedent to the resolution in the case of *Poulet v. Poulet*, which first settled this matter, they are of no weight with me; whereas that of *Bright v. Norton* is an authority which comes up to the present point.

Upon the whole, therefore, I am of opinion, that neither the distinctions endeavoured to be established, nor the authorities cited for the plaintiff, are sufficient to take the case out of the general rule; and that as the sum in question is given to the person in whose right the plaintiff claims it, no otherwise than by the direction for payment, and as she died before the time of payment came, it never vested in her.

Bill dismissed without costs.

(1) The statement of this case, and the arguments of counsel, are taken from Lord Hardwicke's Note-book; and the judgment from a Manuscript Report, compared with the several printed Reports, another Manuscript Report, and heads of the judgment in Lord Hardwicke's Note-book.

(2) Lord Thurlow is reported to have said in *Godwin v. Munday*, 1 Bro. Chan. Ca. 191, That *Hall v. Terry* cannot be reconciled with *Lowther v. Condon*, 2 Atk. 127; and Mr. Sanders, in his note to Mr. Atkyns's report of the case says, that the same remark seems to apply to other cases, as particularly to *Emes v. Hancock*, 2 Atk. 507. *Hutchins v. Foy*, Com. Rep. 716. *Sherman v. Collins*, 3 Atk. 319. *Tunstall v. Brachen*, Ambl. 167, cited in note to 1 Bro. Ch. Ca. 124. *Jeale v. Titckener*, Ambl. 703. *Hodgson v. Rawson*, 1 Ves. 44. It is apprehended that *Lowther v. Condon* is easily distinguishable from *Hall v. Terry* by the following circumstances. That there is a gift, independent of a direction for payment; that the legacy is directed to be paid to the executors, administrators, or assigns of the legatees; and there is a direction, that in case the legatees die, their legacies shall not sink into the estate for the benefit of the heir, but be raised for the benefit of the legatees. So likewise are *Emes v. Hancock*, and *Sherman v. Collins*, distinguishable from *Hall v. Terry*, by a right of entry being given upon the premises charged. *Tunstall v. Brachen*, *Hutchins v. Foy*, *Hodgson v. Rawson*, *Jeale v. Titckener* are likewise distinguishable; for in *Tunstall v. Brachen*, the legacy is to be paid to the legatee, her executors, administrators and assigns, and in one event it is directed that the legacy shall not sink into the estate for the benefit of the heir; and in *Hodgson v. Rawson*, the legatee survived the tenant for life, and in that case, in *Hutchins v. Foy*, and *Jeale v. Titckener*, the payment is directed to be paid out of the estate charged, which shews that the payment was deferred with a view to the possession of the estate, and which, though Lord Apsley said it was a slight distinction, yet such distinction fell in with his ideas. See *Jeale v. Titckener*, Amb. Rep. 704.

[505] SIR WILLIAM ASHBURNHAM and Others, Executors and Devises of ROBERT BRADSHAW, *Plaintiffs*; (1) and GEORGE BRADSHAW and Others, the Heirs at law of ROBERT BRADSHAW, the ATTORNEY-GENERAL, and the Corporation of the Charity for the Sons of the Clergy, and the Corporation of Queen Anne's Bounty, *Defendants*.

November 8 and 10, and December 11, 1738, and April 26, 1740. 2 Atk. 36; Barn. 6; 2 Burn's Eccl. Law, 553.

Sir William Ashburnham by his will of the 20th Nov. 1734, devised certain lands to trustees and their heirs for the benefit of certain charitable uses therein mentioned. The statute of Mortmain commenced from and after the 24th of June 1736; and Sir W. A. died in July 1736: held, by all the Judges, that the devise to the charitable uses was good in law. (See *Attorney-General v. Lloyd*, 3 Atk. 551, and 1 Ves. 32, S. C. *Willet v. Sandford*, *ibid.* 186. *Attorney-General v. Heartwell*, Amb. 451; S. C. 2 Eden's Rep. 234. *Attorney-General v. Downing*, Amb. 550.)

Robert Bradshaw, by his will, dated the 20th of November 1734, devised divers lands and tenements to trustees and their heirs, in trust for the benefit of certain charitable uses therein mentioned.

The statute of Mortmain, 9 Geo. 2, c. 36, enacts, that from and after June 24, 1736, no manors, lands, &c., shall be given, granted, aliened, &c., to any person or persons whatsoever, in trust or for the benefit of any charitable uses whatsoever, except in the manner specified in the act, and declares that all gifts, grants, conveyances, &c., of any lands, &c., to or in trust for any charitable uses whatsoever, which shall after the said 24th day of June 1736, be made in any other manner or form than by that act is directed shall be void.

The testator died in July 1736.

The object of the bill was to prove the will, and to establish the trusts and charities.

Mr. Browne, Mr. Owen, Mr. Chute, and Mr. Fenwick, for the heirs at law.

[506] The will was ambulatory till the testator's death; nothing passed by it until after that time, and consequently not until after the 24th of June 1736; but in order to take this case out of the act, it must be shewn that the lands were conveyed before that time. If wills, made before the act, are to take effect where the testator did not die until after it was passed, it will lead to the greatest frauds, such as antedating wills, &c. It is not to be supposed that the legislature intended to give all the time between the passing of the act and the 24th of June 1736, to enable people to make those dispositions by their wills which it was the object of the act to prevent. The decisions which were made upon the Statute of Frauds have no application to the question upon this act. That act related only to the form and circumstances of the execution of wills; this to their actual operation. The Statute of Frauds was construed as if the words had been, all devises of lands made after the 24th of June. This act creates an incapacity in all the subjects of England to take lands to charitable uses after the time therein mentioned; and it cannot be said, that the trustees in this case took any interest in these lands before the testator's death, till that time the will was inoperative. A devise by a joint-tenant is void, though a conveyance severs the joint-tenancy. A devise to a man who afterwards, but before the testator's death, becomes a monk is void.

Mr. Attorney-General, Mr. Fazakerley, and Mr. Pilsworth, for the charities.

This act breaks in much upon the law of the land, and restricts the subject's right of disposing of his property, and ought therefore to be construed with strictness; and in all cases a construction giving to laws a retrospective operation ought if possible to be avoided. It has been argued that a will is as nothing before the death of the testator, but the time of making it is in many respects material. The testator must have the lands devised at the time, and if he should afterwards become lunatic, his will will nevertheless be good. The words in this act relate solely to the act of the party, and the word given peculiarly applies to wills; and can it be said, that the testator gave the property in question after the 24th of June? after that time he did nothing to affect his property. It is common parlance for a testator to say, that he has given property by his will. It is the will which conveys and settles the land, and not the death of the party. It is like an executory devise made before the act which did [507] not take effect until afterwards. The cases upon the Statute of Frauds are precisely in point. *Serjeant v. Puntis*, Pre. in Ch. 77.

The Lord Chancellor mentioned the case of *Gillmore v. Shuter*, 2 Mod. 310; 2 Lev. 227; 2 Jones, 208; 1 Freem. 466; 1 Vent. 330; 2 Shaw, 16, and on the 11th Decem-

ber, the cause standing again in the paper, his Lordship declared that the first question appeared to be a point of law, arising upon the construction of a new Act of Parliament, which had never come in judgment before, and to be a matter of great consequence, for which reason he thought it fit, in order to the settling the law thereon, to take the opinions of all the Judges, and therefore ordered that the opinions of all the judges should be taken upon the following case, *viz.*—*Robert Bradshaw, Clerk*, on the 24th day of November 1734, duly made and executed his last will and testament in writing, and by the said will, gave and devised divers lands and tenements to trustees and their heirs, in trust, or for the benefit of certain charitable uses therein mentioned, amongst several other trusts.

The statute of the 9th Geo. 2, intituled an Act to restrain the Disposition of Lands, whereby the same become Unalienable, commenced from and after the 24th day of June 1736.

In July 1736, the testator died without altering or revoking his said will.

Question : Whether such gift or devise, so far as the same relates to the charitable uses aforesaid, be good in law, notwithstanding the said statute or not.

The Judges, on the 4th of December 1739, certified that they were of opinion that the gift or devise, so far as the same related to the charitable uses aforesaid, was good in law, notwithstanding the said statute.

This certificate was signed by—

W. LEE.
J. WILLES.
J. COMYNS.
F. PAGE.
LAW : CARTER.
E. PROBYN.

J. FORTESCUE, A.
W. FORTESCUE.
W. CHAPPLE.
T. PARKER.
M. WRIGHT.

The following note is found amongst Lord *Hardwicke's* papers relative to this cause ; it does not appear by which of the Judges it was furnished :

" All the Judges except Mr. Justice *Denton* having heard counsel for all the parties, met at Lord Chief Justice *Lee's* [508] chambers, 4th December 1739, and held that a will was a revocable disposition *in presenti*, to take effect *in futuro*, that there are two times a will has respect to, the time of making, and the time of its taking effect by the death of the testator. The time of making the will concerns the capacity of the giver ; the time of its taking effect, by the death of the testator, concerns the capacity of the taker. The present act does not work an incapacity in the taker, but in the giver. The act has no retrospect ; if that had been intended, it would have been general, and not to take effect from a particular day. They unanimously held the devise good, and accordingly certified to the *Lord Chancellor*, and grounded their opinions on Dy. 45, b 2 ; And. 11 ; 4 Leonard. 5, prop. 106 ; 3 Bul. 43, 47 ; 2 Ch. Rep. 301 to 303 ; 2 Mod. 310 ; 2 Show. 17 ; Skin. 227 ; Pre. in Ch. 77 ; 2 Lev. 227 ; 2 Jo. 108 ; 1 Vent. 330. *Bunter v. Coke*, 1 Salk. 237 ; Fitzg. 225, 233, and my brother *Denton* informed me that he entirely concurred in this opinion."

The following letter from Lord Chief Baron *Parker* to Lord *Hardwicke*, dated 1st December 1738, is likewise found amongst the papers relating to this cause.

" MY LORD,

" I have considered of the statute of the 9th of his present Majesty, against dispositions to charitable uses, which recites those dispositions to be contrary to law, and enacts, that from and after the 24th of June 1736, no manors, lands, &c., shall be given, granted, aliened, limited, released, transferred, assigned, or appointed, or any ways conveyed or settled to or upon any person or persons, &c., in trust, or for the benefit of any charitable uses, unless in the manner therein directed ; and by another section provides, that all gifts, &c., which shall, from and after that day be made in any other manner or form, shall be void. The question is, whether this act extends to a will made before the 24th of June 1736, by a man who died after that day.

" It must be admitted that a will is so far ambulatory, and not consummated, that no interest can vest in the devisee till the testator's death ; but though a will is subject to revocation during the testator's life, and cannot take effect with respect to the passing of an interest till his death, yet it seems to me to be a disposition of the estate devised from the time of making, because no writing, publication, or other act is necessary to be done between the making of the will and the testator's death, and if so. the statute

will not affect the pre-[509]-sent case. This your Lordship will find to be my Lord *Holt's* opinion in the case of *Bunter v. Coke*, in Fitzg. Rep. 226, and Lord *Trevor's* opinion in the case of *Arthur v. Bockenham*, 237, 238, 239, of the same book. The cases in this book are very incorrectly reported, but I have been credibly informed that these two arguments are authentic, and were communicated by Mr. *D'Anvers* to Mr. *Walthoe*, the publisher, to make the book sell the better. There are no terms in *Fitzgibbon* when these resolutions were delivered, but I find in Salk. 237, that the case of *Bunter and Coke* was determined Mich. 6 Annæ, B. R. and by the Journals of the House of Lords, which I have perused, the judgment appears to be affirmed 24th Feb. 1707, and by a report of Mr. *Blencowes* (where the case of *Arthur v. Bockenham* in *Fitzgibbon* is called by the name of *Archer v. Bockenham*), the resolution of the Court of Common Pleas appears to be delivered in Hilary 1707-8. The case of *Gilmore v. Shuter*, 2 Lev. 227 ; 2 Jo. 108, 109 ; 2 Show. 16, 17 ; 1 Vent. 330, seems to countenance this opinion, though not entirely similar, because wills are gratuitous dispositions, but it would have been against natural justice to have construed the Statute of Frauds, to have a retrospect so as to destroy contracts for just debts, but the case in 2 Ch. Rep. 301, and the Judges' opinions cited by Mr. *Pollexfen*, in 2 Show. 17, do in my humble apprehension, pretty much resemble the present case. By 29 Car. 2, c. 3, s. 5, devises of lands are to be in writing, and executed as there directed, or else to be void. The circumstances there required affect the operation of the will as well as the directions of this statute affect the operations of a gift, and there is room for the same observation in the word 'restrain' in the title of this act as upon the word 'prevention' in the title of the Statute of Frauds, to shew this to be a cautionary law made to prevent future inconveniences.

"I submit these loose thoughts to your Lordship's consideration ; and am as I am bound to be with the utmost respect.

"My Lord,

"Your Lordship's most obliged humble servant,

"T. PARKER."

Inner Temple,
December 1, 1738.

The Lord Chancellor, on the 26th of April 1740, decreed the charitable bequests, and devises, and the trusts of the will to be established. (Reg. Lib. A. 1739, fo. 441.)

(1) The whole of this case is taken from Lord *Hardwicke's* Note-book, and the papers found amongst his Lordship's manuscripts.

[510] RAINSFORD v. LANGHAM.(1)

Nov. 11th, 1738.

Sir Edward Nichols being entitled to the advowson of *Hardwicke*, by his will devises to his trustees and their heirs all and singular his messuages, cottages, closes, farms, woods, lands, tenements, and hereditaments, lying in *Hardwicke*, &c., and all other his lands and tenements whatsoever not before devised, with their appurtenances, upon trust to pay £30 *per annum*, to each of the vicars of eight vicarages, one of which was the vicarage of *Hardwicke*, and directs the surplus of the rents to be disposed of to such charitable uses as his trustees should think fit.

The church of *Hardwicke* having become vacant after the death of the testator, upon a bill filed against the trustees by the heir at law of the testator alleging that the advowson passed to them under the will, and against the bishop to compel him to grant institution to the plaintiff's clerk. It was held upon the certificate of the judges that the advowson did not pass by the will to the trustees ; and a lapse having been incurred the bishop was decreed to admit the plaintiff's clerk.

Sir Edward Nichols being seised in fee of the manor of *Faxton* and of several messuages and lands in *Faxton*, *Hasilbick*, *Sulby* and *Hardwicke*, and also of the advowson of the church of *Hardwicke*, by will bearing date 12th of August 1708, devised part of the premises to the use of his sister for life ; and then gave and devised to his trustees their heirs and assigns for ever, all and singular other his messuages, cottages, closes, farms,

woods, lands, tenements, and hereditaments, whatsoever, situate, standing, lying and being in *Faxton* aforesaid, *Hasilbick*, *Sulby* and *Hardwicke*, and all other his lands and tenements whatsoever before devised, with their and every of their appurtenances, upon this special trust and confidence in them reposed, and to the intent and purpose that they do and shall out of the rents and profits yearly and every year for ever hereafter pay or cause to be paid the sum of £30 a-piece to eight several vicars for the time being of eight respective vicarages, one of which was the vicarage of *Hardwicke*, and directed that the surplus of the rents should be disposed of to such charitable uses as the trustees should think fit.

After the testator's death the church of *Hardwicke* became vacant, and the plaintiff being the heir of *Jane Kemsey* deceased, who was the heir of Sir *Edward Nicholls*, filed a bill against the bishop to enjoin him from presenting the clerk nominated by the trustees, and to compel him to grant institution to the clerk nominated by the plaintiff, and against the trustees alleging that the advowson passed to them under [511] the will, and insisting that no use being declared of it there was a resulting trust for the heir at law.

The Lord Chancellor, conceiving a doubt whether the advowson passed to the trustees by the will, directed a case to be made upon that point for the opinion of the judges of the Court of King's Bench, who after hearing it twice argued certified unanimously that they were of opinion that the advowson did not pass by the will to the trustees.

The cause now came on again.

Lord Chancellor. But for one reason I should have dismissed the plaintiff's bill, for it comes now to be in the nature of a *quare impedit*.

The first question was, whether the advowson passed, and if it did, then 2ndly, Whether there was a resulting trust for the heir at law.

The opinion of the judges is, that this is strictly a legal title; but a circumstance has taken place which prevents the plaintiff from maintaining a *quare impedit*, namely that a lapse has been incurred.

Now as this Court sometimes interposes to prevent the statute of limitations from taking effect, so in this case it may be decreed that the advowson descended upon the heir at law of Sir *Edward Nichols*, and that the Bishop of *Peterborough* ought to admit the clerk who has been appointed under that title.

Decree that the bishop do admit the plaintiff's clerk without costs. (Reg. Lib. B. 1738, fo. 110.)

(1) The whole of this case is taken from a manuscript report, Lord *Hardwicke's* note of it being very short.

[512] BRANDLING v. ORD.(1)

[See *Moss v. Anglo-Egyptian Navigation Co.*, 1865, L. R. 1 Ch. 115; *Lord Tredegar v. Windus*. 1875, L. R. 19 Eq. 613.]

November 15th, 1738. 1 Atk. 571.

A man who purchases for a valuable consideration, with notice of a voluntary settlement, from a person who bought without notice, shall shelter himself under the first purchase. (See *Louther v. Carleton*, Cas. temp. Talbot, 187. *Harrison v. Forth*, Prec. in Chan. 51. *Kennedy v. Daly*, 1 Sch. & Lef. 379. *Macqueen v. Farquhar*, 11 Ves. 479.)

A man cannot defend himself in this court, as a purchaser for a valuable consideration under articles only. (See *Fitzgerald v. Falconbridge*, Fitz. Rep. 207. *Hart v. Middlehurst*, 3 Atk. 377.)

Where defendants pleaded a former suit they must shew it was *res judicata*.—A tenant in tail out of possession, cannot bring a bill to perpetuate testimony.—A bill dropped for want of prosecution, is never to be pleaded as a decree of dismissal.

It was said by the Lord Chancellor in this cause, that a man who purchases for a valuable consideration, with notice of a voluntary settlement from a person who bought

without notice, shall shelter himself under the first purchaser, yet it must be very same interest in every respect.

He likewise said, he never knew a man defend himself in this Court, as a purchaser for a valuable consideration under articles only ; if he is injured, he must sue at law upon the covenants in the articles.

His Lordship also laid it down as a rule, that where the defendants plead a former suit, that the Court implied there was no title when they dismissed the bill, is not sufficient, they must shew it was *res judicata*, an absolute determination in the Court that the plaintiff had no title.

He also held, that a tenant in tail, out of possession, cannot bring a bill to perpetuate testimony of witnesses, till he has recovered possession by ejectment ; if he does, on the defendant's demurring for this reason, the Court will allow it. (*Parry v. Rogers*, 1 Vern. 441. *Philips v. Carew*, 1 P. Wms. 117, and see *Mitford's Pleadings*, 131.)

And that a bill dropped for want of prosecution is never to be pleaded as a decree of dismissal in bar to another bill.

And that a fine by a termor for years, is a forfeiture ; but the reversioner has five years after the expiration of the term to enter.

(1) This case is taken from *Atkyns*. There is no statement of the case in Lord *Hardwicke's* Note-book, or in the Register's-book, it appears both from his Lordship's Note-book and the Register's book that the plea was overruled. See Reg. Lib. A. 1738, f. 21.

[513] CONYERS and OTHERS, *Plaintiffs* ; (1) and LORD ABERGAVENNY and OTHERS, *Defendants*.

Nov. 16th, 1738. 1 Atk. 285.

A bill of peace praying an injunction to stay the defendants who have an interest in the manor of *Tunbridge* from proceeding at law against the plaintiffs for building houses on the manor without leave, and that they may accept of such a compensation as the Court shall think reasonable.

The Court dissolved the injunction, as they cannot be applied to as an arbitrator, nor have any legislative authority, but act in a judicial capacity.—A bill of peace may as well be brought by tenants against a lord, as by a lord against tenants.

A motion by the plaintiff for an injunction to stay the proceedings of the Defendants at law, till the hearing of the cause in this Court, upon a suggestion that this is a bill of peace, and always favoured in equity, for the principal prayer of it is, that the defendants who have only a small interest in that part of the manor of *Tunbridge*, which is in dispute may accept of such a compensation as this Court shall think reasonable, for the houses the plaintiff has built upon the waste.

Lord Chancellor. I do not see how this Court can assume such a power, unless they had a right of being applied to as an arbitrator, or had a legislative authority lodged in them, neither of which belong to them ; for they act only in a judicial capacity.

The proper bill of peace was a former one, brought by the tenants of this manor, for such a bill may as well be brought by tenants against a lord, as by a lord against tenants (see *The Mayor of York v. Pilkington*, ante, page 293, and the notes to that case) ; but that bill was dismissed, upon the suggestion of this very plaintiff, Mr. *Conyers* himself, that they ought regularly to proceed at law ; and therefore thither let him go, and not apply improperly for relief in that Court, which he had absolutely insisted had no power of relieving. This comes very near the case of election, for he has chosen to proceed at law, and therefore let him seek his remedy there.

His Lordship for these reasons ordered the injunction to stand dissolved.

(1) This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book

[514] EDMUND OKEDEN, *Plaintiff*; (1) and PETER WALTER, JOHN BOND, WILLIAM OKEDEN, JOHN GOULD and MARY his Wife, CONYERS PLACE the Younger, Clerk, and MAGDALEN, his Wife, and WILLIAM OKEDEN, an Infant, the Son of the Plaintiff, *Defendants*.

November 15th and 17th, 1738. 1 Atk. 550.

William Okeden by his will directs that his debts and legacies and also the sum of £5000 due to his daughter should be paid out of his personal estate, but if that should be insufficient then he devises certain estates upon trust to sell the same or any part thereof, and thereby pay of his debts and the said £5000, and such part as should not be sold, and all other his lands he devised to trustees for 300 years with remainder to the defendant, *William Okeden*, for life, remainder to his first and other sons in tail male with like remainder to the plaintiff and his first and other sons; and he declared the trusts of the 300 years term to be that the trustees should receive the rents, issues, and profits thereof, and thereout after paying a certain annuity should apply such sums as they should think fit for the maintenance, placing out, and education of the plaintiff and defendant, his two natural sons, until they should attain the age of twenty-five years, and for raising the £5000 for the plaintiff, in case he should attain the age of twenty-five; and to apply yearly such sums as should be necessary for the support and reparation of his mansion-house, buildings, and estates, and to pay the residue of the rents and profits to the person entitled to the estate after the term was satisfied.

Held, that the sum of £5000 given to the plaintiff was not to be raised by sale, but after payment of the annuity and the maintenance was to be paid out of the rents and profits of the estate until *William Okeden* attained the age of twenty-five.

William Okeden having two natural sons, the plaintiff and the defendant, *William Okeden*; and only one legitimate child, *Mary Glisson*, to whom a sum of £5000 upon his death was secured by a term affecting all his real estates which was created by his marriage settlement; by his will, dated the 29th of January 1716, directed that his debts and legacies, and also the said £5000 due to his daughter should be paid out of his personal estate; and if that should not be sufficient, then he devised to trustees certain estates in the counties of *Dorset* and *Wilts*, in trust that the trustees and their heirs might sell the same or any part thereof, and thereby pay of his debts, legacies, and funeral expenses, and also the said £5000 and such part as should not be sold, he devised to the same uses as his man-[515]-sion house at *Moor-Critchell*, and which by his said will and all other his lands he devised to trustees for three-hundred years, remainder to the defendant *William Okeden* for life, remainder to his first and other sons in tail male, remainder to the plaintiff for life, remainder to his first and other sons in tail male, remainder to his own right heirs with power for his two natural sons to make jointures and leases when they should come into possession. And he declared the trusts of the term of 300 years to be that his trustees should from time to time receive all and singular the rents, issues, and profits, and thereout to pay £30 *per annum* to *Mary Morgan*, provided she continued sole and unmarried; and that his trustees should apply such sums for the maintenance, placing out in the world, and education of the plaintiff and defendant, his two natural sons as they should think fit, until they should attain the age of twenty-five years, and for raising the sum of £5000 for the plaintiff in case he should attain the age of twenty-five years; and to apply yearly such sums as should be necessary for the support and reparation of his mansion-house, and other buildings, houses, plantations, and estates, for taking care of and managing his estate, and to pay the residue of the rents and profits to the person entitled to the estate after the term was satisfied.

The testator died in 1718, leaving *Mary Glisson*, his only legitimate child, who with her husband died soon afterwards intestate, leaving the defendants, *Mary Gould* and *Jane Pace*, her only children, and who thereupon became entitled to the £5000 secured by the marriage settlement and to the reversion in fee of the real estate.

The object of the bill was for a sale of a sufficient part of the estate to pay off the charges imposed by the will.

It appeared that the defendant, *William Okeden*, attained the age of twenty-five in 1728, and that the plaintiff attained that age in 1731, and that the defendant having been let into possession of the estate by the trustees when he attained the age of twenty-one years had ever since applied the rents and profits to his own use.

The question was whether the sums of money charged upon the term of 300 years were to be raised by a sale of the lands, or were to be paid out of the rents and profits.

Mr. *Browne* for the plaintiff.

Mr. Serjeant *Hussey* and Mr. *Wilbraham* for the defendant *William Okeden*. Mr. Attorney-General and Mr. [516] *Fazakerley* for the trustees, contended, that the incumbrances ought to be paid by a sale of a sufficient part of the land ; that if otherwise no provision would remain for the tenant for life, and the creation of the term would be useless. That a charge of a gross sum upon rents and profits was always construed to authorise a sale. That the plaintiff was entitled to his £5000 at the age of twenty-five, and after that age, the provision for his maintenance ceased ; but that object could only be secured by raising the money by a sale for the whole estate did not exceed £650 *per annum*, and as the £5000 was not to be paid, unless the plaintiff lived to the age of twenty-five, it could not till that time be a charge upon the rents and profits, and they cited *Rook v. Banks*, 5th or 6th December, 5 Ann. cor. *Cowper*, C. which was re-heard in 1722, by Lord *Macclesfield*, who thought that the opinion of Lord *Cowper* was wrong, because the case differed but little from that of *Ivy v. Gilbert* ; also *Jones v. Warren*, March 1728, Cor. *King*, C. *Trafford v. Ashton*, 1 P. Wms. 415. *Berry v. Askham*, 2 Vern. 26. *Sheldon v. Dormer*, 2 Vern. 310 ; and Sir *I. Talbot v. Duke of Shrewsbury*, Prec. in Ch. 394, and *Warburton v. Warburton*, 2 Vern. 420.

Mr. *Noel*, and Mr. *Floyer*, for the defendants *Mary Gould* and *Jane Pace*, who were entitled to the reversion in fee, contended that the charges were to be satisfied by the rents and profits only, and that there was no authority to sell the term of three hundred years, that some of the trusts of that term could only be executed by receiving the rents and profits, as that for keeping the estates in repair. That where the testator intended to give a power of sale, the words are express, as in the direction relative to the raising of the daughter's portion of £5000. That the last trust to pay over the residue of the rents and profits, clearly implies that the other trusts were to be carried into effect out of the other parts of the rents and profits, and they cited *Ivy v. Gilbert*, 2 P. Wms. 13 ; Prec. in Ch. 583.

Nov. 17, 1738.—Lord Chancellor. The intention of the testator is clear to me, that the sum of £5000 was to be raised out of the rents and profits, and not from an absolute sale, unless from mere necessity ; and what the Court would do in such case is another consideration. (See *Green v. Belchier*, ante, p. 217, and the notes to that case.)

The directing the trustees to pay yearly money for the [517] repairs of the mansion-house, farm-houses, plantations, &c., is a strong indication that the trustees should keep possession, till the defendant, *William Okeden*, arrived at his age of twenty-five.

I do not think that the directing a gross sum to be raised, will necessarily imply that it should be raised at once, and this was settled in the case of *Evelyn v. Evelyn*, 2 P. Wms. 291 ; for it may be raised out of the rents and profits, and so laid up till it amounts to that sum.

The age of twenty-five in this will, is the time fixed for the payment, but I do not think it the time fixed for the raising, for the testator has directed, if there should be any surplus, that it should be paid to the reversioner, and the natural consequence would have been, if *William Okeden* had died before twenty-five, that what had been received out of the rents would have been the money of the reversioner, and must have been paid over to him.

Whether the testator computed right as to the value of this estate is not material, for the view and intention is to be regarded only.

The consideration is, how far this Court will controul the original and natural import of the testator's words, so as to decree a sale.

There have been a great many strong cases cited to this purpose, but they do not come up to the present case. The case of *Sheldon v. Dormer*, 2 Vern. 310, goes upon the point of necessity, that the annual rents and profits would not, in a vast tract of time, pay the money ; besides, in that case, the very sale of the estate itself would not answer the £4000 charged upon it.

Ivy v. Gilbert is not a case in point, for the defendant the reversioner, and indeed it is impossible that these cases arising upon wills should tally in every respect, yet it certainly is a very strong case in favour of the reversioner.

It has been truly said, that this Court has laid great stress upon a particular time being appointed for the payment, and has enlarged the power of trustees, in order to raise the money within the time.

Therefore here the surplus profits over and above the £50 *per annum* annuity, and the maintenance to *Edmund*, shall be applied towards the discharge of the £5000, but if the surplus profits will not be sufficient to answer the purpose, then I shall be strongly inclined that the estate shall be sold to make up the deficiency.

[518] It is absurd to suppose that the defendant *William Okeden*, was entitled to be let into possession before he attained his age of twenty-five, as both he and his brother were to have a maintenance till that age, and therefore the trustees, by letting him into possession of the rents and profits before that age, have abused their trust; for as they have managed, how was it possible that the £5000 could be raised by the time the plaintiff came to the age of twenty-five.

I will not immediately decree a sale, till the trustees have accounted for the surplus rents and profits; for it is hard the reversioner should suffer by the sale of the estate, when it might have been quite cleared, if the trustees had faithfully executed their trust.

His Lordship ordered it should be referred to a Master, to take an account of the rents and profits of the trust devised to the trustees for the term of 300 years, accrued from the death of the testator, *William Okeden*, until the defendant *William Okeden* attained twenty-five years, that have been received by the trustees, or by the defendant *William Okeden*, and his Lordship declared that the defendants the trustees are answerable for so much thereof as have been received by the defendant, *William Okeden*, until he attained the age of twenty-five years.

And his lordship decreed that the rents and profits, after making certain allowances therein mentioned, were to be applied to the payment of the said portion of £5000 given by the testator's will to the plaintiff. And the consideration of how the surplus was to be raised in case of deficiency, was reserved. (Reg. Lib. B. 1738, fo. 111.)

(1) The statement of this case, and the arguments of counsel are taken from Lord *Hardwicke's* Note-book; the judgment from *Atkyns*.

[519] HARDY v. BAKER and Others.(1)

November 20th, 1738.

Mary Mottershed shortly before her death told her servant that she had put in the drawer where her will was laid a purse with fifty guineas in it, which, when she was dead she desired her servant to take and give to the defendant *Baker*. Held that the gift was void. That it could not operate as a *donatio mortis causa* because there was no delivery, nor as a nuncupative will, the requisites of the statute not having been complied with.

The bill was for an account of the personal estate of *Mary Mottershed*, deceased.

The defendant, *Baker*, was one of the executors and trustees to whom £100 was given by the will for his trouble.

He also claimed to retain fifty guineas under the following circumstances:—

It appeared from the evidence of *Ann Searle*, a servant to the deceased, that the testatrix shortly before her death had told her that she the testatrix was much obliged to her cousin, the defendant *Baker*, for several services; and that she had intended to make his children some present; but that as that might be taken notice of she had put in the drawer where her will was laid a purse with fifty guineas in it, which when she was dead, she desired the witness to take and give to the defendant, *Baker*.

The Lord Chancellor said, that he did not see how this gift could take effect; that it could not as a *donatio mortis causa*, because there was no delivery in the lifetime of the testatrix; and that it could not take effect as a nuncupative will because the directions of the statute had not been followed. His Lordship declared that the defendant, *George Baker*, was not entitled to the said fifty guineas insisted on by his answer, and decreed a general account of the personal estate of *Mary Mottershed*. (Reg. Lib. A. 1738, fo. 369.)

(1) This case is taken from a manuscript report compared with Lord *Hardwicke's* Note-book.

[520] PHILADELPHIA BOYCOT, SOPHIA COTTON, HESTER MARIA COTTON and SYDNEY ARABELLA COTTON, the surviving Daughters of Sir THOMAS COTTON, and PHILADELPHIA, his Wife, *Plaintiffs*; (1) and Sir ROBERT SALISBURY COTTON, and Dame PHILADELPHIA COTTON, his Wife, LYNCH SALISBURY COTTON, COTTON KING, and JOHN CREW, *Defendants*.

[See *Parker v. Hodgson*, 1861, 1 D. & S. 574; *Henty v. Wrey*, 1882, 19 Ch. D. 503; 21 Ch. D. 356; *Balfour v. Cooper*, 1883, 23 Ch. D. 477.]

November 20th and 24th, 1738. 1 Atk. 552.

By indenture of the 27th of July 1687, Sir *Thomas Cotton* when in possession of a certain estate was empowered to limit any part of the estate not exceeding £500 *per annum* to a wife, for her jointure, and also to limit any part of the lands not exceeding £500 *per annum* for raising portions for younger children.

The value of the estate not exceeding £600 *per annum*, Sir *Robert Cotton* when in possession by deed in pursuance of his power, charges part of the lands with £500 *per annum* for the jointure of his wife and by another deed charges the residue of the lands and the reversion of the lands charged with his wife's jointure with the sum of £675 for each of his younger children to be paid to such of them as should attain twenty-one before his death, within one year after his death, and as to such of them as should not have attained that age, to be paid to the sons at twenty-one, and to the daughters at twenty-one or marriage, such respective portions to be paid with interest at £5 *per cent.* from the time of his death to the time of the payment thereof. Sir *Thomas Cotton* died in 1715, *John S. Cotton* one of his sons died in 1728, having attained the age of twenty-six, and *Vere Cotton* in 1730, having attained the age of sixteen. Held that Sir *Thomas Cotton* under the deed of July 1687, was empowered to charge the estate with interest upon his children's portions before the time at which they were payable. (A power to charge a sum in gross upon land implies a power to give interest, *Lord Kilmurry v. Geery*, 2 Salk. 538. *Hall v. Carter*, 2 Atk. 358. *Lewis v. Freke*, 2 Vez. Jun. 509.) And that the interest upon the portions ought not to accumulate until the time of payment; but ought to be paid annually until the principal became due; and that Miss *Vere Cotton* having died unmarried and under the age of twenty-one, her portion sunk into the estate for the benefit of the heir at law. (See *Prowse v. Abingdon*, ante, page 312.)

By indenture of the 27th of July 1687, Sir *Robert Cotton* and Dame *Hester* his wife, covenanted to levy a fine of certain estates to the use of themselves for life, and the life of the survivor without impeachment of waste, remainder to *Thomas* their second son for life, remainder to his first and other sons in tail male, remainder to the other younger sons, [521] and their heirs male in like manner, remainder to the right heirs of Dame *Hester*. And it was provided that it should be lawful for *Thomas Cotton*, and the other sons when in possession, after the death of Sir *Robert Cotton* and *Hester* his wife, by deed or will to limit any part of the lands not exceeding £500 *per annum* to a wife for life for her jointure, and also to limit and charge any part of the lands not exceeding £500 *per annum* for the purpose of raising portions for younger children.

The whole of these lands did not exceed the annual value of £600.

The eldest son of Sir *Robert Cotton* afterwards died, and *Thomas Cotton*, then the eldest son, married and had several children.

Sir *Robert Cotton* and Dame *Hester* his wife afterwards died, and in 1714, *Thomas* then Sir *Thomas Cotton*, in pursuance of the powers reserved to him by the deed of July 27, 1687, by a deed poll of the 31st of July 1714, charged certain of the lands comprised in that deed with the sum of £500 *per annum* for his wife for life, for her jointure; and by another deed poll dated the 1st of August 1714, charged the residue of the lands comprised in that deed, and the reversion of the lands charged with his wife's jointure with the sum of £675 for each of his younger children to be paid to such of them as should attain twenty-one before his death, within one year after his death; and as to such of them as should not then have attained that age, to be paid to the sons at twenty-one, and to the daughters at twenty-one or marriage such respective portions to be paid with interest at £5 *per cent.* from the time of his death to the time of the payment thereof.

Sir *Thomas Cotton* died in 1715, leaving his wife his executrix; in 1728 *John Salisbury Cotton*, one of the younger children, died at the age of twenty-six, and in 1730, *Vere Cotton*, another of the younger children died at the age of sixteen, both intestate and unmarried and without having received their portions.

The mother, the widow of Sir *Thomas Cotton*, in pursuance of an agreement for that purpose assigned all her interest in the personal estate of the deceased *John Salisbury Cotton* and *Vere Cotton*, to the plaintiffs the surviving daughters.

[522] The bill prayed that the sum of £675 a-piece to which the plaintiffs were entitled under the deed of 1st August 1714, might be raised and paid to them with interest, from the death of Sir *Thomas Cotton*, and also that the plaintiff's distributive share of the two sums of £675 and interest, to which they claimed to be entitled in right of *John Salisbury Cotton*, and *Vere Cotton* deceased, might in like manner be raised and paid to them.

Mr. Attorney-General, Mr. Chute, and Mr. Wilbraham, for the plaintiffs, contended that the portion of *Vere Cotton* was transmissible, although she did not live to attain the age at which it was payable, because the giving interest in the mean time made it vested, and cited *Stapleton v. Cheele*, 2 Vern. 673, and Prec. in Ch. 317, and *Cave v. Cave*, 2 Vern. 508.

Mr. Browne and Mr. Fazakerley, for the defendant Sir *Robert Salisbury Cotton*, the eldest son, insisted that the portion of *Vere Cotton*, who died before the time at which it was payable sunk into the estate. That the deed of 27th of July 1687, did not give Sir *Thomas Cotton* the power to charge the estate with interest upon the portions, for that after deducting the £500 *per annum* jointure, the estate was not sufficient to pay interest upon the portions, and that it was not to be supposed that interest was to be raised out of the reversion, and that if the power did extend to charge any interest upon the portions, it could not extend to charge a sum by way of interest to be paid at the time the portions were payable, and not to be payable from time to time; and that such was the intention of the deed of 1st of August 1714. They also insisted that Sir *Robert Salisbury Cotton* was entitled to an allowance for the maintenance of *John Salisbury Cotton* deceased, who had lived several years with him, although no agreement had ever been made for that purpose, and cited *Carter v. Bletsoe*, 2 Vern. 617; Prec. in Cha. 267, and *Tournay v. Tournay*, Prec. in Ch. 290.

Nov. 24, 1738.—Lord Chancellor. Three questions have been made in this case, 1st, whether by virtue of the power contained in the deed of 1687, Sir *Thomas Cotton* could charge the estate with interest upon his children's portions before the time at which they were payable.

2ndly, Supposing that he could, the next question is on the construction of the execution of the power, whether he has charged interest so that it will become due annually [523] from time to time until the time of payment, or whether it ought to accumulate and wait till that time, and then be paid together with the principal sum.

3rdly, The third question relates only to the portion of Miss *Vere Cotton*, who died unmarried, and under the age of twenty-one, and consequently before her portion became payable, and is, whether that portion was transmissible and is now to be raised for the benefit of her representatives, or ought to sink into the estate for the benefit of the heir.

As to the first, I am of opinion that Sir *Thomas Cotton* could well charge the estate with interest upon these portions, upon the authority of the case of Lord *Kilmurry v. Geery*, 2 Salk. 538, and cited in 2 P. Wms. 671, 1 Eq. Ca. Ab. 341, pl. 4, and 2 Eq. Ca. Ab. 665, pl. 14, which was not the case of a portion, but only of a charge on land by way of security; and where there is a general power for raising portions, it seems in the nature of it to include that of giving interest, and where a father gives a legacy to a child, though he makes it not payable till twenty-one, or perhaps gives it not till then; yet, where the child has no other provision, this Court has gone so far as to give interest even before the vesting.

It was objected, that this was a power to charge the portions on the reversion only, which this Court has always been anxious to avoid doing, lest the estate in the hands of the heir should be over burthened. As to that, it is true that this was a charge on the reversion, because the estate produced only £600 *per annum*, and was subject to a jointure of £500 *per annum*, but the objection has no weight in the present case, because it does not appear to have been the object of the parties so much to preserve the estate, as to provide portions for the children, for there is no time of payment appointed, and

no particular sum limited in the power. Portions therefore might have been charged to the whole value of the estate, and it must be immaterial to the heir whether the estate is exhausted by principal monies or interest.

As to the second point, I am of opinion that the interest became due annually: interest is given as a satisfaction for the postponement of the time of payment, and no precedent has been shewn of interest being directed to accumulate in the manner proposed in this case, nor is there any reason from the circumstances for such a construction here. Sir *Thomas Cotton* having a power to charge interest, must be supposed to have given it for the purpose of maintenance.

[524] As to the third point, I am of opinion that the portion of *Vere Cotton* upon her dying under age, and unmarried, sunk into the estate.

The general rule in all such cases, excepting that of *Jackson v. Farrand*, 2 Vern. 424, which is anomalous, hath been that portions charged upon land, whether given with or without interest, and whether by deed or will, sink into the land upon the party's dying before the time of payment.

It was contended that the giving interest upon this portion from the father's death made it *debitum in presenti*, and the case of *Cave v. Cave*, 2 Vern. 508, was cited for that purpose. As that case is there reported it certainly is in point, but upon searching the Register's Book, it turns out that it is no authority at all, because that point could not have been in question. The defendant, Sir *Thomas Cave*, having expressly admitted by his answer, that the £4000 given to *Charles*, who died, ought to be raised, and only insisted that no interest was payable, until the time at which *Charles*, if he had lived, would have been entitled to the portion, and so it was directed. I doubt, indeed, of the propriety of that direction as to the question of interest, because in the event of *Charles's* dying before the legacy was payable to him, it was expressly left over to be distributed amongst the grandchildren, and no time being specified at which it should be payable to them, I think that as to them it was a new legacy, and vested immediately upon the death of *Charles*,⁽²⁾ although he died before the time at which it was to be paid to him, but however that may be, the present question could not have arisen in that case, because the defendant admitted that the principal of the portion ought to be raised. The case of *Bruen v. Bruen*, 2 Vern. 439, and Pre. in Ch. 195, which last report exactly agrees with the Register's Book, is directly contrary to the supposed authority of *Cave v. Cave*. and much resembles the present case, for there maintenance was directed to be raised during the infant's life, although the principal was held to sink into the land. The case of *Tournay v. Tournay*, Pre. in Ch. 290, is also ex-[525]-actly in point. It is true that the decree is not entered, but the minute book warrants the report, and the Register, contrary to the usual practice, has taken down the saying of the Court, which exactly agrees with the report. I am therefore of opinion that Miss *Vere Cotton's* portion of £675 ought not to be raised. Another question remains as to the interest of this sum during Miss *Vere Cotton's* life after her father's death, and I am of opinion, that this interest was given by way of maintenance, and that it ought therefore to be raised and paid to such person as has been at the expense of her maintenance, according to the case of *Bruen v. Bruen*, for she could not have less for maintenance than the interest of this sum. As to the time Mr. *John Salisbury Cotton* lived with the defendant, his brother, if it be insisted upon, I cannot help allowing something for maintaining him so long, for if a younger brother has a provision under a settlement, and lives with the elder, who is entitled to the estate so charged, he shall have an allowance for his maintenance, but in making this allowance, I cannot exceed the interest of the portion.

His Lordship declared, that Miss *Vere Cotton* dying before such time as her portion becomes payable, the principal sum of £675 ought not now to be raised, but must sink into the estate charged therewith, for the benefit of the defendant Sir *Robert Salisbury Cotton* the heir at law, and did therefore order the plaintiff's bill, as far as it seeks to have the £675 raised for the portion of Miss *Vere Cotton*, to be dismissed.

And as to the rest of the cause, decreed that it be referred to the *Master*, to take an account of what was due to the plaintiffs for their original portions of £675 a-piece under the deed of the 27th of July 1687, with interest for the same at £5 *per cent.* from the death of Sir *Thomas Cotton*.

And his Lordship declared, that a reasonable allowance should be made for the maintenance of Miss *Vere Cotton* during her life, equal to the interest of her portion of £675 at £5 *per cent.* from the death of Sir *Thomas* her father, and did therefore decree the several sums before mentioned to be raised by the sale of the lands and premises

comprised in the deed of the 1st of August 1714, subject to the jointure of Lady *Philadelphia*; and out of the money arising by the sale, he decreed that the plaintiffs should be paid their original portions of £675, together with interest for the same as aforesaid, and as to the portion of £675 given to *John Salis*-[526]-*bury Cotton*, he ordered that the same be divided into ten equal parts, whereof one-tenth part was to be paid to the defendant, *Sir R. S. Cotton*, and one other tenth part to the defendant, *Lynch Salisbury Cotton*, another tenth part to the defendant *Cotton King*, and the remaining seven tenth parts to the plaintiffs. (Reg. Lib. A. 1738, fo. 306.)

(1) The statement of this case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book, the judgment from two manuscript reports.

(2) So *Laundy v. Williams*, 2 P. Wms. 478. *Roden v. Smith*, Amb. 588. *Crickett v. Dolby*, 3 Ves. 10. But if the representative of the deceased legatee is entitled to the legacy, he shall wait until such time as the legatee would have been entitled to it, in case he had lived, *Chester v. Painter*, 2 P. Wms. 336, unless interest be given upon the legacy, in which case the representative may claim immediately, *Harrison v. Buckle*, 1 Str. 238. *Green v. Pigot*, 1 Bro. G. C. 105. *Crickett v. Dolby*, D. 3 Ves. 10.

DUNN and Other, *Plaintiffs*; (1) and COATES and BALGUY, *Defendants*.

[See *Harvey v. Lovekin*, 1884, 10 P. D. 127.]

November the 24th, 1738. 1 Atk. 288; 8 Vin. Ab. 337, pl. 9, S. C.; 2 Eq. Ca. Ab. 78, pl. 11; Ib. 629, pl. 1, S. C.

This Court will not admit a bill of discovery in aid of the jurisdiction of the Ecclesiastical Court, because they are capable of coming at that discovery themselves.—Where there is a custom pleaded to a suit in the Ecclesiastical Court for a church rate, and the plea admitted, they may proceed to try the custom, but if denied it is a ground for prohibition.

The defendants had instituted a suit in the Ecclesiastical Court, for a church rate, to which there was a custom pleaded of something done in lieu of the rate, and that plea admitted.

And now a bill is brought here for an injunction to stay the defendants' proceedings in the Ecclesiastical Court, and to be relieved against the rates, and to compel a discovery from the defendant *Balguy* of the value of the respective real and personal estates of the several inhabitants of the several parishes and places in the bill mentioned, and how the money collected by means of the said rates had been disposed of.

The defendants demurred to so much of the bill as sought to stay the proceedings in the Ecclesiastical Court by injunction, and also as to the discovery prayed thereby, as the matters contained in such part of the bill as they demurred to, were properly cognizable in the Ecclesiastical Court; and, if true, ought to have been insisted on there, or at common law, and was not a proper foundation for a bill in this Court.

[527] *Lord Chancellor*. This Court will not admit a bill of discovery in aid of the jurisdiction of the Ecclesiastical Court, because they are capable of coming at that discovery themselves.

If there is a suit instituted in the Ecclesiastical Court for a church rate, and a custom pleaded of a certain sum in lieu of the rate, or something done in the room of it, and that plea admitted, they may proceed to try that custom in the same manner as a *modus*; but if the custom is denied, it would be a proper ground for a prohibition, *propter triationis defectum in curia ecclesiastica*, for the trying of the custom in the province of the common law. (*Earl of Derby v. Duke of Athol*, 1 Ves. 203. *Anon.* 2 Ves. 451.)

His Lordship was of opinion, it was a good demurrer, and therefore ordered that the same do stand and be allowed. (Reg. Lib. A. 1738, fo. 49.)

(1) This case is taken from *Atkyns*, it is not to be found in Lord *Hardwicke's* Note-book.

HARRISON v. OWEN.(1)

November the 25th, 1738. 1 Atk. 520.

If a mortgage is found cancelled in the possession of the mortgagee, it is as much a release as cancelling a bond.

This cause went off to an issue, to try whether certain mortgages were fairly cancelled by the mortgagee, or whe[528]-ther they were fraudulently and by stealth carried away by the mortgagor, and the seals cut off by him.

The *Lord Chancellor* said in this cause, that if a mortgagee cancels a mortgage, and it is found so in his possession, it is as much a release as cancelling a bond, but it does not convey or revest the estate in the mortgagor, for that must be done by some deed.

(1) This case is taken from *Atkyns*; it appears in *Lord Hardwicke's* Note-book under the name of *Harris v. Owen*, and the parties to the suit were—

Arthur Harris and *Thomas Harris*, Executors of *Edward Harris* deceased, who was one of the Executors of *Arthur Harris Clerk* deceased, Plaintiffs; and *Salem Owen*, Executor and Devisee of *Henry Roberts* deceased, and *Richard Massary* and *John Massary*, Defendants.

The object of the bill was to have a satisfaction of several sums of money due to the plaintiffs, as representatives of *Arthur Harris* and *Edward Harris*, on bonds and mortgages, and to compel the defendant *Owen* to redeem or be foreclosed.

The defence set up by *Roberts* was, that *Edward Harris*, shortly before his death, with whom he was on terms of great intimacy, cancelled the mortgage deeds, and delivered them up to *Roberts* by way of present or free gift.

The mortgage deeds were, on the death of *Edward Harris*, in the possession of *Roberts* cancelled; but they were proved, shortly before *Edward Harris's* death, to have been locked up partly in a chest in his bed-chamber, and partly in a bureau in his study.

The cause came on before his Lordship upon an appeal from an order of the *Master of the Rolls*, who, by an order of the 30th June 1738, ordered that the plaintiff, and the defendant *Owen*, should proceed to a trial at law on this issue, whether the said *Edward Harris* cancelled the following deeds: an indenture of the 23d of November 1717, an indenture of the 25th of December 1722, an indenture of the 11th of January 1724, and certain indentures of lease and release of the 29th and 30th days of May 1733, in the answer of the late defendant *Henry Roberts* mentioned, and the said defendant *Owen* was to produce the said deeds at the trial. The plaintiffs appealed from this order, on the ground that no such issue ought to have been directed; but that they were entitled to the relief prayed by their bill, without the trying of any such issue. But his Lordship affirmed the order with this addition, that the defendant *Owen*, at the trial of the issue, should admit that no money or other consideration was paid by the said *Henry Roberts* for cancelling the said mortgage deeds. (*Reg. Lib. A. 1738*, fol. 141.)

[529] MICHAELMAS TERM, 1738.

BOWER v. SWADLIN.(1)

1 Atk. 294.

A release to one obligor is a release to both in equity as well as at law. (2 *Roll's Abr.* 412, G. 4, 5. *Shep. Touch.* 335. *Har. Co. Lit.* 232, a. n. 1. *Skip v. Huey*, 3 *Atk.* 91. *Ex parte Smith*, 1 *P. Wms.* 237. *Hawkshaw v. Parkins*, 2 *Swans. Rep.* 539.)

Where there is an assignment of a bond in trust for others, precedent to a release, though without consideration, it will be a material question, whether the obligee could release, or if it could operate to the releasee, as he is a trustee in the assignment. Every man is supposed to be conusant of a deed, to which he is himself a party.

An obligee gave a release to one of the obligors in a bond, the bill brought by the representative of the obligee, and likewise by a trustee under the assignment of this bond, for the sum conditioned to be paid by the bond.

The defendant insisted, by way of plea, that a release to one obligor is a release to all.

Lord Chancellor. There is no doubt but a release of one obligor is a release in equity to both, as well as in law ; but if there be an assignment of the bond in trust for the benefit of others, precedent to the release, though the assignment be with or without consideration, it will be a material question, whether the obligee could release, or if it could operate to the releasee, as he must be presumed to have notice of this assignment, being himself a trustee in the assignment, and every man is supposed to be conusant of a deed to which he is a party.

His Lordship directed that the cause should stand over till the defendant had answered to the date of the release ; for it does not appear at present, whether the release was precedent or subsequent to the assignment.

(1) This case is taken from *Atkyns*. It does not appear in *Lord Hardwicke's Notebook*.

[530] EDWARD RUSSELL, WILLIAM HAYWARD, and Others, *Plaintiffs* ; (1) and ELIZABETH HAMMOND and Others, *Defendants*.

November 25th or 27th, 1738. 1 Atk. 13.

German Hammond being tenant for life of a freehold, and a leasehold estate called *Ford*, with remainder to his son in tail, and being absolutely entitled to another leasehold estate, joins with his son after his marriage in making three settlements of the three different estates, all the settlements being of the same date ; By the first settlement, in consideration of £200, part of the wife's portion paid by her father, they join in settling upon the son and his wife, and the issue of the marriage, the freehold estate ; By a second settlement, in consideration of £100, being the residue of the portion paid soon after the execution of the settlement, they make the same settlement of the *Ford* estate ; And by a third settlement, the other leasehold estate in which *German Hammond* had an absolute interest, was assigned upon trust, to secure *German Hammond* and his wife an annuity of £25 during their joint lives, and after the death of one of them, to pay £13 to the survivor, and subject thereto to the son and his wife for their lives, with remainder to such uses as the survivor might appoint ; The father and son being both indebted at the time of the execution of these settlements, it was held that the first and second settlements were not within the statute of the 13th of Eliz. c. 5, fraudulent as against their creditors, but that the third settlement was fraudulent against their creditors, there being no pecuniary consideration to support it, and the father's reservation of an annuity to the value of the leasehold estate being a strong badge of fraud.

The defendant, *Elizabeth Hammond*, intermarried with *William Hammond*, her late husband, in 1720, but the marriage being without the consent of *Thomas Stedman*, her father, he refused to give her any portion, but afterwards, *William* and *German Hammond*, his father, offering to make a settlement upon her, *Thomas Stedman*, her father, agreed to give £300 as her portion, and accordingly, by indentures of lease and release of the 16th and 17th of April 1722, in consideration of £200, a freehold estate was settled upon *William Hammond* for life, remainder to the defendant *Elizabeth* for life, remainder to the first and other sons of the marriage in tail male, remainder to the right heirs of *William Hammond*, and by another indenture of the 17th of April 1722 (being the same date as the release) in consideration of £100 then in hand paid or secured, to be paid by [531] *Thomas Stedman*, and of the marriage already had, a leasehold estate called *Ford*, was assigned by *German* and *William*

Hammond, to trustees upon trust for *William Hammond* for life, and the said *Elizabeth* during her life, remainder to the issue of their two bodies for life, remainder to the executors and administrators of the survivor. And by a third indenture of the same date, in consideration of the marriage already had, and for settling and assuring the estate, and for divers other good considerations, another leasehold estate was assigned to trustees upon trust to secure to *German Hammond* and his wife £25 *per annum*, during their joint lives, and after one of their deaths, to pay the survivor £13 *per annum*, and subject thereto for *William Hammond* for life, remainder to the defendant *Elizabeth*, his wife, for life, remainder to such uses as they or the survivor of them shall appoint.

It appeared that *German Hammond* was tenant for life of the freehold estates, remainder to *William Hammond* in tail, and that he was likewise tenant for life of the leasehold estate called *Ford* (which was a leasehold for lives) with remainder to his son in tail.(2)

The leasehold estates conveyed by the third indenture were leaseholds for lives belonging to *German Hammond*, the father, and of which no settlement upon the son had been made.

At the time of these deeds being executed, both the father and son were in debt. The £100 stated as the consideration for the settlement called *Ford*, was not paid at the time, but was paid soon afterwards. *German* and *William Hammond* were both dead, the latter leaving the defendant, his widow, and four children.

The bill was brought by the creditors of *German* and *William Hammond*, and sought to set aside these three settlements as fraudulent and void against creditors, and to have satisfaction for their demands out of the estates thereby settled.

[532] Upon the hearing of the cause, on the 25th Feb. 1734, before the *Master of the Rolls*, his Honour declared the settlement of the leasehold estates to be fraudulent and void against creditors, and that so much of the bond debts of *German* and *William Hammond* as their respective personal estates would not extend to pay, should be discharged out of their respective interests in such leasehold estates, but he dismissed the bills without costs, so far as it sought to impeach the settlement of the freehold estate. From so much of the decree as affected the settlement of the leasehold estates, and because it did not give her the costs of the suit, so far as it sought to impeach the settlement of the freehold estate, the defendant, *Elizabeth Hammond*, appealed.

Mr. *Chute*, Mr. *Fazakerley*, and Mr. *Smith*, in support of the appeal, cited *Osgood v. Strode*, 2 P. Wms. 245. Sir *Ralph Bovy's* case, Ventr. 194. *Louder v. Blockston*, 2 Lev. 147. *Scott v. Bell*, 1 Lev. 71, and 3 Heb. 82. *Kirk v. Clark*, Pre. in Ch. 275, Styles Rep. 446, and *Cook v. Lord Fauconberg*, cor. *Talbot*, Ch., about 1735, where a father being tenant for life, remainder to the son in tail, joined in suffering a recovery and settling the estate upon the marriage of the son; and in default of issue of which marriage, it was settled upon collateral branches of the family, and it was held that they took as purchasers for a valuable consideration.

Mr. *Attorney-General* and Mr. *Browne*, in support of the decree, insisted that there was no case in which a voluntary settlement made by a person indebted at the time had been held good against creditors, and that the £100 stated to be the consideration for settling the leasehold estate called *Ford*, not having been paid or secured at the time, that settlement was purely voluntary, and could not be confirmed by the subsequent payment, which might be only colourable.

Between Nov. 25th and Dec. 5th 1738.—*Lord Chancellor*. There is no evidence whatsoever in the cause to impeach the settlements of actual fraud.

But what the plaintiffs insist on is, that *German Hammond* was largely indebted at the time of making the settlements on *William* the son, and that therefore these settlements were fraudulent upon the statute of the 13th of Eliz. ch. 5, which regards creditors only.

I must consider this Act of Parliament as it would have been considered at law, for I will not lay down any other rule of construction, in equity, than is followed at law upon this statute.

[533] What is prayed by the creditors, is the application of these leasehold terms as assets for the satisfaction of their debts. The present is a case of general creditors, and not of mortgagees, judgment creditors, or purchasers; and therefore not so strong as where a man has paid his money for the same estate; which would have brought it within the statute of the 27th of Eliz. cap. 4, which makes every conveyance made

with the intent to defraud purchasers, for a good consideration, to be utterly void. (So *Buckle v. Mitchell*, 18 Ves. 110. *Pulvertoft v. Pulvertoft*, 18 Ves. 84.)

There are three settlements in question, the first of a freehold estate, the second of a leasehold estate called *Ford*, and the third of another leasehold estate.

William Hammond the son married the daughter of one *Stedman*, without the consent of the fathers of either side; no articles or settlement were made before the marriage; Mr. *Stedman* afterwards proposed to *German Hammond* to give £300 as a portion with his daughter, if he would make an adequate settlement; afterwards a kind of survey was taken of the premises proposed to be settled, and therefore the settlement was not merely colourable.

The consideration for settling the freehold is £200 paid; there is no pretence to impeach this, it is as fair a transaction as can be. (*Stileman v. Ashdown*, 2 Atk. 479.)

The second is a settlement of the leasehold estate called *Ford*, made in consideration of the marriage already had, and for the consideration of £100 paid, or secured to be paid.

The question is, whether this shall prevail against the creditors of *German* as a good settlement.

A great deal has been said upon this head, but it depends upon circumstances, and every case varies in that respect.

There are many opinions that every voluntary settlement is not fraudulent; what the Judges mean is, that a settlement being voluntary is not for that reason fraudulent, but an evidence of fraud only, *Bovey's* case, in 1 Vent. 193, and *Lord Teynham v. Mullins*, 1 Mod. 119; though I have hardly known one case where the person conveying was indebted at the time of the conveyance, that has not been deemed fraudulent. There are, to be sure, cases of voluntary settle-[534]-ments that are not fraudulent, and those are, where the person making is not indebted at the time; in which case subsequent debts will not shake such settlement.(3)

But I will not enter into a nice disquisition, whether every voluntary settlement is or is not fraudulent? because I think, as to the *Ford* estate, there was a valuable consideration, upon the face of the settlement, for the father was tenant for life, and the son entitled to the reversion in tail.

And where father and son join in a marriage settlement, it is a bargain for a good valuable consideration, and has been so held in several cases; but then the question is, whether it has been extended to creditors.

In the present case, the son could not have settled the residuary interest, without the father's help, because he was tenant in tail in reversion, and not in possession; but if the father had been tenant for life, and the son tenant in fee, and had joined in such settlement, it would have made a material difference, for then I should have thought this not good against creditors; for there was no occasion for the son's joining, as the son might have disposed of the residuary interest without him.

I am of opinion besides, here is a fair pecuniary consideration, as there was a sum of money paid, amounting to £100, by *Stedman* to *German Hammond*, and, when paid, expressed to be on account of the third £100, agreed to be given by *Stedman* as a portion, and no other account appears to have passed between *Stedman* and *Hammond* but this.

As to the assignment of the other leasehold estate, it is of a very different nature; for it is expressed to be in consideration of the marriage, and divers other good considerations.

[535] All the deeds bear date the same day, and it is insisted it is inartificial to split them into three.

But I cannot think it is so here; for they have made the consideration of the freehold £200, and of the *Ford* estate £100, and I cannot take in the consideration of those deeds, which have a *quid pro quo*, and a consideration of their own, to support a third deed.

But in the last settlement there is a plain badge of fraud, for *German Hammond* took back an annuity to himself and his wife for life of £25 which probably was the full value of the estate comprised in this deed, and therefore gave the son nothing; which is almost tantamount to a continuance in possession, and has always been deemed a strong circumstance of fraud. (*Twyne's* case, 3 Co. 80 b. *Taylor v. Jones*, 2 Atk. 600.)

Therefore I am of opinion the creditors ought to be relieved against this settlement.

The decree was made in February 1734, very near four years ago, and if I should enter into the consideration of costs, I doubt I must give the plaintiffs costs before the Master, and though the bill, as to two of the matters, has no foundation for relief, yet

as to a third part, viz. the last settlement, it is as clearly for the plaintiffs; therefore, for all parties, it will be better to drop the costs.

His Lordship therefore ordered that the said decree be affirmed, save as to that part thereof as relates to the settlement of the said leasehold estate called *Ford*, and as to the plaintiff's bill, so far as it seeks to impeach the settlement of that leasehold estate, and to make the same liable to the plaintiff's demands; his Lordship doth order that the same be likewise dismissed out of this Court without costs.

And as to the costs of the rest of this suit, that the said decree whereby the same are reserved till after the said report, be varied as follows:—That to the time of hearing this cause at the Rolls, no costs be paid on either side, but that the consideration of costs of such other parts of this cause from the hearing, be reserved till the Master shall have made his report, the ten pounds deposit to be paid back to the defendant. (Reg. Lib. B. 1738, fol. 209.)

(1) This case is taken principally from *Atkins*, with some alterations and additions from Lord *Hardwicke's* Note-book. A material alteration is made in the statement of what his Lordship is made to say, relative to settlements, where the father is tenant for life, remainder to the son in fee, in contradiction to the case where the father is tenant for life, remainder to the son in tail. That this is a proper alteration appears not only from the sense and context, but from another manuscript report found amongst his Lordship's papers.

(2) Mr. *Saunders*, in his edition of *Atkins*, states, in his note to this case, that it does not appear in the Register's book, that the son was entitled to the reversion in tail of the *Ford* estate, and says, "Indeed Lord *Hardwicke's* reasons respecting the *Ford* estate seems rather to apply to freehold than leasehold." It is true that it does not appear in the Register's book which states Lord *Hardwicke's* decree in this cause; but it appears in the Register's book (where the decree of the *Master of the Rolls* is stated), that the son was tenant in tail of the *Ford* estate, and that the *Ford* estate was a leasehold for lives, see Reg. Lib. B. 1734, fo. 130.

(3) So *Shaw v. Lady Standish*, 2 Vern. 326. *Middlecome v. Marlow*, 2 Atk. 518. *Lord Townshend v. Windham*, 2 Ves. 10. *Stephens v. Olive*, 2 Bro. Ch. Ca. 90. *Mathews v. Feaver*, 1 Cox, 278. *Lush v. Wilkinson*, 5 Ves. 384. *Kidney v. Coussmaker*, 12 Ves. 136. *Holloway v. Millard*, 1 Madd. 414. *Partridge v. Gopp*, 1 Eden, 163. *Battersbee v. Farrington*, 1 Swanst. 106. Otherwise if indebted at the time, *Beaumont v. Thorp*, 1 Ves. 27. *Mathews v. Feaver*, 1 Cox, 278, or if a man make a settlement with a view to his being indebted at a future time, D. per Lord *Hardwicke*, *Stileman v. Ashdown*, 2 Atk. 481. *Fitzer v. Fitzer*, ib. 511. *Taylor v. Jones*, ib. 600. But an assignment of copyholds (not being subject to debts) cannot be fraudulent against creditors, *Mathews v. Feaver*, 1 Cox Cases, 278. But *Quære* whether an assignment of stock or of choses in action, can be fraudulent against creditors, see *Taylor v. Jones*, 2 Atk. 600. *Horn v. Horn*, Amb. 79. *Dundas v. Dutens*, 1 Ves. jun. 198. *Grogan v. Cooke*, 2 Ba. & Be. 233.

[536] ROBERTS v. DIXWELL; and SANDYS v. DIXWELL; and PYOTT v. DIXWELL.(1)

[See *Thorp v. Owen*, 1854, 2 Sm. & G. 93; *Williams v. Lewis*, 1859, 6 H. L. C. 1022. *In re Jeaffreson's Trusts*, 1866, L. R. 2 Eq. 281; *Appleton v. Rowley*, 1869, L. R. 8 Eq. 142; *Cooper v. MacDonald*, 1877, 7 Ch. D. 297.]

December 8th, 1738. 1 Atk. 607; 2 Ves. 652.

Sir R. S., by his will, devises certain estates to trustees upon trust, subject to certain charges, to convey one fourth part thereof in trust for the separate use of his daughter *Priscilla*, for her life, and so as she alone or such persons as she should direct, might receive the rents and profits thereof to her sole and separate use, *her husband not to intermeddle therewith*, and after her decease, in trust for the heirs of the body of the said *Priscilla*, for ever; and also upon trust to convey the remaining three-fourths to his other three daughters, and the heirs of their bodies; and he declared that if any of his daughters should die without heirs of their bodies, the part or share of her or them so dying, should be conveyed to the use of his surviving daughters, equally to be divided, and the heirs of their bodies, but the share of his daughter *Priscilla* to be

conveyed in trust, as aforesaid, and if all his daughters died without issue, and there should be no issue left of his body, then to his own right heirs for ever.

Priscilla having died, leaving a husband and two sons, and part of the lands devised being gavelkind; held that *Priscilla* took only an estate for life in the lands devised to her, the trusts as to her being merely executory, and that her eldest son took as purchaser an estate tail, both in the gavelkind lands, and lands in socage.

And where a testator having a son and a daughter in pursuance of a power by which he is authorised to appoint, a real estate to the use of his children for such estates, and in such shares and proportions as he should direct, by his will appoints the real estate to his son in fee, upon condition that he should pay to his sister £3000, wherewith he charged the estate; held, that though the direct terms of the power are not pursued, that the intent and design of it are; and that such appointment to his daughter was a good execution of his power.

Sir *Richard Sandys*, by his will, dated the 7th of January 1722, devised certain real estates to trustees upon trust, subject to various charges thereon, to convey one full fourth part thereof in trust for the separate use of his daughter *Priscilla Sandys* (the mother of the plaintiff *Sandys*), for her life, and so as she alone, or such persons as she should direct, might receive the rents and profits thereof to her sole and separate use, *her husband not to intermeddle therewith*, and after her decease, in trust for the heirs of the body of the said *Priscilla*, lawfully begotten, for ever, and also upon trust to convey one full fourth part thereof to his daughter *Mary*, the mother of the plaintiff *Roberts*, and the heirs of her body, and one other full fourth part thereof to his daughter *Elizabeth*, who afterwards died in his lifetime, and the heirs of her body, and the remaining fourth part thereof to his daughter *Ann*, afterwards married to the plaintiff *Pyott*, and the heirs of her body; but the conveyances to be made [537] to his said daughters *Ann* and *Elizabeth*, were not to be made until the time of their respective marriages; and if either of them should during the lifetime of their aunt *Priscilla* and *Sarah Rolle*, marry without their consent, then the part or share of her so marrying, should not be conveyed to her or the heirs of her body, but unto his said other daughters, or such of them as should not marry without such consent, equally to be divided, and the heirs of their bodies, and if any of his said daughters should die without heirs of their bodies, the part or share of her or them so dying should be conveyed to the use of his surviving daughters, equally to be divided, and the heirs of their bodies; but the part and share of his daughter *Priscilla*, to be conveyed in trust as aforesaid, and if all his said children died without issue, and there should be no issue left of his body, then to his own right heirs for ever.

The testator afterwards mortgaged the whole of this estate.

By the settlement made previous to the marriage between *Mary Sandys*, one of the daughters of Sir *Richard Sandys*, and *William Roberts*, the father and mother of the plaintiff, and of the defendant *Elizabeth Mary Roberts*, dated the 12th of July 1722, *William Roberts* covenanted in case there should be one or more children besides an eldest or only son, then that he would either in his lifetime, or at his decease, give or leave to such child or children, the several sums of money following: That is to say, if but one, £1000, if two, £1500, and if three or more, £2000 to be equally divided between them.

Subsequently to the marriage, and after the death of Sir *Richard Sandys*, by indenture of the 17th of January 1726, *William Roberts* covenanted that he and his wife would levy fines of the third part or share of the real estates, to which his wife *Mary* was entitled under the will of her father, Sir *Richard Sandys*, which said fines were declared to be to the use of the said *Mary Roberts* for life, remainder to *William Roberts* for life, and after the decease of the survivor of them to the use of such of the children of that marriage for such estates, and in such shares and proportions as the said *William* and *Mary*, his wife, should by any deed or writing to be by them duly executed in the presence of two or more credible witnesses direct, and for want thereof to such of the said child or children as the survivor of them should in like [538] manner direct, and for want of such last mentioned appointment, to certain other uses.

The fines were accordingly duly levied.

Mary, the wife of *William Roberts*, having died without any appointment having been made in pursuance of the power reserved in the above indenture, and *William Roberts* by his will dated the 22nd of January 1735, after reciting the above indenture, and the powers thereby vested in him and his late wife, and the survivor of them, and

that no appointment had been made by him and his wife; did, by that, his will, in pursuance of the said power, limit and appoint the said undivided third-part of the lands, &c., in the said indenture and fines mentioned unto his only son, the plaintiff, *Robert*, his heirs and assigns for ever, upon condition that he should pay to his sister of the whole blood, the defendant *Elizabeth Mary Roberts* £3000; and upon this further condition that he should pay £50 a-year maintenance, until she attained twenty-one, or married. And the said testator charged the said undivided third-part, with the payment of the said £3000; and in case the plaintiff should refuse to pay the same, he limited and appointed the said undivided third part unto the defendant *Elizabeth Mary Roberts*, her heirs and assigns for ever; and he declared his mind to be, that £1000 part of the said £3000 was in full satisfaction of the £1000 which he stood engaged to pay to his daughter *Elizabeth Mary Roberts* by his marriage settlement, as the only child of that marriage living at the time of his death, and that £2000 residue of the said £3000 should be paid to the defendant *Elizabeth Mary Roberts*, at twenty-one or marriage, but that if she should die before, then that the said £2000 should be paid by the plaintiff to the defendant, *Mary Roberts* (the testator's daughter by a former marriage) at twenty-one or marriage; and he gave the residue of his personal estate equally between his two daughters.

These causes embraced a great variety of objects, and, amongst others, the following questions were argued and decided under the will of Sir *Richard Sandys* :—

1st, Whether under that will *Priscilla* was tenant in tail of the lands devised to her, and her husband entitled to be tenant by the curtesy? and she having left two sons, *Richard* and *Henry Sandys*, and part of those lands being of gavelkind tenure, whether the gavelkind part of those lands were to go to the eldest son as heir at common law, or were to descend according to the custom?

[539] 2dly, Under the will of *William Roberts*,

1st, Whether his will was a good execution of the power reserved by the indenture of the 17th of January 1726?

2dly, Whether the covenant in the marriage settlement as to the provision for younger children was satisfied by the will?

Upon the first question as to what estate *Priscilla Sandys* took under her father's will, it was contended by Mr. Attorney-General for *Richard*, the eldest son of *Priscilla*, that *Priscilla* took only an estate for life, and that her eldest son was entitled to have an estate in tail conveyed to him as a purchaser, and that consequently the husband of *Priscilla* was not intitled as tenant by the curtesy. That *Henry*, the second son had no title as co-heir to the gavelkind lands, because the heir, who takes by purchase must be heir by common law. There is no legal estate given to the wife, but only an executory trust, and an express estate for life directed for her; if a conveyance had been made in her lifetime, it must have been to trustees for her benefit, for the purpose of excluding the husband; it would have been to trustees and their heirs during the life of *Priscilla*, in trust for her separate use, remainder to the heirs of her body, in which case the heirs of the body would have taken as purchasers. Lord *Say and Seal's* case, 3 Bro. P. C. 458 [2nd Ed. 113]. In the case of Lord *Glenorchy v. Bosville*, Ca. Temp. Talb. 3, the Court acting upon an executory trust, directed an estate for life, though the words in the case of a legal estate would have made an estate-tail. In *Papillon v. Voice*, 2 P. Wms. 471, the devise was of money to be laid out in land to A. for life, remainder to trustees to preserve contingent remainders, and then to the heirs of the body, and it was held to give an estate for life only to A., and so was executed in strict settlement.

But supposing *Priscilla* to have had an estate-tail under the will, yet her husband is not entitled as tenant by the curtesy. To create that estate there must be an actual seisin during coverture. It is considered as initiate during her life, for after the birth of a child, the husband may alone do homage, Co. Litt. 29 b, 30-124. It is a continuation of her estate, but in this case he is expressly excluded from all interest during his wife's life, as to that estate the wife is to be considered as a feme sole.

Mr. *Fazakerley* and Mr. *Legg* for *Henry*, the younger son contended, that *Priscilla* took an estate-tail under the [540] will, and that the estate therefore descended to the heirs, according to the custom of gavelkind.

If this had been a devise of a legal estate, it would clearly have created an estate-tail; the construction in equity must be the same of a trust executed, and so where the trust is executory, unless it can clearly be shewn that the testator's intention will thereby be defeated; but in this case there is reason to suppose that the testator intended to create

an estate-tail, because he has directed immediate estates-tail to be conveyed to his other daughters, and the only object which he seems to have had in view in varying the devise to his daughter *Priscilla* was to exclude her husband from any benefit, but that provision will not alter the nature of the estate, Co. Litt. 378 b. We join in contending that the husband has no claim to the tenancy by curtesy, but insist that the wife nevertheless was tenant in tail, her husband being expressly excluded from any benefit, there is no reason for supposing that the testator intended to alter the course in which the estate would descend; and yet if the mother was only tenant for life, the second son will be excluded. In *Backhouse v. Wells*, 1 Eq. Ca. Abr. 184, pl. 27, the words were for life only; but Lord Ch. J. *Parker* said, that if the limitation had been to the heirs of the body, and not to the issue, the legal force of those words would have been such that the estate would have been an estate-tail. In Lord *Glenorchy v. Bosville*, the decision proceeded upon the ground that the estate for life was to be without impeachment of waste, except voluntary waste in houses.

Mr. *Idle*, for the husband, contended, that though there was no actual seisin of the husband during the life of the wife, yet that the right to the curtesy was not thereby invalidated, for that it prevailed in all cases of trusts, though there can be no actual seisin, and cited *Broughton v. Langley*, 2 Salk. 679. *Sweetapple v. Bindon*, 2 Vern. 536. *Williams v. Wray*, 1 P. Wms. 137, and 2 Vern. 680, S. C. *Casburne v. Inglis*, ante, p. 221.

As to the second question upon the will of *William Roberts*, it was contended by Mr. *Browne*, on behalf of the plaintiff *Roberts*, who claimed the estate of *Mary Roberts*, which was settled by the deed of the 17th of January 1726, that the power reserved by that deed was not well executed by the will of *William Roberts*, so far as related to the £3000 given to *Elizabeth Mary Roberts*, for that the power was to appoint to the uses of the estate, and not to grant a [541] rent charge out of it, that the contingent appointment of £2000 part of the £3000 in favour of *Mary Roberts*, the testator's daughter by a former wife, was clearly beyond the power and that the appointment of the £1000 of her part of the £3000 was wholly bad, being in satisfaction of the testator's debt, or if valid, that the plaintiff *Roberts* was entitled to stand in the place of *Elizabeth Mary Roberts*, and to claim that sum under the covenant.

Mr. *Noel* and Mr. *Clarke*, for *Elizabeth Mary Roberts*, insisted that she was entitled to the £3000 under the appointment, and to the £1000 under the covenant, for that the former could not be considered as a satisfaction of the latter, because it was not competent to the testator, so to satisfy his debt, and because the thing given in satisfaction must be of equal value, but that the title to this £3000 depended upon a contingency, because a fine only having been levied, and no recovery having been suffered, the remainders over would not be subject to the £3000 if the base fee should determine; that the execution of the power was good in itself, the granting a rent charge being a good execution of a power to appoint to the uses of land, and for this purpose they cited *Thwaytes v. Dye*, 2 Vern. 80.

Between Dec. 8th and 11th, 1738.—Lord Chancellor. In this case, all is executory, and the estate to be conveyed to the trustees is to be a trust estate. The question is, how this executory trust is to be carried into execution, and what kind of estate the trustees ought to convey, whether an estate tail to *Richard Sandys* as a purchaser, or an estate tail to *Richard* and *Henry Sandys*, as co-heirs in gavelkind to their mother *Priscilla*? and this depends upon a previous question, namely, what estate ought to have been conveyed to *Priscilla*, if the conveyance had been made in her lifetime, whether an estate in tail or for life only? It is clear that such an estate ought to have been conveyed to her as would best have answered the testator's intention, as it is to be collected from his will. If an estate tail would support the intention, that estate ought to have been conveyed, but if the conveying that estate would have defeated the intention, as I think it clearly would, then only an estate for life. The words of the will are that the trustees should convey one-fourth of the estate in trust for the separate use of the testator's daughter *Priscilla* for her life, and so as she alone, or such persons as she should direct, might receive the rents and profits thereof to her sole and separate use, and her husband not to intermeddle there-[542]-with. These words give her an express estate for life, but that is not so in the devise to the other daughters, and the difference in the manner in which these devises are expressed, strongly implies a difference of intention as to what estate each daughter was to take. It is true, that where there is a devise of a legal estate to one for life, and after his decease, to the

heirs of his body, the first taker according to the rule in *Shelley's* case, takes an estate tail, and so undoubtedly it would be in the case of a trust actually executed, for then equity follows the law, and whatever estate the party would have had in case of a devise of the land, he is entitled to in the case of a devise of the trust of it, but where the trusts are merely executory, and something remains to be done to perfect and carry into effect the testator's intention, the Court is not confined to the strict rules of common law, but governs itself by the testator's intention, and does that which will best answer and support it. (2) For this purpose, limitations to preserve contingent remainders have been inserted by this Court, though none were directed by the will, as was done by Lord Cowper in the case of Sir John Maynard's will, *Stamford v. Hobart*, 1 Bro. P. C. 288. Upon this ground, the Court provided in the cases of *Papillon v. Voice*, 2 P. Wms. 471, and Lord Glenorchy v. Bosville, cas. temp. Talbot, 3, though in the latter there could have been no doubt, but that if a legal estate or a trust executed had been devised, Lady Glenorchy would have been tenant in tail, yet on account of circumstances, shewing the testator's intention to make her only tenant for life, the Court pursuing that intention, decreed her only that [543] estate. Thus in all these cases, the intention has uniformly been observed; in this case the intention is clear, the conveyance directed is for *Priscilla* for her life, for her separate use; now if such instructions were to be given for a settlement, no one, I apprehend, would limit an estate tail to the wife for her separate use, but only to her use for life, and afterwards to her children, and the subsequent words, *wherewith the husband is not to intermeddle*, do in common sense and understanding denote such a settlement wherein the husband was to have neither interest nor power, but that immediately upon the wife's decease, which is the meaning I put upon the words "after her decease," the same should remain to the heirs of her body. It may indeed be said, that these words were intended only to exclude the husband from taking the profits during his wife's life, but I think they go much further, and not only exclude him from meddling with the profits, but from having any thing to do with the estate.

If the wife had been tenant in tail, I think that the husband would have been entitled as tenant by the curtesy. It has been urged, that whilst the trust remained executory, the wife had no seisin out of which the husband's right to the curtesy could arise, or that if she had, yet that the husband being excluded from all participation during her life, had not such an interest as would entitle him to the curtesy, that estate being considered as initiate upon the birth of a child; but it has been settled that there may be a tenancy by the curtesy of a trust estate in general, and of an equity of redemption, and of a trust for the payment of debts (see *Casburne v. Inglis*, ante, page 221); why, therefore, may it not as well take place in case of a trust of an equity of redemption, which is this case? As to the seisin, if the wife had been tenant in tail, she would have been as much seised of this as she could have been of any other trust estate; and Lord Coke does not say, that the husband must receive the profits, but only that the wife must be seised; and I think that the husband must have been tenant by the curtesy of this trust estate, in imitation of the law, by which, had this been a legal estate, the wife would have been actually seised; for if a legal estate be devised to a woman for her separate use, and after her death, to the heirs of her body, by which she would take an estate tail (see *Fearne's Contingent Remainders*, 6th Edit. p. 54, 201), [544] the husband could not meddle with the profits during her life, but he would nevertheless be seised of the freehold in her right, as a trustee, as after her decease he would hold by the curtesy, that being one of the incidents to every estate tail; and in that case, the husband and wife together might have suffered a recovery, and so have barred the remainders over; and so they might in equity, in case of a trust estate. If, therefore, in this case, the wife had been tenant in tail, the intervention of the husband's estate would have postponed the title of the issue, which it was, I think, the testator's intention should take place immediately upon the decease of the wife; or the husband and wife together might have entirely defeated their title, although it was expressly provided that the husband should not at all intermeddle with the estate.

I think from these circumstances that it was the intention of Sir Richard Sandys to give only an estate for life to *Priscilla*.

The only question which remains is, whether the alteration of the course of descent of the gavelkind lands will vary the construction which I have put upon the will, and I think that it will not, for this is only a consequence of pursuing the testator's

intention, which in my opinion is plain upon the other parts of the will ; besides, in this case, socage and gavelkind lands are intermixed, and I know of no rule which warrants a different construction upon each, when the intention is the same as to both. It is said, that by these means the second son will be deprived of all his claim to the land, although as much heir, according to the custom, as the eldest son. But, as I said before, this is only a consequence of vesting the estate by purchase in the children ; and the second son will not be entirely deprived, for he will have a remainder in tail after the decease of his brother without issue. As to the other point, upon the execution of the power, it is true that the direct terms of the power are not pursued, but the intent and design of it are. It is admitted, that the father might have appointed part of the estate to be sold, and have directed the application of the money to arise from such sale (*Long v. Long*, 5 Ves. 445. *Kenworthy v. Bate*, 6 Ves. 793. *Bullock v. Fladgate*, 1 Ves. & Be. 471). It is the same to the heir or remainder-man which way the child is to be provided for ; but giving a portion of the estate might be the means of tearing it to [545] pieces, whereas now the estate will be kept entire, and it is better for the daughter that she should have a sum of money than a small estate. The case of *Thwaytes v. Dye*, 2 Vern. 820, is a strong authority upon this subject ; but I think that the covenant is not discharged by the will, for where a gift is to discharge a former debt, something must move from the giver (see *Bellasis v. Uthwatt*, ante, page 273) ; but, in this case, the whole is to arise out of the wife's estate, and therefore to satisfy the father's covenant, this declaration is entirely void. However, as it was the father's intention to give his daughter only £3000, I think that only £2000 ought to be raised out of the wife's estate, and that the other £1000 should be raised out of the father's estate.

By the decree it was declared that one third part of the real estate of Sir *Richard Sandys* belonged to *Priscilla* late the wife of *Henry Sandys*, the elder, and her issue to be conveyed and settled in the manner thereafter mentioned, and that the said *Henry Sandys*, the elder, was not entitled to be tenant thereof by the curtesy of *England*. And it was ordered and decreed that the trustees should convey such third part of the said Sir *Richard Sandys* real estate to *Richard Sandys*, the infant son of the said *Priscilla*, in general tail, with remainder to *Henry Sandys*, his younger brother, in general tail, with remainder over, in default of heirs of the body of the said *Priscilla* according to the will of the said Sir *Richard Sandys*.

The decree also declared the will of *William Roberts* to be well proved and ought to be established except as to the sum of £1000 thereby appointed to *Elizabeth Mary Roberts* in satisfaction of the like sum due from him to her by covenant, and declared that one third part of the real estates of Sir *Richard Sandys* belonged to *William Roberts* by virtue of the appointment contained in his father's will for such estate as was gained or created by the fine levied by his father and mother, and the declaration of uses thereof subject to the charge of £2000 part of the sum of £3000 to be raised for the benefit of *Elizabeth Mary*, his sister and declared that the limitation over of the sum of £2000 to *Mary Roberts* by the said will was void, and as to the sum of £1000 residue of the sum of £3000 mentioned in the will of *William Roberts*, it was declared that the appointment thereof by the said will for satisfaction of a debt due [546] from him by covenant contained in his marriage settlement was void ; and that *Elizabeth Mary Roberts* was entitled to have satisfaction for the principal sum of £1000 with interest as a specialty creditor under that covenant, and for that purpose directed accounts of the real and personal estates of *William Roberts*, the father ; and in case there should not be assets to pay the said sum of £1000 and interest his Lordship reserved the consideration as between *Elizabeth Mary Roberts* and her brother *William Roberts*, whether he was entitled to have satisfaction out of her mother's third part of Sir *Richard Sandys* estate, for the residue of the said sum of £1000 and interest as a gratuitous appointment and whether the conveyance of such third part by the said trustees to the said *William Roberts* ought not to be made subject thereto. (Reg. Lib. B. 1738, fo. 119.)

(1) The statement of this case, and the decree, are taken from the proceedings in the cause, the arguments of counsel from Lord *Hardwicke's* Note-book, and the judgment from a manuscript report.

(2) This distinction between trusts executed and trusts executory is clearly established, *Leonard v. Earl of Sussex*, 2 Vern. 526. *Lord Stamford v. Hobart*, 1 Bro. P.

C. 288. *Papillon v. Voice*, 2 P. Wms. 471. Lord *Glenorchy v. Bosville*, Ca. Temp. Talbot, 3. *Baskerville v. Baskerville*, 2 Atk. 281. *Wright v. Pearson*, 1 Eden's Rep. and Amb. 358, S. C. *Green v. Stephens*, 17 Ves. 64, and that Lord *Hardwicke* denied such distinction to exist, as stated in *Bagshaw v. Spencer*, 2 Atk. 577, is contradicted by Lord *Hardwicke* himself, who says "I did not there say no weight was to be laid "on that distinction," *Ezel v. Wallace*, 2 Ves. 323, and see *Garth v. Baldwin*, 2 Ves. 656, and seems to be contradicted by Lord *Northington*, who admits the distinction, and says, "Lord *Hardwicke's* determination in *Bagshaw v. Spencer*, was as right, "sound, and certain as his different determination was in *Garth v. Baldwin*," see *Le Rousseau v. Rede*, 2 Eden's Rep. 6, see *Fearne's* Contingent Remainders, *et seq.*, and see Mr. *Fonblanque's* Treatise on Equity, vol. 1, 418, and *Maddock's* Chancery Practice, vol. 1, 588, *et seq.*, see also *Synge v. Hales*, 2 Ba. & Be. 499. *Jervoise v. Duke of Northumberland*, 1 Jac. & Walk. 559.

[547] DENNIS DALY and Lady ANN, his Wife, Plaintiffs; (1) and Sir EDWARD DESBOUVERIE, JOHN MANLEY and THOMAS WARD, Trustees of Lady CLANRICKARD's Will, the Earl of CLANRICKARD, and Others, Defendants.

May 1st, June 6th, and December 11th, 1738. 2 Atk. 261.

J. Smith devises a certain real estate to Lady *Clanrickard* for life, with remainder to such persons and for such uses and estates as she should limit and appoint. Lady *Clanrickard* appoints the real estate to her son for life, remainder to his issue, remainder as to a moiety to the plaintiff, her daughter, Lady *Ann* for life, with remainder as to her sons and daughters in tail male, and provides that if Lady *Ann* should marry without the consent of three trustees or the major part of them, that she and her issue should forfeit her and their right to the estate and that the next person in remainder might enter and enjoy the same.

Held that Lady *Clanrickard* might annex to the appointment such conditions in restraint of marriage; and that the plaintiff *Daly* being desirous of marrying Lady *Ann*, and having submitted proposals to the trustees for a certain settlement to be made by his father, to the terms of which the trustees having objected; but one of the trustees at the request of the others having written to a friend of the plaintiff *Daly's* father, stating that if the father would make the settlement proposed by the son they should be obliged to consent on account of the young people's affections being engaged; and the plaintiffs having married privately without the knowledge of the trustees before an answer was received to that letter; It was likewise held under the circumstances of the trustees not objecting to the family, fortune, or person of the plaintiff, and upon the father's consenting to make the settlement proposed by the son which was in itself reasonable, that the marriage must be deemed a marriage had with the consent and approbation of the trustees. (As to conditions in restraint of marriage, see note (2) to the case of *Hervey v. Aston*, ante, page 351.)

John Smith, the father of the Countess of *Clanrickard* and Lady *Desbouverie* by a settlement of the 8th of September 1714, settled certain lands upon himself for life, remainder to trustees in trust for the separate use of Lady *Clanrickard* for life, remainder to such persons, and for such uses and estates as she should appoint and in default of such appointment to her and her heirs.

The said *John Smith* by his will of the 9th of July 1718, gave to the plaintiff Lady *Ann* and her sister, daughters of Lady *Clanrickard*, legacies of £1000 a-piece payable at twenty-one or marriage and gave the residue of his real and personal estate to trustees upon trust as to one moiety for the separate use of Lady *Clanrickard* for life, remainder to such persons and for such uses and estates as she notwithstanding [548] standing her coverture should limit and appoint, and as to the other moiety upon trust for her other daughter with the same powers, and the said testator by a codicil to his will directed that in case the plaintiff Lady *Ann* or any of his grand-daughters named in his will should marry in the lifetime of their mother, under the age of twenty-one without the consent of their mother that their legacies were to be divided amongst the rest

of his grand-daughters, and the plaintiff Lady Ann's brother John, and such other children as the plaintiff Lady Ann's mother should have.

Lady *Clanrickard* after the death of her father, and husband, by deed poll of the 1st of August 1732, appointed the surviving trustee of the settlement of the 8th of September 1714, to convey the premises therein comprised to Sir *Edward Desbouverie*, John *Manley*, and *Thomas Ward* to the use of her son the Earl of *Clanrickard* for life, remainder to his first and other sons in tail male, remainder to his first and other daughters in tail general, remainder as to one moiety to the use of her daughter, the plaintiff Lady Ann for life, remainder to her sons and daughters in tail male, and as to the other moiety to the use of her other daughter Lady *Mary* for life, with the same remainder to her children and with cross remainders between her two daughters; and she thereby declared and provided that if any of them the said Earl of *Clanrickard*, Lady Ann and Lady *Mary*, should marry without the consent of the said Sir *Edward Desbouverie*, John *Manley*, and *Thomas Ward*, or the major part of them or of the survivor of them, if any of them should be then living that then he, she or they so marrying without such consent, and his, her or their issue and descendants should forfeit and lose all his, her, or their right to the premises, and that the next person in remainder should and might enter and enjoy the same as if he, she or they was or were dead without issue.

By another deed poll of the same date, Lady *Clanrickard* appointed and directed that the residue of the real and personal estate of her father, should be conveyed to Sir *Edward Desbouverie*, John *Manley*, and *Thomas Ward*. to be by them sold, and that they should lay out the money to be produced by such sale, in the purchase of lands to be settled upon the same uses as mentioned in the preceding deed.

Lady *Clanrickard*, by her will of the 2nd of August 1732, confirmed the above appointment, and appointed Sir *Edward Desbouverie*, John *Manley*, and *Thomas Ward*, executors, and [549] residuary legatees, upon the like trusts as are before mentioned in the said deed-poll.

After Lady *Clanrickard*'s death, the trust property was in pursuance of a decree of this Court, conveyed and assigned to the trustees appointed by her.

In the month of April 1735, the plaintiff, Mr. *Daly*, informed Sir *Edward Desbouverie*, one of the trustees, with his desire of marrying Lady Ann, and stated to him the heads of the proposed settlement, which the trustees desired him to put into writing, which he accordingly did, and sent them by letter to Sir *Edward Desbouverie*, dated the first of May, and which letter was in the words following:—"The proposals to be sent to Dean *Taylor*, and what my father will come into is, the settling the reversion of 4000 acres of land, and of the lady's fortune, the maintenance to be £600 a-year, and the jointure to be £500, and £600 in case of no issue. This I am sure my father will immediately come into."

These proposals *Desbouverie* communicated to *Ward*, who both agreed that it was unreasonable that Lady Ann's fortune should be settled upon the father for his life, and they said they would not consent to the marriage, unless the interest of her fortune was to be settled upon her and her intended husband, for their maintenance, in addition to the £600 *per annum*.

Desbouverie communicated with Lady Ann upon the subject, and told her that the trustees would not consent to the match, unless the interest of her own fortune was settled upon her and *Dennis*, for their present maintenance, as well as the £600 a-year; to which Lady Ann answered, she always understood it was to be so, and that otherwise she would never agree to the match; but told him there would be no harm in sending the proposal to Dean *Taylor* to inquire into the value of the estate which the plaintiff's father proposed to settle, upon which the defendant *Desbouverie* told her he would desire the other trustees to send them, and desired her always to remember upon what footing they were sent, and declared he would not be concerned in the said proposals, or consent thereto, without her fortune being settled upon her and her husband, for their present maintenance, in addition to the £600 *per annum*.

Mr. *Manley*, at the request of the other trustees, who were strangers to *Dennis* and his father, transmitted the son's proposals to Dean *Taylor*, who was a friend of the [550] family in *Ireland*, and guardian to the Earl of *Clanrickard*, and which he accordingly did in the following letter, dated the 29th of May 1735.

"We take the liberty to give you some further trouble in relation to Lady Ann, who we find has an inclination to marry the son of Mr. *Dennis Daly*. The young

gentleman has sent the inclosed proposals to Sir *Edward Desbouverie*; as we are entire strangers to Mr. *Daly*, we desire you will inquire into his circumstances, and how far he is able to make the settlement proposed by his son; and if his father should desire to treat, it is our opinion my lord's counsel should be consulted thereupon. Lady *Ann*'s fortune at present is from her grandfather *Smith*, about £3400, besides what was left by her father out of his *Irish* estate, which will make the whole, as we compute, upwards of £7000, and she has a further expectancy in case of my lord's death, of a moiety of what my Lady *Clanrickard* left my lord, if she marry with our consent, if not, she will lose it; and the whole will go to her sister, unless she should likewise marry without our consent, in which case the whole goes to Sir *Henry Parker*, my lady's son by her first husband. This is all the influence we have over Lady *Ann*, and she might with her fortune marry much better, yet if Mr. *Daly*'s father will make the settlement proposed, we believe the young folks are too far engaged for us to attempt to break off the match, and therefore we shall be obliged to consent to it. Lady *Ann* very soon after her father's death, went to her father's relations without our privity or consent, and how far they may have perverted her, we cannot tell, but she and the young gentleman both declare themselves Protestants, and say that is the reason my lady's father's relations are against the match.

"We are your most humble servants,

"JOHN MANLEY.

"*London, 29th of May 1735.*

"*P.S.* The above letter was prepared for all the trustees, but Sir *Edward Desbouverie* going out of town in a hurry, desired I would forward it to you."

On the 5th of June, 1735, the plaintiffs were married privately without the knowledge of the trustees.

By a letter dated the 12th of June, 1735, Doctor *Taylor* wrote to Mr. *Manley* a letter in answer to Mr. *Manley*'s letter, wherein he inclosed the proposals given him by Mr. [551] *Dennis Daly*, the father, which was as follows:—"Four thousand acres to be settled to the use of *Dennis Daly*, sen. for life, to *Dennis Daly*, jun. for life, with remainder to his first and other sons in tail male. The said *Dennis Daly* hath agreed, that he will lay out the portion at interest or in the purchase of land, when had, which should be settled to the same uses, £600 *per annum* present maintenance, £600 *per annum* jointure, if no issue, but if issue £500 *per annum*, that is what was agreed and settled by Sir *Edward Desbouverie*, and a settlement to be made accordingly." In answer to which letter, Sir *Edward Desbouverie* wrote [as] follows:—

Langford, 25th of June 1735.

"I saw Mr. *Daly* once or twice at my lodgings in *London*, I came to no manner of agreement with him, but referred every thing till his father's proposals came from *Ireland*. I find them now widely different from what I expected, that I cannot think myself or the other trustees will ever come into them; he demands the income of the Lady *Ann*'s fortune for himself during his life, for which he offers to settle on them £600 *per annum*, present maintenance; he estimates her fortune at £9000, which at 8 *per cent.*, the common interest in *Ireland*, produces £540 *per annum*, and he now allows his son £60 *per annum*, so that he really intends at present to part with nothing, and Lady *Ann* will only have during the father's life, the income of her own fortune to maintain herself, and possibly a large family of children. I am ashamed the father should make such a preposterous offer; but, however, if you please to tell him that if he expects my consent in this affair, that I insist Lady *Ann*'s fortune be settled with the £600 *per annum* for present maintenance, and if she survives his son, the said income of her own fortune should be settled as an additional jointure on her, together with £600 or £500 *per annum*, which shall happen, as in his proposals; and if he is not pleased with these terms, I shall concern myself no more about the matter."

Which letter the two other trustees *Manley* and *Ward*, inclosed in the following letter to Dr. *Taylor*, dated the 5th of July.

"SIR,

"We received your letter of the 12th of June, last month, [552] Sir *Edward* being in the country, we sent it him, and he having fully expressed his own as well as our

sentiments in the inclosed letter, we have nothing more to add, only to assure you that we are thoroughly sensible of your care of my lord's affairs: as to Mr. *Daly's* proposal, unless he will consent to settle Lady *Ann's* fortune, and £600 *per annum* for maintenance, and as a jointure in case she survives his son, as proposed by Sir *Edward*, we shall not concern ourselves any further."

The bill prayed that Lady *Ann's* portion might be laid out in the purchase of lands, and that a settlement might be made of the lands so to be purchased, and of the estates proposed to be settled by Mr. *Daly*, according to the proposal and agreement.

The defendants, the trustees, insisted by their answer, that the marriage was had without their consent.

Mr. *Daly*, the father, consented to make the proposed settlement, if it should be held that the marriage was with the consent of the trustees.

The cause first came on upon the 1st of May, 1738, when it was adjourned to the first day of causes in the next term, by reason of the pendency of the cause of *Hervey v. Aston*, for the opinion of the judges, wherein several of the points on the effect of conditions against marrying without consent, were expected to be determined.

It again came on on the 6th of June in the same year, and was again adjourned to the next term, with liberty for the plaintiffs to file a supplemental bill, in order to bring the issue of the plaintiffs before the Court, and was finally heard on the 11th of December, 1738.

Mr. *Chute*, Mr. *Noel*, Mr. *Hoskins*, and Mr. *Murray*, for the plaintiffs, contended, 1st, That Lady *Clanrickard* had no power to impose these conditions upon her children.

2dly, That the restrictions were of such a nature that they ought not to take effect, and

3rdly, That there was sufficient evidence of consent by the trustees, or of what was equivalent to it, to entitle Lady *Ann* to her portion.

As to the first point, it was contended, that Lady *Clanrickard* having only a power of appointment, could not annex this condition, which was not contemplated by the grandfather, from whom the property proceeded. That if the power had been executed in the lifetime of the father, it might have in-[553]-terfered with the proper exercise of parental authority. As to the second, it was contended, that this case differed from that of *Hervey v. Aston*. This being a condition subsequent, and a forfeiture imposed not only upon the person offending, but upon her children. As to the third and principal point, it was contended that there was sufficient evidence of actual consent; that they received the proposal, and approved of it, subject to an alteration which has since been adopted; that they must have approved of the person and family of the plaintiff, before they could direct any inquiries as to his property; that by the course which they adopted, they had permitted the plaintiffs to engage each other's affections, and had given that encouragement to the marriage which was equivalent to actual consent, and the cases of *Mesgrett v. Mesgrett*, 2 Vern. 580, and *Farmer v. Compton*, 1 Ch. Rep. 1, were cited.

Dec. 11, 1738. Mr. Attorney-General for Lady *Mary Burke*, and Mr. *Browne* and Mr. *Fazakerley* for Sir *Henry Parker*, contended, that there was no evidence of the trustees having communicated any sort of consent to either of the plaintiffs; that the letter of the trustees to Doctor *Taylor* was the only evidence of consent; that at the utmost that letter amounted only to a consent if certain terms were complied with; and that the marriage having taken place before those terms were complied with, was in fact without consent, and that the property therefore immediately went over to the next in remainder, and could not be called back again by any thing done afterwards, and the case of *Fry v. Porter*, 1 Ch. Ca. 138, was cited.

Lord Chancellor. As to the first point, whether Lady *Clanrickard* could clog the appointment made by her with such conditions as in the present case, I am of opinion that she could. Mr. *Smith* enabled her to appoint the lands to such uses, and to such persons, and for such estates as she thought proper, and I have no doubt but that, under so large a power, she might subject them to such terms and conditions as she pleased, but although she had such a power, I can by no means think that she has executed it reasonably. Mr. *Smith*, from whom the whole proceeded, had set her a pattern of a much more proper restraint, which was from marriage before twenty-one without consent, but she has carried that restraint to the end of their lives, and in case of disobedience in the parents, has created a forfeiture in the children, though they claim

in their own right as purchasers, [554] and not by descent from their parents, nay, though they should marry a second time with consent, there is no room for repentance, but the penalty extends to all the issue of such second marriage. Therefore, although a Court of Equity will never encourage children to oppose their parents, yet in such hard cases, they ought to be as liberal and favourable as possible in construing the execution of such extraordinary powers; they accordingly have always regarded the substance and end of such powers, and have looked to the main point only, namely, whether there be any evidence of consent by the trustees. To find this out, we must see whether there was any objection to the person, family, or fortune of the gentleman, and I see none in the present case. There is no appearance of any disparagement to the lady, and under these circumstances, it is probable that the trustees would be inclined to consent, nay, if they found the lady inclined to the match, it was their duty to consent, and this Court would not suffer them obstinately to refuse their consent. Trustees for this purpose are put in the place of parents, and ought to act as parents, whose duty it is not to oppose the happiness of their children.

Under the circumstances of this case, I think that there is evidence that the trustees approved the match, and gave their consent. The letter to Doctor *Taylor* shews, that they were privy to the lady's affection for the plaintiff, and that the plaintiff had delivered proposals to them, but that they being ignorant of his father's affairs, were desirous of ascertaining whether he was of ability to complete the settlement proposed; if he was, no objection seemed to remain to the match; the settlement was the only thing about which there seemed to be any scruple; if that was made good, I cannot see that they disliked either the plaintiff's family or person, or any thing else. It is objected that the letter does not impart any actual consent, but only states reasons upon which they might be induced afterwards to consent, and that too with force, saying they shall, they fear, be obliged to consent, but I think it plainly appears that they referred every thing to the settlement, and that they in fact did consent, in case that was perfected.

As to the expression of their being obliged to consent, what could oblige them? no external force, but only the reasonableness and fitness of the thing; and if upon such a proposal of marriage they had refused their consent, I should have thought them guilty of a breach of their trust. It is [555] objected that Mr. *Daly*, the father, was under no obligation previous to the marriage, to confirm the proposals, but that proves nothing; for when the settlement is made, it will have relation to the original proposals, and will be as much for their benefit as if it had been actually sealed before the marriage; the performance of the condition will refer to, and must be connected with the previous consent, and I am satisfied that the trustees did consent, provided the father would carry the proposals into effect. In all these cases the Court has proceeded upon very liberal grounds, and has put a construction most favourable to prevent a forfeiture, and has only inquired whether there was reasonable evidence of consent as in the cases of *Mesgrett v. Mesgrett*, 2 Vern. 580. *Farmer v. Compton*, 1 Ch. Rep. 1, and *Bostock v. Ireton*, Reports of Cases in Lord *Nottingham's* time, Mich. 1675, reported in 2 Ch. Rep. 13, under the names of *Wiseman v. Foster*.

His Lordship declared that the plaintiff's marriage ought, upon the circumstances of this case, to be deemed a marriage with the approbation and consent of the trustees, and that the defendant *Daly* ought to make a settlement according to the proposal, and he directed the trustees should carry into effect the directions and trusts contained in the deeds Poll, except as to the proviso obliging the Lady *Ann* to marry with the consent of the trustees, such marriage having been already had. And his lordship referred it to the Master to enquire what the portion of Lady *Ann* was, which moved from her father, together with the money legacy to which she was entitled under her grandfather's will, and directed the same to be laid out in land to be settled to the same uses as the £4000 money, and in making the settlement, provision is to be made for younger children, and the Master was to take an account of the interest of Lady *Ann's* portion of the legacy she is entitled unto under her grandfather's will since her marriage, and how it has been applied, and that so much as remains unreceived be paid over to the defendant *Dennis Daly*, and thereupon the defendant, *Dennis Daly*, is to pay what shall appear due to the plaintiff for the £600 a-year agreed to be settled for the maintenance of himself and his family, deducting what the plaintiff *Dennis Daly* has received for the interest of the Lady *Ann's* portion and legacy, and

what the defendant *Dennis Daly* has paid on account thereof. (Reg. Lib. A. 1738, fo. 320.)

(1) The statement of this case is taken from the *Lord Chancellor's* Note-book and *Atkyns*; the arguments of counsel from *Lord Hardwicke's* Note-book, and the judgment from a manuscript report.

[556] LUCAS and Others, *contra* SEALE.(1)

Appeal from the Rolls.

December 12th, 1738.

Executors cannot bring a bill to compel their co-executor to pay to them money due from him to the estate of their testatrix, unless under special circumstances.

The defendant borrows of *Elizabeth Gee* £500, and for securing payment of the same in 1728, mortgages his estate in fee to *Elizabeth Gee*, and gives her a bond.

Elizabeth Gee by her will dated the 25th of July 1732, devises the mortgaged estate to the plaintiffs and defendant, and makes them executors of her will.

The plaintiffs bring their bill to compel the defendant to redeem; and in case the mortgaged premises were not of sufficient value, that the defendant might make up the deficiency.

The *Master of the Rolls* referred it to the Master to see what was due for principal and interest on the mortgage, and to tax the costs, and upon payment of the same, the plaintiffs were to re-convey; but in default of payment defendant was to be foreclosed, and the mortgaged premises were to be sold; and if the money arising from the sale was insufficient for payment of principal, interest and costs, defendant was to pay the deficiency.

From this decree the defendant appealed.

Mr. *Browne* for the plaintiffs.

Defendant being a joint devisee, plaintiffs could not bring an ejectment against him; neither could they bring any action on the bond for the payment of the money.

Mr. *Attorney-General* for the defendant, insisted, that the plaintiffs ought not to have the money out of the defendant's hands, who was a co-trustee. The Court never does that unless there is proof of his being insolvent, and that they should have brought a bill to have the money secured, and applied according to the will.

Dec. 12, 1738.—*Lord Chancellor* said, this decree has gone too far; when a person is co-executor and debtor, the money is assets [557] in his hands; and therefore unless there is something special in the case, they cannot bring a bill to compel him to pay the money to them; but the proper bill had been to have an account, and it should have been brought by those entitled under the will.

But there is no ground to compel him to pay the assets over to another executor, because he has an equal right; and if there is likely to be a loss, the Court itself would take care of the assets.

In this case he is mortgagor and devisee under the will of the estate itself, therefore this estate at law can never be recovered from him wholly.

It may therefore be reasonable that he should assign his right as devisee to the other executors.

But I will not direct that, before it has been enquired into whether this mortgage be a good security, and therefore reversed the decree, and directed that inquiry, and reserved all further directions. (Reg. Lib. B. 1737, fol. 90.)

(1) This case is taken from a Manuscript Report of Mr. *Forrester*, which agrees with the same case in *Lord Hardwicke's* Note-book.

HALHED v. MASON.(1)

(This cause came on by Appeal from the Rolls.)

December 12th, 1738.

Elizabeth Mason being at the time of her marriage in treaty for an estate, it was agreed by marriage settlement, that if the purchase could be obtained, that the purchase money should be paid out of her fortune, and the estate when purchased should be settled upon the husband and wife, and the issue of the marriage; but if the purchase could not be obtained, then the husband covenanted that he would lay out £500, part of *Elizabeth's* fortune, in the purchase of other lands, to be settled to the same uses. Upon the marriage settlement, which was executed in the usual manner, an indorsement was made before the sealing and delivery of the deed, by which it was declared by all parties, that if the particular purchase could not be effected, that then the husband should not be obliged to lay out the sum of £500, or any other sum in the purchase of any other estate. The indorsement was not signed by the parties, but the attestation of the witnesses was annexed to it. Held that the indorsement, though neither signed nor sealed by the parties, but only attested was part of the deed, having been made before the sealing and delivery of the deed.

By marriage settlement of the 24th of January 1718, previous to the marriage between *Nathaniel Halhed* and *Eliza*-[558]-*beth Mason*, after reciting that *Elizabeth Mason* was then in treaty for the purchase of certain lands belonging to Mr. *Broome*, computed to be of the value of £500, it was agreed, that if the purchase could be obtained, that the £500 should be paid for out of the fortune of *Elizabeth Mason*, and that the lands when purchased should be settled upon the husband for life, remainder to the wife for life, and from and after their deaths, to the use of such children, in such shares, and for such estates as the husband and wife should jointly appoint; and in default of such appointment, to such children as the survivor should appoint, and in default of such appointment, to the use of all the children living at the death of the survivor equally as tenants in common, and the heirs of their several and respective bodies with cross remainders between them, remainder to such persons as the wife should appoint; and in default of such appointment, to the heirs of the husband. But if the said purchase could not be obtained, then the said *Nathaniel Halhed* covenanted with the trustees that he would, within two years after the said intended marriage, lay out £500 of the estate in money of the said *Elizabeth* in the purchase of some estate of inheritance as near the settled estate as might be, and cause the same to be settled to the like uses as the estate of *Broome* if purchased, would have been settled; and it was thereby declared, that the provision thereby made for the issue of the marriage should not bar them from claiming by the custom of the city of *London* any part of his personal estate.

This deed was executed in the usual manner, but upon it was indorsed the following indorsement:—"Memorandum, that before the sealing or executing the within indenture, it was agreed and declared by and between all the parties thereunto to be their true meaning, that in case the purchase of the estate at *Broome* therein mentioned can be obtained, that then the purchase money for the same shall be raised and paid out of the personal estate or fortune which the within named *Nathaniel Halhed* will be entitled to by the marriage with the within named *Elizabeth Mason*; but if the said purchase cannot be had or obtained, then the said *Nathaniel Halhed* or his heirs shall not be obliged to lay out the sum of £500 or any other sum in the purchase of any other estate, or make any other settlement whatsoever, any thing in the said indenture to the contrary notwithstanding."

This indorsement was not signed by the parties, but the attestation of the witnesses was annexed to it.

[559] *Nathaniel Halhed* by his will, bearing date February 5th, 1728, gave £2000 to his son *William Halhed*, to be paid at twenty-one, and £1000 a-piece to his two daughters, to be paid upon the attaining twenty-one or marriage; but if they died before either of those events, their legacies were to cease for the benefit of his executors; and he charged certain messuages with the payment of the £2000, and all the residue

of his estate, real and personal, he gave to *Nathaniel Halhed*, his eldest son by a former wife, and made him sole executor.

The purchase of the lands called *Broome* was not completed, and no other lands having been purchased with the sum of £500, this bill was filed for the purpose of having the £500 laid out in the purchase of lands according to the marriage articles.

For the plaintiffs it was contended, by Mr. *Attorney-General*, that the indorsement upon the marriage articles was void, being in contradiction to the deed itself, and not being signed by the parties; and that it did not appear that the estate called *Broome* could not have been obtained; that the legacies given by the will of the husband could not be taken in satisfaction of the agreement to lay out the £500, for that there was no instance of a money legacy being held to be a satisfaction for land, and that the children were to have different interests in the lands to be purchased, and the legacies.

Mr. *Fazakerley* for the defendants insisted, that the indorsement having been made previous to the execution of the deed, was to be taken as part of it, as much as the condition of a bond was part of the deed, and that it was perfectly immaterial where the seal was placed; that from the acts of the parties it was to be presumed that the lands called *Broome* could not be purchased, or at least that some inquiry ought to be directed upon that head; that the father had by his will made a disposition of his whole estate; and that the legacies must either be taken in satisfaction of the agreement, or if not, that the plaintiffs ought not to be permitted to take under the will, and at the same time to insist upon the execution of the articles, and thereby defeat the will.

Dec. 12, 1738. The *Lord Chancellor* expressed his opinion, that the indorsement, though neither signed nor sealed by the parties, but only attested, was nevertheless part of the deed, having been made before the delivery, and that the sealing and delivery of the deed went to the indorsement likewise.

[560] Upon the other point his Lordship cited the case of *Saville v. Saville*, Sel. Cas. in Ch. 32, and 2 Atk. 458, S. C., and directed an inquiry, whether any, and what endeavours had been used by the testator, or by *Elizabeth* his wife, or either of them, to complete the purchase of the said estate of the said *Broome*, and whether the same could have been obtained, and what was the reason that the purchase had not been completed; and whether the same could then be obtained, and upon what terms; and directed the Master to state the same, and all the circumstances to the Court, and his Lordship reserved the consideration, whether any, and what sum of money ought to be laid out in the purchase of lands, according to the marriage agreement, and touching the interest thereof, until after the Master should have made his report. (His Lordship reversed the decree of the *Master of the Rolls*, so far as it directed that the said £500 should be laid out in the purchase of land, to be settled to the uses of the marriage settlement of the 24th of January 1718; and so far as it directed interest to be given on the said sum of £500 since the testator's death. (Reg. Lib. A. 1738, fol. 155.))

(1) The statement of this case, the arguments of counsel, and the enquiry directed, are taken from Lord *Hardwicke's* Note-book, the judgment from a Manuscript Report.

[561] GREEN v. SMITH:—MOORE GREEN, an Infant, *Plaintiff*; (1) and ELIZABETH, HANNAH, and BRIDGET SMITH, and Others, *Defendants*. And ELIZABETH, HANNAH, and BRIDGET SMITH, *Plaintiffs*; and MOORE GREEN and Others, *Defendants*.

December 15th, 1738. 1 Atk. 572.

Where a testator by his will directs his personal estate to be laid out in land, to be settled upon certain trusts, and subsequent to the date of his will contracts for the purchase of an estate, but dies before it is completed, the Court will not decide where there is a doubtful title, between the heir at law of the testator and the devisees, whether the contract ought to be carried into effect, without having the vendor a party to the suits.

John Smith by his will, bearing date the 19th of December 1722, devised his real estates to trustees, upon certain trusts therein mentioned, and after performance

thereof, and subject to certain charges, upon trust that they should, when his kinsman, the plaintiff, *Moore Green*, should attain twenty-four years of age, convey to him the said estates for his life, with remainder to his first and other sons successively in tail male, with provision in the mean time for maintenance, remainder over in default of issue of the plaintiff; and directed that the residue of his personal estate should be laid out in the purchase of lands, to be settled to the same uses as his real estate.

The original bill prayed the execution of the trusts of the testator's will.

By the cross bill, the heirs at law of the testator claimed all such lands as had been purchased or contracted for since the execution of the will, and all such copyhold premises as had not been surrendered to the use of the will, and prayed that the trustees might complete the unfinished purchases out of the personal estate, for the benefit of the heirs at law.

[562] By the decree made by the then *Lord Chancellor*, on the 26th of February 1730, it was, amongst other things, declared, that as to the copyhold lands and hereditaments not surrendered to the use of the will, and as to the freehold lands purchased or contracted for, after the making of the will, that the same belonged to the heirs at law; and that if any part of the purchase money remained unsatisfied, the same was to be paid out of the testator's assets, and that the conveyances of such of the said lands and hereditaments as were not then made, were to be made to the heirs at law.

The Master, by his report, bearing date the 24th of July 1738, made in pursuance of an order of the 21st of July 1735, to state the circumstances particularly to the Court, certified that the testator *John Smith*, in the year 1728, agreed with *John Havard* for the purchase of certain freehold and copyhold premises at the sum of £368, and died soon afterwards: that *John Havard*, after the testator's death, offered to the executors either to abandon the agreement, or to complete the purchase before a certain day. That the executors in answer, stated to him the necessity of applying to the Court for directions.

The Master also certified, that upon the marriage of *John Havard*, it was agreed that the freehold part of the premises in question, should be settled upon the husband for life, remainder to the wife for life, remainder subject to a term of five hundred years to their first and other sons in tail, remainder to the heirs of their bodies generally, remainder to the right heirs of the husband, and that it was agreed that the copyhold premises should be settled to the same uses, except as to the term of five hundred years, and that it was further agreed that a power should be reserved to the husband and wife jointly, with the consent of the trustees, or the personal representative of the survivor, in case a good price should be offered for the said premises to the good liking and satisfaction of the said trustees, or the survivor of them, or the executors or administrators of such survivor, to revoke the uses before limited, as to all or any part of the premises, and to sell the same, so as the purchase money was invested in the purchase of other lands, to be settled upon the same uses. The report further stated, that at the time of making the above articles, the premises in question were subject to a mortgage of £240, which it was agreed should be paid off out of the wife's portion; but it was not in fact paid off until after the death of the testator, *John Smith*; namely, [563] until the month of September 1729. That at the time of making the contract of sale, all the trustees of the settlement were dead, and that the wife of *John Havard*, the vendor, was the personal representative of the survivor, and consented to the sale, and would have joined her husband in carrying it into effect, and that she died after the testator; namely, on the 30th of January 1733, leaving two infant children.

These causes came on to be heard on the special matter in the first report.

John Havard, the vendor, was not made a party to these suits.

The *Lord Chancellor* in this cause, is stated by Mr. *Atkyns*, to have laid down the following rules;

"That agreements to be performed, are often considered as performed; for if a man covenants to lay out a sum of money in the purchase of lands, generally, and devises his real estate before he has made such purchase, the money agreed to be laid out will pass to the devisee." (So *Milner v. Mills*, Mos. 123. *Greenhill v. Greenhill*, Pre. in Ch. 320. *Lingen v. Sowray*, 1 P. Wms. 172; S. C. cited 3 P. Wms. 221. *Potter v. Potter*, 1 Ves. 438. *Beauleck v. Mead*, 2 Atk. 168. *Oldham v. Hughes*, ib. 452. *Whittaker v. Whittaker*, 4 Bro. C. C. 31. *Guidot v. Guidot*, 3 Atk. 254. *Broome v. Monck*, 10 Ves. 611. *Rose v. Cunningham*, 11 Ves. 554.)

"That where a man having made his will, afterwards enters into a contract for the purchase of land, the lands contracted for will not pass by the will, but descend to the heir at law." (So *Langford v. Pitt*, 2 P. Wms. 629. *Allen v. Allen*, Mos. 262. *Capel v. Girdler*, 9 Ves. 509, and see *Broome v. Monck*, 10 Ves. 597. *Gaskarth v. Lord Lowther*, 12 Ves. 107.)

"That if a man gives a portion to his daughter by a will, and afterwards advances her with the like sum, it shall go in ademption of the legacy." (See *Bellasis v. Uthwatt*, ante, p. 273.)

"That where an ancestor, after the making of a will, agrees for the purchase of particular lands, the heir at law would have a right to them, provided a good title can be made, otherwise if it cannot; but it is going too far to say that though the heir at law cannot have the land, yet he shall have the money so intended to be laid out."

"That the vendor of the estate is, from the time of his con-[564]-tract, considered as a trustee for the purchaser, and the vendee, as to the money, a trustee for the vendor." (So *Chapman v. Tanner*, 1 Vern. 267. *Pollexfen v. Moore*, 3 Atk. 273. *Walker v. Preswick*, D. 2 Ves. 622.)

"That in bills for specific performance, this Court never gives relief where the act is impossible to be done, but leaves the party to his remedy at law."

"That where an ancestor has agreed for the purchase of particular lands, but dies before it is quite completed, if the heir at law brings his bill against the devisees, who claim the real estate of the ancestor by a will made before the purchase of those particular lands, the vendor of these lands, where he has a doubtful title, must be made a defendant to the suit, otherwise, if his title be clear."

In the *Lord Chancellor's* notes are the following memoranda:—

The questions are,

1st. Whether a good title can be made since the death of the wife.

2nd. If not whether the heir at law is not entitled to the money, agreed to be laid out, in lieu of the land, as being money covenanted by the testator to be laid out in lands.

3rd. Whether this question can in strictness be determined in this cause.

Upon consideration of the Master's Report I am of opinion that there is no ground for the Court to give any directions in this cause touching the performance of the agreement with *John Havard*, or the payment of the purchase-money therein mentioned. (Reg. Lib. A. 1738, fo. 265.)

(1) The statement of this case is taken from the proceedings in the cause; the rule said to be laid down by Lord *Hardwicke*, from *Atkyns*, and the memoranda from Lord *Hardwicke's* notes.

[565] DANIEL ROBERDEAU, an Infant by his next friend, *Plaintiff*; (1) and JOHN ROUS and his Wife, *Defendants*.

December 16th, 1738. 1 Atk. 544.

This court has no jurisdiction to put a person into possession of lands at *St. Christopher's*, and a demurrer will lie to a bill brought here, for delivery of possession of lands there.

Lands in the plantations are no more under the jurisdiction of this Court than lands in *Scotland*.

An infant may bring a bill for an account of rents and profits against a person who keeps possession, after the death of the infant's ancestor.

The bill was brought for the delivery of the possession of a moiety of lands in *St. Christopher's*, and likewise for an account of the rents and profits.

The defendants demurred to the first part, for that this Court has no jurisdiction over lands at *St. Christopher's*, and likewise to the account prayed of the rents and profits, for that the plaintiff hath not set forth a clear title to them.

Lord Chancellor. As to the first part of the demurrer, I apprehend it is very right, because this Court has no jurisdiction so as to put persons into possession, in a place, where they have their own methods on such occasions, to which the party may have

recourse ; the present bill, therefore, is carrying the jurisdiction of this Court further than ever was before. Vide the case of *Angus v. Angus*, 1736. (See *ante*, page 23.)

Lands in the plantations are no more under the jurisdiction of this Court, than lands in *Scotland*, for it only *agit in personam*.

The next question is, whether an account of rents and profits ought to be demanded before the plaintiff has established his right at law ?

No impediment is shewn to prevent the plaintiff from bringing his ejectment, for he claims a moiety as tenant in common.

As to the general equity, an infant here in *England* may bring a bill for an account of rents and profits against a per-[566]-son who keeps possession after the death of the infant's ancestor ; and as the demurrer is only to the bill, I must take it for granted, he is resiant here in *England*.

The defendant should not have demurred for want of jurisdiction, for a demurrer is always in bar, and goes to the merits of the case ; and therefore, it is informal and improper in that respect, for he should have pleaded to the jurisdiction. (*Note*: This, however, can only be considered as referring to cases where circumstances may give the Court of Chancery jurisdiction, and not to cases where no circumstances can have that effect, per Lord *Redesdale*, Mitford's Pleadings, p. 123, and see *Hill v. Reardon*, 2 S. & S. 439.)

The delivery of possession may be enforced in person, which was the old way ; but the writ of assistance to put persons in possession, as by way of injunction, is of more modern date. (See *Stribley v. Hawkie*, 3 Atk. 275.)

Plantations were originally members of *England*, and governed by the laws of *England* ; and persons went out originally subject to the laws of *England*, unless in some regulations and customs, which they have a power of making.

There have been instances of plantation estates being sold in this Court, and consequently this Court must have a power of enforcing a decree for a sale upon the person ordered to convey.

His Lordship mentioned the case of the widow in *Pennsylvania* and *Hamilton*, where there was an order upon *Hamilton* to deliver possession.

His Lordship held the demurrer to be insufficient ; and therefore ordered the same to be over-ruled. (Reg. Lib. B. 1738, fo. 51.)

(1) This case is taken from *Atkins* ; it does not appear in Lord *Hardwicke's* Note-book.

[567] AMBROSE v. BROOKS.(1)

December 16th, 1738.

An award under the hands and seals of arbitrators is not within the Statute of Limitations.

By a rule of the Court of King's Bench it was referred to three of the jury to ascertain what was due to the plaintiff. They accordingly by an award under their hands and seals, awarded that a sum of money was due to the plaintiff, and should be paid to him by the defendant.

The defendant having died the plaintiff filed a bill against his personal representative for satisfaction out of his effects.

To this bill the personal representatives of the defendant pleaded the Statute of Limitations, 2 James I.

Mr. *Fazakerley*, in support of the plea, contended that as there was no submission by deed there was no specialty ; but only a simple contract debt ; the rule of Court not amounting to a specialty.

For the plaintiff the case of *Hodsden v. Harridge*, 2 Saund. 65, was cited to shew that the Statute of Limitations was not pleadable to an action of debt on an award made under the hands and seals of arbitrators.

Lord Chancellor's note.—I overruled the plea on the authority of the case above cited ; and thought this stronger than the former by reason of the reference being by rule of court.

(1) This case is taken from Lord *Hardwicke's* Note-book.

[568] CRESWICK v. CRESWICK.(1)

January 12th, 1738. 1 Atk. 291.

Where a defendant in a cross-bill, but plaintiff in the original, is in contempt for not putting in an answer, the proper motion is to enlarge publication in the original to a fortnight after the answer is come in to the cross-bill.

It was in this case laid down by the *Lord Chancellor* as a general rule, that where the defendant in a cross-bill, who is plaintiff in the original bill, is in contempt for not putting in an answer to the cross-bill, it is irregular to move to stay proceedings in the original cause, till such answer comes in ; but the plaintiff in the cross-bill may have publication in the original enlarged to a fortnight after the answer to his bill is come in. (*Ramkissenseat v. Barker*, ante, page 181. *Aylet v. Easy*, 2 Ves. 336. *Dalton v. Carr*, 16 Ves. 93. *Cook v. Broomhead*, ib. 133.)

(1) This case is taken from *Atkyns* ; it does not appear in Lord *Hardwicke's* Note-book.

WOODCOCK v. KING.(1)

January 23rd, 1738. 1 Atk. 286.

Where a bill is for a discovery merely, you cannot move to dismiss it for want of prosecution, but pray an order only on the plaintiff to pay defendant the costs of the suit to be taxed.

It was in this case laid down by the *Lord Chancellor* as a general rule, that where a bill is brought for a discovery merely, and prays no relief, you cannot move to dismiss it for want of prosecution, but can only pray an order upon the plaintiff to pay to the defendant the costs of suit to be taxed by a master.

(1) This case is taken from *Atkyns* ; it does not appear in Lord *Hardwicke's* Note-book.

[569] RICHARDS, *Ex parte*.(1)

December 19th, and January 24th, 1738.

An infant feme covert is enabled to convey by fine within the meaning of the 7th of Ann. c. 19. (See likewise *Ex parte Maire*, 3 Atk. 478. The 7th of Ann. c. 19, has been repealed ; but its provisions have been re-enacted and extended by the 6th Geo. 4, c. 74.)

* This was a petition that an infant feme covert might assign a mortgage in fee, pursuant to the act of 7th Anne.

The Master by his Report made upon a reference by the *Master of the Rolls* certified that she was an infant mortgagee within the true intent and meaning of the act.

Mr. *Fazakerley* in support of the petition contended that this was a case equally within the mischief and inconvenience which the act was intended to remedy as any other ; and that the construction of the act ought therefore to be extended to include it. That though in this case it was necessary that a fine should be levied yet that the act enabled an infant to levy a fine if necessary ; that if the legal estate of a mortgagee in fee had become entailed some method would be found to bar the entail.

The *Lord Chancellor*, observed that the disability to levy a fine did not arise from the coverture ; but from the infancy which the act had supplied, and delivered his opinion that an infant feme covert was enabled to convey by fine within the meaning of the act, and ordered her to convey and assure accordingly.

The decree is, " His Lordship doth on payment of principal and interest, due on the mortgage to the mortgagees, order that *Elizabeth Price*, the infant, do pursuant to the said Act of Parliament convey and assure the said mortgaged premises according to the said Report, and by consent of Mr. *Nicholas Price* the said husband of the said infant he is to join with his said wife in such conveyance and assurance." (Reg. Lib. B. 1738, fo. 151.)

(1) This case is taken from Lord *Hardwicke's* Note-book.

[570] PROCTOR v. HARRIS.(1)

January 26th and 29th, 1738.

George Proctor by his will leaves to his son and his lawful issue all his personal property, and appoints guardians of his son, who are to dispose of his education, pocket-money, and allowances, until his age of twenty-five ; and who during that time are to receive the property, and are empowered to purchase land or stock as they shall judge proper, with the money he leaves behind for the use of his son ; but in case his son should die without lawful issue then all the right invested in his son he bequeaths to his nephew and his issue, with power for his son to jointure his wife with one third of his fortune ; by a codicil he confines him to live on the interest only of the money, or stock, or land, which he leaves him, and directs that he shall not meddle with or lessen the principal during the whole of his life, unless for purchasing a place as far as £300 ; and he allows him to jointure his wife with the whole or any part of the interest of the money ; and if he has children, if boys he may advance them £200 each at the age of twelve years ; and if girls what portions he pleases at the age of fifteen ; and if he dies and leaves any lawful issue he empowers him to leave the remainder of his fortune, amongst them, in what manner he pleases ; but if he has no issue then he leaves it over to his nephew and his issue ; by a second codicil he leaves his son under perpetual pupillage during the life of any of his guardians ; Held that the son was entitled only to the benefit of the testator's personal estate for his life, with limitations over to such issue as he shall leave at the time of his death, and in failure thereof to the testator's nephews in such manner as is directed by the will and codicil.

George Proctor, the plaintiff's father, on the 28th of March 1735, makes the following will :—

" I leave to my son *Thomas Proctor* whatever before was my property, all my money, goods, wages, prize-money, land, or whatsoever else, under what denomination soever, I leave entirely to my son, *Thomas Proctor*, and his lawful issue ; and in case it shall please God to take me hence, before my son *Thomas* arrives to the age of twenty-five years, then I depute my nephew, *Mr. James Upton*, and my brother in law *Mr. Walter Harris*, his guardians, and in failure of either of them, then my nephew *Mr. Charles Upton*, to succeed in guardianship, and appoint them disposers of his education, allowances, and pocket-money, until he arrives at the age of twenty-five, and during that time to transact for him, demand and sue in his name, and receive the property and empower the guardians to purchase land or stock as they shall judge proper with the money I leave behind for the use of my son ; and in case my son should die without lawful issue, then all the right invested in my son I bequeath to my nephew and his issue, except only what [571] jointure my son, if married may settle upon his wife, which I confine to one third of his fortune ; and I give £100 legacy to *Mr. Walter Harris*, and £100 more to his nephew *Mr. Charles Harris*."

On the 2nd April 1735, the testator made the following codicil :—

" Upon further consideration that my son has not been brought up to any trade, which would require ready money for setting up and carrying on of trade ; and therefore think it necessary to confine him to live on the interest only of the money, or stock, or land, that I leave him ; and this I will and direct for the preventing of extravagancies of any kind, and their evil consequences which may leave him to want, and without a refuge to fly to ; and therefore I direct that he shall not meddle with or lessen the principal sum during his whole life, unless for reasons hereafter mentioned ; for purchasing a place as far as £300 will go and no further ; I allow him to settle the whole or any part of the interest he pleases of the money I leave him to jointure his wife during her life, and if he has children, when they come to the age of twelve years if boys, £200 each, to put them out apprentices, or any other way he thinks proper ; if girls and arrive to the age of fifteen years, what portion he pleases if any are inclined, at that age, to marry ; and when he dies if he leaves any lawful issue behind him, he has full power to leave the remainder of his fortune to his lawful issue in what manner he pleases as much as if the money or fortune had been got by his own industry ; but if he has no lawful issue then the remainder of the money I left him to go to my nephew *Mr.*

James Upton, and his issue, and in failure of them to my nephew *Mr. Charles Upton*, and let every thing else be complied with as mentioned in my will."

He afterwards made a second codicil in the following words :

"I leave my son, *Thomas Proctor*, under perpetual pupillage, and his guardians mentioned as aforesaid, as perpetual guardians, and for seeing the matters above executed of the 2nd of April 1735 ; what I mean by perpetual pupillage is during the life of any of the guardians as aforesaid."

Thomas Proctor brought his bill against *Walter Harris* (who had taken out administration to the testator's estate) for an account of his father's personal estate, and against [572] *James* and *Charles Upton*, insisting that when he should arrive at the age of twenty-one or twenty-five, that he had a right to have the whole of his father's personal estate paid over to him.

The *Attorney-General*, and *Mr. Chute*. for the plaintiff.

There is a power in the will for the trustees to purchase land or stock as they shall think fit. The trustees ought to do what is most for the plaintiff's benefit ; and if it was laid out in land, he would be tenant in tail, and then the money ought to be paid to him. There is likewise a power for the plaintiff to distribute amongst his own issue the money as if it had been of his own getting, and there is a power to give such portions amongst his daughters as he pleases.

Mr. Fazakerley and *Mr. Floyer*. for the defendants the *Uptons*.

The testator's intention is clear that this limitation over should take effect, and any reasonable construction must be made, whereby that may be effected. As to the perpetual pupillage, guardianship includes two powers ; one over the person, the other over the estate ; over his person it cannot have effect beyond twenty-one. But the testator had an absolute power over his estate. He empowers his son to make a jointure, and confines him to live upon the interest only of the money, stock, or land, he leaves him. but not to meddle with or lessen the principal sum during his whole life unless for the reasons mentioned in his will ; by which he restrains him to an estate for life with a power to dispose if he has children. By the word issue he means children. But if he has no children then he leaves it over to his nephew.

The *Attorney General*, in reply—

1st. Consider this as mere personal estate.

2nd. As intended to be laid out in lands.

1st. Upon the will the word issue is a word of limitation only.

2nd. How is this altered by the codicil.

There is no alteration of the estate given ; there is only an intention of restraining him from aliening it : this is a void condition, and like a restraint of alienation on an estate in fee-simple. The restriction that he shall not lessen it during his life implies that he might do it, to take effect after his death.

[573] 2nd. As to the power to lay it out in land :

If it is laid out in land it must be in tail.

His Lordship declared, that the plaintiff is entitled only to the benefit of the testator's personal estate for his life with limitations over to such issue as he shall leave at the time of his death, and in failure thereof to defendants, *James* and *Charles Upton*, according to the will and codicils, subject to such powers as are given to the plaintiff by the said will and codicils ; and decreed an account with directions agreeable to this declaration. (Reg. Lib. B. 1738, fo. 186.)

(1) This case is taken from Lord *Hardwicke's* Note-book.

GUNSTON v. DARE :—JOHN GUNSTON and other Trustees, for the Conservation of the River TONE, in the County of SOMERSET, *Excepants* ; (1) and JAMES DARE on behalf of himself and Others, Inhabitants of TAUNTON, *Respondent*.

February 6th and 7th, 1738.

By the 10th and 11th of Wm. 3, c. 8, certain tolls were imposed upon vessels navigating the river *Tone*, the surplus of which after purchasing the interest in the navigation and in making and keeping the river navigable, was to be applied by the conservators

for the benefit of the children of certain parishes in the act mentioned ; and the account of the receipts and disbursements of the conservators were every year to be brought before the bishop of *Bath and Wells*, and the justices for the county of *Somerset*, or any five or more of them who were to examine and allow the accounts, at the next general Quarter Sessions to be held after the 24th day of June ; The justices having examined and allowed the accounts, the bishop not having been proved to be present, and the commissioners of charitable uses having taken upon themselves to examine the accounts ; it was held that the Commissioners of Charitable Uses had no authority to examine the same, but that the bishop and the parties had a summary jurisdiction to examine and pass the accounts.

This case came before the Court upon exceptions to a decree of the Commissioners of Charitable Uses.

[574] By an act of the 10th and 11th of W. 3, c. 8, for making and keeping the river *Tone* navigable from *Bridgewater* to *Taunton*, in the county of *Somerset*, and appointing certain persons conservators ; certain tolls are imposed which are directed to be applied in reimbursing to the conservators the principal and interest which they may disburse in purchasing the interest of the heirs of *John Mallett* in the navigation, and in making and keeping the river navigable, and the surplus is directed to be applied for the benefit of the poor of *Taunton*, *Saint Mary Magdalen*, and *Taunton St. John's*, by the conservators, who are empowered and authorised to lay out and dispose of the same in building one or more hospital or hospitals, or otherwise from time to time according to their best discretions for the better educating and maintaining such poor children as are or shall become chargeable to the town and parishes aforesaid, and it was provided that an account of all expenses, costs, and charges, disbursed and of all monies received by them should be kept and entered in a book or books, and that every year such books, and accounts, and vouchers should be brought before the bishop of *Bath and Wells*, and the justices of the peace for the county of *Somerset*, or any five or more of them within the town of *Taunton*, or ten miles thereof, stated, corrected, and allowed, and which accounts were to be made up every 24th of June, and to be stated, examined, corrected, and allowed, at the next general Quarter Sessions to be held after the said 24th day of June ; and the said bishop and justices were empowered to examine upon oath touching the truth of the said accounts ; and after the said accounts were allowed a duplicate was to be transmitted to be kept amongst the records of the Sessions of the county.

By an act of the 6th year of Queen Anne, c. 70, after reciting the act of King William, and that the conservators had in part accomplished making the river navigable ; but had not completed the same for want of deepening the channel in a particular part of the river, and for want of a half lock at a place called *Knapbridge*, for performance whereof it would be necessary to advance a considerable sum of money, notwithstanding the large sum already disbursed by the conservators which by an account taken and allowed by the justices of the Quarter Sessions of the 17th of July then last, appeared to have been £3566, 9s. 5½d. ; [575] It was enacted that an additional toll should be collected and paid in respect of every vessel that should pass through the said half lock ;

And it was further enacted that after the conservators should be reimbursed their principal and interest already expended or to be by them expended in making the river navigable, and in repairing the locks and collecting the duty, together, with their costs, charges, and expences which the said justices at the Quarter Sessions were authorised and required to allow as by the said former act was directed, that then the tolls were to be reduced to certain sums mentioned in the act.

The accounts were examined and allowed by the justices at the Quarter Sessions ; but the bishop was not present as a party to such examination and allowance.

The commissioners for charitable uses having afterwards taken upon themselves to examine the same accounts, by their decree disallowed many sums which had been allowed by the justices at the Quarter Sessions.

The trustees for the conservation of the river *Tone* took exceptions to this decree, upon the ground that the commissioners of charitable uses had no authority to examine and state the accounts.

Mr. *Attorney-General*, Mr. *Pauncefort*, and Mr. *Browne* in support of the exceptions, contended, that although the act did not contain any words of exclusion of the commissioners of charitable uses, yet that they were in effect excluded, for that every establishment of a new jurisdiction implies a negative as to others, as in the establishment

of summary jurisdictions ; and that otherwise the method of passing the accounts prescribed by the act would be fruitless and nugatory.

That as to the objection that the bishop was not a party to passing the accounts, it was a sufficient answer that he was not made one of the *quorum* by the act.

Mr. Noel, Mr. Fazakerley, and Mr. Floyer for the respondents, insisted that many sums had been very improperly allowed by the justices at quarter sessions, such as for entertainments for the sheriffs and juries, and interest upon interest from year to year on the sums laid out. That there was nothing in the act to exclude the jurisdiction of the commissioners of charitable uses, any more than the jurisdiction of the *Chancellor* ; and that in fact the accounts had never been allowed according to the act, for that the bishop was a material person in passing the accounts ; the words any five [576] or more of them referring to the aggregate body of the justices.

Lord Chancellor.

On this exception two questions arise : first, whether by this act of parliament, the bishop and justices have not the sole and exclusive authority of stating and passing these accounts ; and secondly, whether the accounts have not been duly passed under the act of parliament, and if so, whether they are not conclusive.

The first question is the principal one, and the determination of which will govern my opinion.

It is necessary to consider the authority given by the act.

The jurisdiction here given is a summary jurisdiction, which is final, unless appealed from, and implies a negative of other jurisdictions. If the bishop and justices should neglect to put this power into execution, a *mandamus* will lie : where that is so, it would be to overturn the act to interfere in the manner proposed. It is objected, that although the surplus only is given to the charity, yet that it is impossible to ascertain what that surplus is without taking the accounts : but it is only the surplus to which the charity is entitled, and the commissioners have no authority to fix and settle what that is. To hold that they have, would be productive of the most important consequences, for many things with which the commissioners have nothing to do must be determined, in order to ascertain and fix the amount of a surplus : before the surplus of a personal estate left to charitable uses can be ascertained, all the questions upon debts and legacies must be disposed of. If such an account be taken in this court, the commissioners cannot overrule it. If a general account is wanted, this court must be applied to, for otherwise all kinds of property would be subjected to the determination of the commissioners.

It is not very material at present to consider whether these accounts have been passed pursuant to the act. If any fraud or collusion has taken place, it will be necessary to come into this court. I think it doubtful, whether, by the act, the bishop is made one of the *quorum*, but that is a question proper for a court of law.

His Lordship declared, that by the acts of parliament of 10th and 11th of King William, and 6th of Queen Anne, a summary jurisdiction is given to the bishop and justices to examine and pass the accounts in question, according to the method thereby prescribed ; and that therefore the commis-[577]sioners of charitable uses had no authority to re-examine, state, or pass the accounts, and therefore allowed the exception, and reversed the decree. (Reg. Lib. A. 1738, fo. 642.)

(1) This case is taken from Lord *Hardwicke's* Note-book.

GUGELMAN v. DUPORT :—JOHN GUGELMAN, Executor of JANE DUPORT, *Plaintiff* ; (1) and JOHN DUPORT, MARY WATSON, Administratrix of ROBERT WATSON and Others, *Defendants*.

February 9th, 1738.

F. D. by her will, devises an estate to her grandson, upon condition that he first paid to her granddaughter £1000 at the age of twenty-one, or marriage, and charged the estate therewith, and empowered her executor to raise the same out of the rents and profits of the estate, and to keep the same in his own possession till it should be paid, and in the meantime to pay her interest, to commence after the payment of a mortgage debt upon the estate ; the executor entered into possession of the estate, and received

sufficient rents and profits to pay off the mortgage and the portion ; but died insolvent without having satisfied the portion ; held that the estate was not discharged from the portion by the receipt of the executor, but that the portion with interest was to be raised by sale or mortgage of the estate.

Frances Duport, by her will, bearing date the 27th of August 1725, devised to her grandson the defendant, *John Duport*, and the heirs of his body, all her plantations and lands, upon condition that he first paid £1000 to her granddaughter, *Jane Duport*, at her age of twenty-one years or marriage, which should first happen, and she thereby charged her said lands and plantations with the said sum of £1000 and interest for the same. And she empowered *Robert Watson*, her executor, to raise and pay the same out of the rents and profits of the said premises, and to keep the said plantation and other lands in his own possession till the said £1000 should be so raised and paid ; and in the mean time to pay the said *Jane* interest, after the rate of 5 *per cent. per annum* for the same, towards her maintenance, to commence from the time that *Debeuzes* debt (which was a mortgage upon the estate) should be fully paid, which she earnestly desired might be first done.

[578] The devisee *John Duport*, and the legatee *Jane Duport*, were both infants at the time of the death of the testatrix. The executor, *Robert Watson*, entered and received rents and profits sufficient to pay off the mortgage, and to satisfy the portion. The mortgage was paid ; but the executor died insolvent, without having satisfied any part of the portion.

The bill prayed that the £1000 portion might be raised by sale of the estate.

Mr. *Chute* and Mr. *Serjeant Burnet*, for the plaintiff, contended that although the trustee had received sufficient to have satisfied the portion, yet that the plaintiff had still a right to come upon the estate. That the devise to the defendant was conditional, and that he could not take till that condition was performed. That the portion was expressly charged upon the estate, and that the power subsequently given to the executor, would not weaken the claim upon the estate, and cited the cases of *Tompkins v. Tompkins*, Prec. in Cha. 397, and *Oldfield v. Oldfield*, 1 Vern. 336.

Mr. *Fazakerley* and Mr. *Clarke*, for the defendant *John Duport*, insisted that the executor having received sufficient out of the estate to pay the portion, became a trustee of what he had so received for *Jane Duport*, and that the land having borne its burden, ought to be discharged, and cited *Corbet's case*, 4 Co. 81, and *Thomasin v. Mackworth*, Carter, 77. That if a tenant by elegit is put out of possession by a stranger, he shall be accountable for the profits during that time ; but otherwise, if put out of possession by the owner, Anon. 1 Salk. 153, and *Carter v. Barnadiston*, Mich. 1720, 1 P. Wms. 505, 518, where a testator directed that his executor should receive the rents of his estate for payment of his debts and legacies, and made the same person executor and tenant for life of the estate ; it was held by Lord *Macclesfield*, after the death of the tenant for life and executor, that the estate should only be liable until the debts and legacies might have been paid.

9th Feb. 1738.—*Lord Chancellor*. The rule of this Court is not to incline to such a construction of wills for raising the portions of children and grand children, as may tend to weaken their security. The question is, whether the portion of £1000 and interest remains as a charge upon the estate, or whether that sum having been raised out of the rents and profits by *Robert Watson*, the executor, the land is to be taken as discharged, either in the whole or *pro tanto*, according to what he has received ? I admit that where trustees [579] are created for the benefit of a *cestui que trust*, if the trustee enters and receives the rents to an amount sufficient to discharge the trust, the estate is to be taken as having borne its burthen, and the *cestui que trust* must take his personal remedy against the trustee for his misapplication of the profits (so *Juxon v. Brian*, Prec. in Cha. 143. *Carter v. Barnadiston*, 1 P. Wms. 505, 518. *Oldfield v. Oldfield*, 1 Vern. 336. Anon. 1 Salk. 153. *Hutchinson v. Massareene*, 2 Ba. & Bea. 49) : but these cases are all of this kind where there is a trust for raising money, and the trustee enters *eo nomine* for the purpose of raising it. In such case the *cestui que trust* must look to his trustee, and the land shall be charged no longer than was necessary for the purpose of raising the money, the interest of the trustee amounting to no more than a tenancy by elegit, and of this description are all the cases cited, 1 Vern. 386. 1 Salk. 153, and *Carter v. Barnadiston*, in which I was of counsel, and in which it was held that the executor took only an estate in the nature of an estate by elegit, being an uncer-

tain chattel interest for the payment of debts and legacies which could continue no longer than until such time at which they might have been paid, and was then to determine ; but the present case is different, for here is a devise to the heir at law, upon condition which operates as a limitation, and gives a right of entry to the legatee ; the daughter therefore had a legal estate, and a legal remedy. Under the second clause, part of the inheritance might have been sold ; and as to the last clause, upon which the doubt arises, and which has been relied upon as making the whole a trust for raising the portions, I think that it ought not to weaken the security before given for the portion ; for that clause seems to have been intended for the ease and benefit of the devisee of the estate, that the incumbrances might be discharged by receipt of the rents during his minority, and cannot add to or weaken the security for the portion. Besides, there was another reason why the trustee should enter ; namely, to satisfy the mortgage. It cannot, therefore, be said that the trustee entered as trustee for the daughter to raise the portion, but as trustee for the devisee to pay off the incumbrances.

His Lordship declared that the charge subsisted on the estate, and was to be raised by mortgage or sale of the estate in question, together with interest for the same from [580] the 25th of December 1733, being the time when the mortgage to *James Debeuze* was satisfied. (Reg. Lib. A. 1738, fo. 366.)

(1) This case is taken from Lord *Hardwicke's* Note-book, except the judgment, which is taken from two manuscript reports.

ANONYMOUS.(1)

February 12th, 1738. 1 Atk. 519.

Where money by an order of this Court is paid into the Accountant General's hands to be placed in the bank, till it can be laid out according to the directions of a decree ; if you move for an application of this money, you must not only have a certificate that the money was paid into the bank, but that it is actually in the bank at the time of the motion made.

(1) This case is taken from *Atkyns* ; it is not to be found in Lord *Hardwicke's* Note-book.

ANONYMOUS.(1)

February 12th, 1738. 1 Atk. 491.

Where there is a trust, or any thing in the nature of a trust, notwithstanding the Ecclesiastical Court have an original jurisdiction in legacies, yet this Court will grant an injunction.

A bill brought for an injunction to stay a suit in the Ecclesiastical Court for a legacy, because that Court cannot make a legatee refund in case of a deficiency of assets, and this being the day for shewing cause why the injunction should not be dissolved, the counsel for the plaintiff relied on the case of *Knight v. Clarke*, cited in the case of *Noel v. Robinson*, 1 Vern. 94, where the Lord Chancellor said, there was a difference between a suit for a legacy in the Spiritual Court, and in this Court ; if in the Spiritual Court, they [581] would compel an executor to pay a legacy, without security to refund. there shall go a prohibition.

The Lord Chancellor continued the injunction till the hearing, because the plaintiff is an executor in trust only, for where there is a trust, or any thing in the nature of a trust, notwithstanding the Ecclesiastical Court have an original jurisdiction in legacies, yet this Court will grant an injunction, trusts being only proper for the cognizance of this Court.

The rule in this Court now is varied, since the case in *Vernon's* Reports, for legatees are not obliged to give security to refund upon a deficiency of assets.

His Lordship mentioned a case where a woman, an infant, was entitled to a legacy

upon her marriage ; the husband instituted a suit in the Ecclesiastical Court for it, which he might do ; but upon the executor's bringing a bill, and suggesting this matter to the Court, an injunction was continued till the hearing of the cause ; and the same order was made in the present case. (See *Hill v. Turner*, ante, p. 195. *Jewson v. Moulson*, 2 Atk. 420, cited in Pre. Ch. 548. *Wind v. Jekyl*, 1 P. Wms. 575.)

(1) This case is taken from *Atkyns* ; it is not to be found in Lord *Hardwicke's* Notebook.

DEGGS v. COLEBROOK.(1)

February 19th, 1738. 1 Atk. 396.

Upon payment of 20s. costs, bills may be amended after answer put in, but the Lord Chancellor said he would consider how to make a more adequate compensation to a defendant for the future, after a long answer, and other necessary proceedings on the part of the defendant. (Though a plaintiff amends his bill several times, yet he shall not pay taxed costs, but only 40s., unless it be a case of particular oppression, *Masse-rene v. Lyndon*, 2 Bro. Ch. Rep. 291, or unless the amendments be frivolous, *Bennet v. Green*, 1 Cox, 253.)

The Lord Chancellor said in this cause, that he would not, in any one particular case, oblige a plaintiff to pay more than 20s. costs to a defendant (after answer put in) on the amendment of the bill, because it had been the constant rule of this [582] Court, and established at first, to prevent the inconvenience of entering too largely into the merits of the cause, before the proper time for hearing the merits.

In Lord Chancellor *King's* time, there was an attempt to vary from this rule, but it did not answer ; but Lord *Hardwicke* said, he would notwithstanding consider how to make a defendant some amends for being put to a great expense, by allowing him a more adequate compensation, than only twenty shillings costs, on the plaintiff's amending his bill, after a long answer, and other necessary proceedings on the part of the defendant.

(1) This case is taken from *Atkyns* ; it is not to be found in Lord *Hardwicke's* Notebook.

HOBBS v. TAITE :—JOHN HOBBS and Another, Executors of ANN HOBBS deceased, Plaintiffs ; (1) and WILLIAM TAITE and THOMAS SMALL, Executors of NATHANIEL HARDY, Defendants.

February 21st, 1738.

Nathaniel Hardy being indebted to his servant for wages, by his will gives to her, in consideration of her great care and trouble about him, during his long illness, the sum of £250, and also all his household goods, furniture, and linen ; the servant is entitled both to her wages and legacy.(2)

Nathaniel Hardy, by his will, dated the 4th of September 1736, bequeathed as follows :—

[583] "I give to *Ann Hobbs*, now living with me, in consideration of her great care and trouble about me, during my long illness, the sum of £250, and also all my household goods, furniture, and linen."

Ann Hobbs had lived as a servant with the testator for a considerable time previous to his death, and at that time he was indebted to her for wages, which he had kept in his hands, and paid her interest for the amount.

Ann Hobbs being dead, having in her lifetime been paid her wages, amounting to the sum of £87, 15s. by one of the executors of the testator ; the executors of *Ann Hobbs* brought a bill for the satisfaction of £250, and interest ; the executors insisted that the monies paid to her for wages should be allowed in part payment of the legacy.

Mr. Attorney-General and Mr. *Browne* for the plaintiffs, insisted that both the sum due for wages, and also the legacy, were due, the latter being intended as a bounty,

and not as a satisfaction of a debt, and cited *Chancery v. Wootten*, 1 P. Wms. 408, and 10 Mod. 399.

Mr. *Owen* and Mr. *Car*, for the defendants, contended that from the expressions used, it was clear that the testator did not intend to give a bounty beyond what was due for wages, the consideration expressed being only that which was a duty to do.

The Lord Chancellor decreed that the legacy should be paid, and interest at 4 per cent., and costs. (Reg. Lib. A. 1738, fo. 260.)

(1) This case is taken from Lord *Hardwicke's* Note-book.

(2) Where a legacy either exceeds or is equal to the debt and nothing but a plain general legacy is given to the creditor, it is a general rule that the legacy is a satisfaction of the debt, per Lord *Hardwicke*. *Richardson v. Greese*, 3 Atk. 68. *Talbott v. Shrewsbury*, Pre. in Ch. 394. *Fowler v. Fowler*, 3 P. Wms. 253, but the Court has been fond of distinguishing cases out of the general rule, per Lord *Hardwicke*, 3 Atk. 69. *Mathews v. Mathews*, 2 Ves. 635. *Hinchcliffe v. Hinchcliffe*, 3 Ves. 529 and 564, and therefore, where there has been a direction for the payment of debts and legacies, *Chancey's* case, 1 P. Wms. 410. *Richardson v. Greese*, 3 Atk. 68, or where the legacy is not equally beneficial as to the time of payment, *Atkinson v. Webb*, Prec. in Ch. 236. *Clark v. Jewell*, 3 Atk. 96. *Mathews v. Mathews*, 2 Ves. 635, or if the legacy be given on a contingency, *Nickolls v. Judson*, 2 Atk. 300, or be not *ejusdem generis* as the debt, *Eastwood v. Vinke*, 2 P. Wms. 614. *Tolson v. Collins*, 4 Ves. 483; legacies are not presumed to be given in satisfaction of debts. Nor is a legacy a satisfaction for an uncertain debt depending upon a running and open account, *Rawlins v. Powel*, 1 P. Wms. 298, or for a debt contracted after the making of the will, ib. *Thomas v. Bennett*, 2 P. Wms. 343. *Mascal v. Mascal*, 1 Ves. 324. And it seems that a debt due upon a negotiable bill of exchange will not be ademed by a legacy, *Carr v. Eastabrooke*, 3 Ves. 564, and between parents and children, and strangers, there is no difference in the application of this general rule, *Tolson v. Collins*, 4 Ves. 483, but see *Wood v. Briant*, 2 Atk. 521. *Seed v. Bradford*, 1 Ves. 501. *Chave v. Farrant*, 18 Ves. 8. And parol evidence may be admitted to repel the presumption that a debt is satisfied by a legacy, see *Hinchcliffe v. Hinchcliffe*, 3 Ves. 516. *Druce v. Denison*, 6 Ves. 385, and though the will affords an inference in favour of the presumption, *Wallace v. Pomfret*, 11 Ves. 542.

As to satisfaction of portions, see *Bellasis v. Uthwatt*, ante, page 273.

[584] WILLIS v. SHORRAL:—JOHN WILLIS and Others, *Plaintiffs*; (1) and HUGH SHORRAL, Son and Heir of JOHN SHORRAL, MARY BULKLEY, and Others, Daughters and Heirs of THOMAS BULKLEY, *Defendants*.

February 24th, 1738. 1 Atk. 475.

Under a settlement it was provided, in the events which happened, that *J. B.* and his heirs should, within one year after his wife's death, pay £100 to such person as she should by will appoint, and in default of payment, that it should be lawful for *J. M.* and his heirs to raise the same, with interest, by making leases of certain lands; the wife by her will appoints the £100 to be paid in trust for the plaintiffs; the heir of the husband levies a fine of the estate, mortgages and releases the equity of redemption to the mortgagee: held, though five years had passed subsequent to the levying the fine, without any demand having been made, that the plaintiffs were entitled to the £100 with interest, and not barred by the fine, the power of leasing being a naked power in a stranger, not party or privy to the fine.

By the settlement made upon the marriage of *John Bulkley* and *Anne Moreton*, dated 22d November 1686, it was amongst other things provided, that if *Anne* should die without issue by *John Bulkley*, that he or his heirs should, within one year after her death, pay £100 to such person as she should by will, or other writing, appoint, and that in default of payment, it should be lawful for *John Moreton* and his heirs to raise the same, with interest, by making leases of certain lands called *Sayers Farm*, so that upon payment of the same, with interest, such leases should be void.

John Bulkley died in the year 1697, without issue, and Anne in the year 1723; having by her will, dated the 5th of September 1721, in pursuance of the power

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reserved in the settlement, directed the £100 to be paid in trust for the plaintiffs, in different proportions.

Application being made to *Thomas Bulkley*, the heir of *John Bulkley*, in respect of this sum of £100, he answered that the power was of no effect.

In 1729, *Thomas Bulkley* levied a fine of the premises in question, and mortgaged them to *John Shorral*, and in 1736 released the equity of redemption to him.

[585] At the time of the mortgage, *John Shorral* had not any notice of the claim to the £100 ; but it was admitted that he had such notice previous to the release of the equity of redemption.

Five years elapsed after the fine had been levied, before any demand was made by the appointees of the £100, and the question was whether that claim was barred.

The bill prayed that the £100 might be raised, and paid to the plaintiffs.

Mr. *Fazakerley* and Mr. *Fenwick* for the plaintiffs contended, that the fine in this case was no bar, the power to make leases being only collateral to the land ; and the rule being, that nothing can be barred by a fine but what is first divested, and that if this be considered as a trust, it cannot be barred, and cited *Bovey v. Smith*, 1 Vern. 60. *Welden v. Duke of York*, 1 Vern. 132. *Drapers' Company v. Yardly*, 2 Vern. 662 & 194 ; *Cro. Eliz.* 226 ; 1 Mod. 217 ; 5 Co. *Saffyn's case*, Bro. Fine, 123, and *Zouch v. Stowell*, Plow. Com. (Plowd. 355 ; Jenks Cent. 266.)

Mr. *Wilbraham* and Mr. *Ford* for the defendants, insisted, that with regard to the effect of fines, courts of equity governed themselves by the same rules as courts of law ; that the present was more than an equitable charge on land, for that it was a power to create a legal interest, and that a fine will bar all powers in the party levying it, and cited *Sir Nicholas Stourton's case*, cited in *Lingard v. Griffin*, 2 Vern. 189, that an equity of redemption may be barred by a fine.

Feb. 24th or 25th, 1738.—*Lord Chancellor*. The power vested in *Moreton*, the trustee, is a naked power, and conveys no interest in the land, but is merely collateral to it. All the cases in which a fine bars by nonclaim, are where the party concluded by it, has some claim, right, or interest, to or in the land. (See *Margaret Podger's Case*, 9 Co. 106 a. 1 Cruise, 243 ; Co. Litt. 237 a. *Albany's Case*, 1 Co. 110 a. *Digges's case*, 1 Co. 174 a. *Edwards v. Slater*, Hard. 415.) This appears plainly by the saving in the 4 Hen. 7, c. 11, which excepts only such right, claim, or interest, as the party had ; under this power the trustee could not enter or do any thing, but simply execute a lease ; if he had done so, the lessee, after five years, would have been barred. This is something like an *interesse termini* before it commences, or a judgment before an extent, in which cases the party is not [586] barred, whatever number of years elapse before the commencement of the term or the interest executed. The case of a devise of lands to executors for the payment of debts is a chattel interest, and so within the statute. Powers reserved to the party levying the fine are extinguished, because having parted with all his interest in the land, he necessarily destroys his right to all powers annexed or adhering to it, but that is not the case of a fine levied by a terre-tenant, to bar a naked power vested in another.

I do not enter into the question of how far equitable charges may be barred by a fine. I believe that where a party has such an equitable interest in lands as might be barred by a fine if it were a legal estate, a fine levied by one not a trustee, might bar it ; and so possibly it might be of bare equitable charges, but this I do not determine.

In the present case there is a legal power of raising the money which is not barred by the fine, and this without touching upon the other question is, in my judgment sufficient to support the right to the money. Indeed in this case, if the demand might have been barred as an equitable charge, it would have been hard in a court of Equity to have said that it was so, as so many demands appear to have been made, and as the purchaser appears to have had notice of the charge.

"I was of opinion that the power of leasing being a naked power in a stranger not party or privy to the fine was not barred thereby, and consequently that the plaintiffs were entitled to satisfaction for this £100 and interest at £4 per cent. and costs, whereupon the defendants, the heirs at law of *Thomas Bulkley* submitted in Court to pay the same in three months, which was decreed accordingly, with liberty to the plaintiffs to apply for further directions, in case they made default in payment."

(1) The statement of this case, the arguments of counsel, and the concluding memorandum are taken from Lord *Hardwicke's* Note-book ; the judgment from a manuscript report.

[587] THE ATTORNEY-GENERAL, at the Relation of the MASTER and WARDENS of the COMPANY of COOPERS of LONDON, *Plaintiffs*; (1) and STEPHEN MONTAGUE and OTHERS, Executors of JOSEPH BOSWORTH, FRANCIS PYLE, and OTHERS, Trustees and Guardians of the CHARITY SCHOOL of ROMFORD, and the Churchwardens and Overseers of that Parish, BENJAMIN LEWIS and SUSAN, his Wife, the Heir at Law of JOSEPH BOSWORTH, *Defendants*.

February 26th and 27th, 1738. 1 Atk. 435.

J. B. by his will gave a freehold house to the Charity School at *Romford* so long as it should continue to be endowed with charity, and in case a debt of £1000 owing to him should be paid to the *Cooper's Company*, then he gave the said house to the *Company*, the rents and profits thereof to be distributed amongst the alms-people belonging to the alms-houses at *Ratcliffe*, and he directed that the interest and profits of the said £1000 which he gave to the said *Company* should be applied for the building four alms-houses near *Romford*.

The debt of £1000 devised by the will turned out to be only £365; Held that the £1000 not being received by the *Cooper's Company*, the devise to the Charity School at *Romford* was absolute, and that the sum of £365 was not a lapsed legacy, but that the same should be placed out, and the interest should not be applied to the building the alms-houses at *Romford*, but amongst the alms-people belonging to the alms-houses at *Ratcliffe*.

Joseph Bosworth by his will dated the 6th of July 1730, gave to *M. S.* his freehold messuage at *Romford* for life, and after her death he gave the same to the Charity School at *Romford*, so long as it should continue to be endowed with charity; but in case the sum of £1000 after mentioned should be paid to the *Cooper's Company* for the uses after mentioned then he gave the said house to the said company, the rents and profits thereof to be distributed among the alms-people belonging to the alms-houses of *Ratcliffe*, over and above what is now allowed them by the donor of the said alms-houses, and then proceeded as follows:—"Whereas there is owing to me from *John Stevenson* and Company now resident at [588] *Oporto* in *Portugal*, £1000 and upwards, which sum I give to the Company aforesaid, and the interest and profits thereof to be applied for the building four alms-houses near *Romford*," and he gave the residue of his estate to his sister in tail, with remainders over, and made her and two others executors.

M. S. being dead, the devise of the house came into possession.

The debt of £1000 turned out to be only £365.

This occasioned a doubt what was to be done with the house and the £365.

The information was brought to have the directions of the Court.

Two questions were made,

1st. Whether the Charity School was entitled to the house?

2ndly. How the £365 should be applied?

The first depended upon the question whether the condition upon which the devise of it was made was performed, inasmuch as the £1000 could not be received by the *Cooper's Company*.

But the Court was of opinion that it was not, and therefore the devise to the Charity school was absolute.

As to the 2nd it was insisted for the residuary legatees, since the end for which the £1000 was given could not be answered, which was to purchase the house from the Charity Schools at *Romford* for the benefit of the alms-houses at *Ratcliffe*, that the £365 part of the £1000 must be lapsed, but that was overruled.

It was then insisted for the town of *Romford*, that the £365 ought to go as the £1000 would have gone, to build the almshouses at *Romford*, and not to the alms-houses at *Ratcliffe*, which were not intended to have any benefit from the £1000.

But since the town of *Romford* were to have the benefit of the house, by its being applied to the use of the charity school there, it was held that this £365 ought to go to the same charity as the house would have gone, in case the whole £1000 had been paid, that is to the almshouses at *Ratcliffe*; because the house was the thing directed to be purchased for their benefit; they could not possibly have that, and therefore equity would that they should have the consideration which was to have been given

for it, *i.e.* as much of that consideration as existed, the rule being that till the purchase takes effect, the benefit of the consideration shall go [589] the same way as the thing to be purchased was intended to go.

His Lordship declared that the rents and profits of the freehold messuage at *Romford* ought to be applied to the benefit of the charity school at *Romford* so long as the said charity school should continue to be endowed with charity; and decreed the defendant *Lewis*, and his wife, the heir at law of the testator, to convey the said messuage to the defendants, the trustees of the charity.

And his Lordship directed the sum of £365 should be placed out at interest, and that the interest arising therefrom should be from time to time distributed amongst the alms-people belonging to the almshouses at *Ratcliffe*, for the increase of their allowances, over and above what was allowed them by the donor of the said almshouses. (Reg. Lib. A. 1738, fo. 647.)

(1) This case is copied from a Report found amongst the papers of Lord *Hardwicke*, the reasons for the decision are in his Lordship's handwriting. The case is reported in 1 Atk. 435, under the name of the *Attorney-General v. Pyle*.

MARY ATKINS, Mother and Administratrix of MARY ATKINS, *Plaintiff*; (1) and CORNELIUS FAR, *Defendant*.

February 27 and 28, 1738-39. 1 Atk. 287; 2 Eq. Ca. Ab. 247, pl. 32.

The defendant gave a bond to the plaintiff conditioned to pay her £500 if he did not marry her within twelve months; The defendant by his answer denied that he had ever promised to marry her, and that she gave up the bond to him voluntarily, in contradiction to the bill wherein it was stated that he had fraudulently taken it away from her and destroyed it; upon evidence by one witness that the defendant had taken away the bond forcibly, and of another that he had promised to execute a new bond; it was held, that the plaintiff was entitled to the £500 with interest from the filing of the bill. (2)

The bill prayed payment of the sum of £500 due from the defendant, upon a bond executed by him to *Mary Atkins* deceased.

[590] The case made by the plaintiff's bill was, that the defendant having promised to marry *Mary Atkins*, executed a bond to her dated the 9th of February 1732, in the penalty of £1000, whereby after reciting that an agreement had been made between the defendant and *Mary Atkins*, that a marriage should be concluded between them within twelve months from the date of the bond; the condition of the bond was, that if the defendant did and should not according to the rites and ceremonies of the church marry the said *Mary Atkins* within twelve months after the date of the said bond, he would pay her £500;

That in the month of March following, the defendant having obtained possession of the bond under the pretence of wishing to look at it, took it away, and destroyed it; that the defendant soon afterwards, upon the application of *Mary Atkins*, promised to execute another bond of the same purport as that which he had destroyed, and desired the said *Mary Atkins* to get the same drawn and prepared, and that the time and place was appointed by the defendant to meet her, in order to execute the said new bond; that at the defendant's request, she having applied (to have the said new bond drawn) to the person who drew the former bond, he found by him the very draft or copy of the former bond, and by her directions caused a bond to be drawn in the same words as the former bond was drawn; that the defendant had refused to execute it, though he had frequently promised to do so.

To this bill the usual affidavit was annexed, that the defendant had obtained the possession of the original bond. The contents of the bond were proved by the subscribing witnesses to it. It was proved by one witness, that the defendant had often expressed his intentions of marrying *Mary Atkins*, and that he had admitted having taken away and destroyed the original bond; and by another witness, that he had promised to execute a new bond, and gave directions to have it prepared.

The defendant by his answer stated, that *Mary Atkins* was a woman of bad character, and denied that he had ever promised to marry her, and stated that he had executed the original bond under an idea that it would not be of any validity against

him, and that *Mary Atkins* afterwards voluntarily gave up the bond, saying that she would have nothing more to do with him, and did not within the 12 months make any application to him upon the subject, and denied [591] that he had ever promised to execute another bond. No witness was examined for the defendant.

The bill was filed by *Mary Atkins*, and upon her death the suit was revived by the present plaintiff.

Mr. *Browne* and Mr. *Fazakerley* for the plaintiff.

Mr. *Attorney-General*, Mr. *Chute*, and Mr. *Noel*, for the defendant, contended, that the evidence of the defendant's having obtained possession of the bond would not be received being supported by the testimony of only one witness against the oath of the defendant in his answer. That the plaintiff ought to have shewn a demand and refusal of marriage, whereas it was not even alleged that she was ready and willing to have married the defendant, and that there was no mutuality in the contract, there being no promise to bind *Mary Atkins*, and they cited *Key v. Bradshaw*, 2 Vern. 102.

March 1, 1738.—*Lord Chancellor*. In this case there are two questions: first, whether the plaintiff, from the nature of this case, has any original equity to come into this Court for relief; secondly, whether there is any thing, under the circumstances of the case, to bar the plaintiff of that relief.

As to the first, I think the plaintiff has such equity, which is founded on this bond having been once executed, by which the plaintiff might have had a remedy at law; and afterwards coming into the hands of the defendant, and being cancelled by him, where such case is of a bond, it gives the plaintiff not only ground for a discovery, but also relief, because the admission of the bond by the defendant's answer, or proving that there was such a one, would not be sufficient to enable the plaintiff to bring an action, because there must be a *profert in curia*, and *oyer* may be prayed thereof.

As to the second point, it is objected, that it is only proved by one witness that the defendant took this bond forcibly from the plaintiff's daughter, which the defendant hath denied by his answer upon oath; and it is generally true, that where the equity of the bill was only proved by one witness and is denied by the defendant's answer, that there is not sufficient ground to make a decree, because there is oath against oath; but the rule is misapplied here, for in this case the plaintiff's daughter was entitled to make the first oath, which she has done, and has also proved the same matter by one witness, so that this is only the oath of the defendant in his answer against two oaths; but there is no occasion to rely upon this, because the answer is not a complete denial of the plaintiff's equity, but only a confession and avoidance; and then it is not sufficient to say it is only proved by one witness, for the defendant ought to make out his avoidance; then again here is only one witness that swears to the taking of the bond by force, and cancelling it; yet there is another who swears that after the bond was got into the defendant's custody and cancelled, the defendant promised the plaintiff's daughter to execute a new bond, which could be only because he had got the former wrongfully, and cancelled it; and strongly corroborates what was sworn by the other witness, so as to take it out of the rules of the Court, that there can be no decree where there is one oath against another. It was further objected, that the plaintiff's daughter, by her bill, had not averred to prove in the cause that she was ready to perform her part, and to marry the defendant; but it lies upon the defendant to shew that he requested, and she refused to comply; for the condition of the bond does not oblige her to request the defendant, but puts the performance upon him.

Another objection has been taken, that it does not appear the defendant had any remedy to compel the plaintiff's daughter to marry him, there being only a recital in the condition of the bond, that such an agreement to marry each other had been made between them, but that no such agreement had been signed on her part in favour of the defendant, or any evidence of it.

The answer is, I cannot take it the defendant had no evidence of such promise, and as he has recited there was such a one, I must take it to be true, besides the Statute of *Frauds and Perjuries* (29 Car. 2, c. 3.) does not require promises of marriage to be in writing, but only money to be given in consideration of marriage.

It has been said, it is very pernicious to give relief in such cases as this, because let the woman behave ever so ill after the bond given, yet that would be an obligation on the defendant to marry her, or pay the money. But this Court would relieve against such bond, if she became abandoned and profligate, so as to put herself under different circum-

stances than she was at the time of making the same ; but here is no proof either that it was an improper match, or that the daughter ever misbehaved herself.

Then the case is no more than this ; here is a bond given to a woman of very good character to marry her within a year, or to pay her a sum of money. As to the case of *Key* [593] and *Bradshaw*, 2 Vern. 102, that is a very general reason, and would hold good in all contracts of marriage to be executed, either in the Ecclesiastical Court, or by damages at law ; but in that case it was clearly an improper agreement, and such as from the nature of it was not right, that the mistress should marry her servant, which might be evidence for the Court to believe she was drawn into it.

It has been objected, that this bill is brought for recovering a penalty ; but that is taking it wrong, for it is only the damages that have been adjusted and agreed on between the parties themselves ; and if in an action at law upon a promise of marriage the plaintiff had recovered so much damage, the Court would not have relieved against it.

In this case the Court made a decree that the plaintiff should have the £500 and interest from the time of filing the original bill, with costs. (Reg. Lib. A. 1738, fo. 310.)

(1) The statement of this case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book ; the judgment from a manuscript report, which has also been printed in 2 Eq. Ca. Ab. 247.

(2) But it seems, if a bond be entered into by a child in the lifetime of the parent, or of a person standing in *loco parentis*, to marry a particular person after the decease of the parent, such a bond would be set aside in equity as a fraud upon the parent who disapproved of the match, and as tending to encourage the disobedience of children towards their parents. *Woodhouse v. Shepley*, 2 Atk. 535. *Cock v. Richards*, 10 Ves. 429.

Sir ARTHUR OWEN and Others, next of Kin of ELIZABETH BRERETON, deceased, *Plaintiffs* ; (1) and WILLIAM OWEN, ANN, his Wife, and ELIZABETH, his Daughter, an Infant, *Defendants*.

March 3rd, 1738. 1 Atk. 494.

E. B. after giving various legacies, as to the residue of her estate, gives the same to her two nieces, and desires their father and mother to be their trustees, and declares her will to be, that her estate should be equally divided between them, and appointed them her executrixes ; one of the nieces having died in the lifetime of the testatrix ; held that the two nieces took the residue as tenants in common, and that the moiety of the residue being undisposed of was a lapsed legacy, and must go to the next of kin. (2)

Elizabeth Brereton by her will dated the 19th October 1732,—“ as to all the worldly estate with which it had [594] pleased God to bless her,” &c., after giving certain small pecuniary legacies to each of the plaintiffs (except the plaintiff *Erasmus Owen*), and other legacies to other persons, disposes of the residue in the following manner :—“ as to all the rest and residue of my estate, of what nature and kind soever the same be, I give and bequeath the same to my two nieces, *Catherine Owen* and *Elizabeth Owen*, my god-daughters, the daughters of my nephew *William Owen* and *Ann* his wife, both which I desire to be trustees for their children ; and my will is, that my estate may be equally divided between my two nieces, *Catherine Owen* and *Elizabeth Owen*, whom I nominate and appoint to be my executrixes of this my last will and testament accordingly.”

Catherine Owen died in the lifetime of the testatrix.

The plaintiff, as next of kin to the testatrix, claimed the moiety of the residue bequeathed to *Catherine Owen*.

Mr. *Attorney General* and Mr. *Chute* for the plaintiffs, contended, that the two nieces were, by the will, made tenants in common of the residue, and that the one, *Catherine*, having died in the lifetime of the testatrix, her moiety was undisposed of, and therefore distributable amongst the next of kin, and cited *Page v. Page* before Lord Chancellor *King*, 2 P. Wms. 489 ; and *Holderness v. Rayner*, before Lord Chancellor *Hardwicke*.

Mr. *Browne*, Mr. *Fazakerley*, Mr. *Wilbraham*, and Mr. *Hopkins* for the defendants, contended, that the infant, *Elizabeth Owen*, was entitled to the whole residue, either as surviving residuary legatee or as surviving executrix.

1st. That the nieces were made joint-tenants, and not tenants in common of the residue, the words "equally to be divided" applying not to the bequest of the beneficial interest in the residue which had been before given, but to the office and authority of executrixes; and that according to the ecclesiastical law, the words "equally to be divided" would not prevent a joint-tenancy.

2ndly. That supposing the nieces to have been made tenants in common of the residue, the survivor would be entitled as executrix, it being clear that the testatrix intended to make a complete disposition of her estate, and did not [595] intend any benefit to her next of kin. That at law no part was undisposed of, the whole being vested in the executrix, and the testatrix has desired the father and mother to be trustees of the whole for their children. That by the civil law, a person could not die both testate and intestate, Just. Inst. 1, 8, tit. 5, and they cited 2 Roll. Abr. 301, pl. 13, and *Bastard v. Stukeley*, 2 Jones. Rep. 130. *Hutchinson v. Vincent*, 2 Eq. Ca. Abr. 441, pl. 42, and *Hunt v. Berkley* (1 Eq. Ca. Ab. 201, pl. 13; 243, pl. 4; and Mos. 47), before Sir Joseph Jekyll, 24th of June 1731, in which case *Mary Berkley*, amongst other legacies, gave legacies to her brother and her two sons-in-law, and gave all the rest and residue of her personal estate to her said brother and sons-in-law, to be equally divided between them, and appointed *them* executors. The brother died three years before the testatrix, and the question being, whether the third part of the residue devised to him should go to the next of kin, or to the surviving executors, the Master of the Rolls held that the civil law giving it to the survivors, and the testatrix intending to dispose of the whole of her estate, there did not appear to be any intention that the next of kin should take anything, and therefore decreed for the executors.

March 3, 1738.—*Lord Chancellor*. The first question is, whether if the two nieces had survived the testatrix, they would have taken the residue as tenants in common, and I think it is clear that they would, for it is clearly settled that the words "to be equally divided" in wills create a tenancy in common, both of real and personal estate. (See *Prince v. Heylin*, ante, p. 271, and the cases cited in the note.)

As to wills, it has been so often determined that a bequest of a legacy to two, equally to be divided between them, creates a tenancy in common, and that the legacy upon the death of one lapses, that the authorities cannot now be shaken, and if the ecclesiastical courts were to determine otherwise, some method would be found to controul them. It has indeed been contended, that the words to be equally divided, are not applicable to the bequest of the beneficial interest in the residue, but to the appointment to the office of executrixes; but that cannot be, for the office is in law a joint authority, and cannot be so divided.

The will, therefore, having created a tenancy in common, the next question is, what will be the consequence of the death of one of the residuary legatees in the lifetime of the [596] testatrix? Does the moiety of the residue, which is to be considered as a lapsed legacy, belong to the surviving executrix, or is it distributable as being undisposed of amongst the next of kin?

It has been truly said, that the civil law would give it to the executrix, the maxim being that a man, who makes a will and appoints an executor, cannot die intestate. There have been cases in which suits have been instituted in the ecclesiastical courts by the next of kin to have part of the personal estate distributed, as being undisposed of by the testator, on the ground of particular legacies being given to the executors; but prohibitions were granted to restrain them from proceeding, because by the ecclesiastical law, if a man makes a will, and appoints an executor, the whole belongs to him: and in such cases there is only a trust in the executor, which it is the province of a court of equity to see performed.

In *Page v. Page*, before Lord Chancellor *King*, the testator after several particular legacies, gave the residue to six persons, equally to be divided, and appointed them all executors; one died in the lifetime of the testator, and it was held that his sixth part should not survive to the other residuary legatees, and that they were not entitled as executors, because the testator did not intend that they should have any benefit as executors, the whole being given to the residuary legatees, it was therefore determined that the executors were trustees thereof for the next of kin, and it is well known that Lord *King* gave but little favour to the notion of making executors trustees for the next of kin. This case, on the 29th of August 1734, was cited before Lord *Talbot*, and followed by him (*Bagwell v. Dry*, 1 P. Wms. 700), and by me afterwards in the case of *Holderness v. Rayner*.

It is true, that the case of *Hunt v. Berkeley*, was differently determined ; but in my opinion, the reasons of Sir *Joseph Jekyll* for his decision in that case, were not sufficient to support the decree ; for he proceeded upon the ground that it was the intention of the testatrix to dispose of the whole residue of her estate, and that there was therefore no intention that any part should go to the next of kin ; but that reason is insufficient, because it supposes that the next of kin take a thing which is undisposed of by the intention of the testator, whereas they take by the same title as an [597] heir at law upon whom the law casts all the real estate which is undisposed of, *Farrington v. Knightly*, 1 P. Wms. 554.

William Owen, and *Ann* his wife, the father and mother of the two nieces, are no more than natural guardians to take care of the legacy, for they cannot in law, be trustees, unless some interest in the thing given was actually vested in them.

His Lordship declared, that by reason of the death of *Catherine Owen*, one of the residuary legatees, in the lifetime of the testatrix, one moiety of the residue of the personal estate was to be considered as lapsed and undisposed of by the will, and that it ought to be divided among the next of kin, according to the rule of the statute for settling intestates' estates, and decreed accordingly. (Reg. Lib. B. 1738, fol. 228.)

(1) The statement of this case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book ; the judgment from his Lordship's Note-book, and 2 MSS. Reports.

(2) So *Bagwell v. Dry*, 1 P. Wms. 700. *Page v. Page*, 2 P. Wms. 489. *Peat v. Chapman*, 1 Ves. 542 ; and see *Man v. Man*, 2 Str. 905. *Cheslyn v. Creswell*, 6 Bro. P. C. 1 [2nd Ed. 3 Bro. P. C. 246]. *Bennet v. Bachelor*, 1 Ves. jun. 63. But if there be a joint devise, and in such case, by whatever cause it happens, one of the joint-tenants cannot take ; the other shall have the whole. D. per Lord *Hardwicke*, *Dowset v. Sweet*, Amb. 175. *Humphry v. Tayleur*, Amb. 136. *Frewen v. Rolfe*, 2 Bro. Ch. Ca. 220. *Balwyn v. Johnson*, 3 Bro. Ch. Ca. 455. *Buffar v. Bradford*, 2 Atk. 220.

MORGAN v. MORGAN.(1)

March 3rd, 1738. 1 Atk. 53.

It was in this case laid down by the Lord Chancellor as a rule, that where a defendant pleads a decree of dismissal of a former cause for the same matter in bar of the plaintiff's demand, or his new bill, if the plaintiff does not apply to the Court, that it may be referred to a Master to state whether there is such a decree, but sets down the cause upon the new bill for hearing, it is a waiver of his right of application for such reference, and the Court will determine it.

(1) This case is taken from *Atkyns*. By the Lord Chancellor's note-book it appears that the suit was by a legatee, *William Morgan*, under the will of his mother against *Thomas Morgan*, her executor for payment of the legacy ; and that there was a cross bill by *Thomas Morgan*, which amongst others things sought to establish an account settled between *William Morgan* and his mother with respect to the father's estate ; it also appears that a decree of the Great Sessions of the 12th of September 1732, affirmed in the House of Lords, on the 21st of April 1736, was insisted upon by the counsel for *Thomas Morgan*. By the decree the usual accounts were directed and payment decreed of the legacy. (Reg. Lib. B. 1738, fo. 240.)

[598] BOSANQUET and Others v. Earl of WESTMORELAND and Others :—JOHN BOSANQUET and SAMUEL LONQUET, surviving Assignees of the Estates of SAMUEL COTTON and JOHN COTTON, Plaintiffs ; (1) and Lady ELIZABETH DASHWOOD, The Honourable JOHN FANE, The Honourable DIXIE WINDSOR, and Dr. JOHN KING, Executors of Sir F. DASHWOOD, THOMAS MARTIN and JAMES MARTIN, Defendants.

Appeal and Rehearing.

February 3rd, and March 10th, 1738.

This court will decree the money paid upon a usurious contract to be refunded, where all the money in respect of the usurious contract has not been paid.

The plaintiffs being the surviving assignees under a commission of bankruptcy issued against the two *Cottons* bring their bill for the purpose of compelling the de-

fendants, the executors of Sir *F. Dashwood*, to deliver up to the plaintiffs, certain bonds entered into by the *Cottons* to Sir *F. Dashwood*, to come to an account with them, for what money had been received thereon, to pay the balance to them and to stay proceedings at law upon the bonds.

The plaintiffs alleged by their bill that Sir *Francis Dashwood*, in the year 1702, lent several sums of money to the *Cottons*, and for securing the re-payment thereof with interest at [599] £6 *per cent.*, which was at that time the legal interest, gave him several bonds; that in the month of December 1710, accounts being settled between them and all interests in the bonds being paid, £10,000 being secured by several bonds, remained due to Sir *F. Dashwood*; that Sir *F. Dashwood* soon after demanding payment of the money due on the bonds, and the *Cottons* being unable to pay the same, Sir *F. Dashwood* insisted that for the future they should pay him interest at the rate of £10 *per cent. per annum* for the £10,000, and sign an agreement for that purpose; and that if they would not pay such interest he threatened to put the bonds in suit; whereupon the plaintiffs signed an agreement in writing to pay such interest; that the bankrupts in pursuance of such agreement paid to Sir *F. Dashwood*, from 1710 to 1714 inclusive £1000 *per annum*, as the interest for the £10,000, besides the same interest for £1500 borrowed of him on the 11th of April 1711, on their promissory note, and which was discharged in November 1712, and for the sum of £1000 borrowed of him on the 11th of December 1716, on their promissory note, which was re-paid in the March following; that in the year 1715, the bankrupts paid the testator £500 in part payment of a bond debt and soon afterwards borrowed £500 upon a bond and promissory note, dated 11th May 1716, whereby they became indebted to him in £10,000, for which they paid interest to him, at £10 *per cent.* from that time to 1724; that the bankrupts in July 1724, paid the testator £2000 in discharge of one of their bonds, and since his death paid the defendants, his executors, the further sum of £3000; and the plaintiffs insisted that the defendants, the executors, were overpaid by several thousand pounds.

The defendants, the executors, by their answer admitted, that they had found a note or memorandum, dated the 10th of January 1709, whereby the bankrupts agreed that what sums of money should remain due from them on bonds from Lady-day 1710, should be paid as soon as might be, and that interest should be allowed after the rate of £10 a-year for every £100 till the whole should be paid; and that the bankrupts, about July 1724, paid the testator £2000 in part of the £10,000 which they then owed him; and since his death that they had paid the defendants, his executors, the further sum of £3000 in further part of the principal money owing to his estate; [600] and they said, that since Sir *F. Dashwood's* death there was found amongst his effects, besides a bond from the bankrupts to Sir *F. Dashwood* (which had been delivered up) five bonds, all executed by the said bankrupts to Sir *F. Dashwood*, and they believed that the bankrupts were indebted to Sir *F. Dashwood*, at his death, in £8000 principal and interest for the same, at the rate of £6 for every £100 from Lady-day 1724; and after his death, and before their bankruptcy at several times, they had paid the defendants the said £3000 part of the said principal, and £1350 on account of interest at £6 *per cent.* for every £100; And that in June 1728, the said defendants made up an account of what was received on account of the said £8000 and interest after the said testator's death, computing the interest only to Lady-day 1709, and on the balance of such account £5000 appeared due for principal and £705 for interest, and that such account being then delivered to the bankrupts, they acknowledged such balance was justly due, and promised to pay the same; and the said defendants, the executors, insisted that if the said bankrupts paid their testator any greater interest for the money they owed him than after the rate of £6 *per cent.*, the same being actually paid by the bankrupts themselves, the plaintiffs could not revoke such payments which were voluntarily made, and they admitted assets of their testator sufficient to answer the plaintiffs' demands.

It was proved in the cause that, two of the bonds had been paid off and delivered up; and that a person was employed by the executors and the *Cottons* to draw out and state an account between the executors and the *Cottons*; whereby a balance was found due to the executors; and it was proved that the *Cottons* declared themselves satisfied with the account and promised to pay to the executors the balance. It was likewise proved that on the 9th of April 1711, and on the 10th of December in the same year, general receipts for interest on the £10,000 had been given.

It was decreed at the Rolls that it should be referred to the Master to enquire what was really and *bond fide* advanced and paid by the said Sir F. Dashwood, to the said Samuel and John Cotton the bankrupts, and to compute interest for the same after the rate of £6 *per cent.* [601] *per annum* being legal interest, at the time of entering into the said bonds, and the Master was to enquire and see what was paid by the said bankrupts to the said testator in his lifetime, or to the defendants, the executors, since his death on account thereof, and so much as should appear to have been paid to the testator, and to his executors for interest over and above legal interest, was from time to time, as the same was so paid, to be applied to sink the principal; and the said Master was to compute interest only for the residue of such principal money, and if the Master should find any thing due for principal and interest on the said bonds, then upon the plaintiffs' paying the same, the bonds were to be delivered up to the plaintiffs; but if the said Master should find that the said bankrupts had paid more than was due upon the said bonds, then it was ordered that the defendants, the executors, should repay what should appear to have been so overpaid, and deliver up the bonds to the plaintiffs.

Nov. 11, 1734. Lord Talbot, upon appeal, varied the decree as follows: *viz.* that these words [inquire what was really and *bona fide* advanced and paid by the said Sir F. Dashwood, to the said Samuel and John Cotton, the bankrupts] should be struck out of the decree, and these words [see what the principal sums mentioned in the several bonds entered into by the said Samuel and John Cotton, the bankrupts, to the said Sir F. Dashwood, amounted to] should be inserted instead thereof.

From this decree, made by Lord Talbot, the defendants presented a petition of rehearing, but by their petition they did not complain of that part of the decree whereby it was directed, that if the Master should find that the bankrupts had paid more than was due on the bonds in the pleadings mentioned, that then the defendants, who had admitted assets to pay the plaintiff's demands, should repay the said plaintiffs what should appear to be overpaid, and deliver up the bonds to the plaintiffs.

Feb. 3, 1738.—Lord Chancellor. The direction for refunding not being particularly objected to by the petition of re-hearing, I ordered the cause to stand over on defendant's payment of the costs of the day; the defendants being at liberty to amend their petition of re-hearing in that particular. (Reg. Lib. A. 1738, fol. 169.)

[602] On the 10th of March 1738, the cause came on again to be re-heard.

Mr. Attorney-General, Mr. Fazakerley, and Mr. Hamilton for the defendants, the executors of Sir F. Dashwood.

The decree ought not to extend to any enquiry as to the bonds that were cancelled and paid off, nor the account to any but the subsisting bonds.

First, Consider what the law allows as to usurious contracts; if money is paid on an usurious contract, the obligor cannot recover it back again, *Tomkins v. Barnett*, 1 Salk. 22; *Skin.* 411.

If money be paid upon a mistake, or mere deceit, it may be recovered in an action for money paid and received for the party's use: in *Astley v. Reynolds*, £10 paid more than was due, in order to get his goods out of pawn; action brought, *Raymond, Page, and Probyn*, thought this case differed from that in Salk. upon the compulsion; *Lee, J.*, doubted upon that, and it was adjourned. (2 Strange 915, it is stated in Strange that the plaintiff had judgment.)

The determination that after payment of the money, the party to the usurious contract may be a witness, shews it was not apprehended that any remedy could be had for re-funding, *Long's case*, Sir Thomas Raymond, 191.

Second. No ground for a court of equity to carry this farther than the law would do; for the act of parliament is the only ground on which this Court can proceed. Such a precedent may tend to overhale things after a great length of time, when they are incapable of explanation. All these bonds are distinct securities, and do not run into one another; and there is no instance where money has been paid upon one transaction, that it has been applied to another independent transaction; besides, the stated account and agreement to pay £5000 and interest amounts to a waiver, *Walker v. Penrin*, Pre. in Ch. 50.

Mr. Broune, Mr. Noel, Mr. Roberts, and Mr. Murray, for the plaintiffs.

First Objection. That there ought to be no decree for re-funding what has been overpaid; because the law will not admit of recovering back what has been paid upon an usurious contract.

We do not come here for a legal demand out of assets ; but suppose we did, usury is unlawful in itself. In *Holmes* [603] v. *Hall* (1 Vin. Ab. 269, pl. 9), it is said, that an action would not lie to recover money upon an usurious contract. *Tomkins v. Barnet*, 1 Salk. 22, opinion of *Treby*, C. J. ; a material difference between that case and this ; it did not appear that there was an over payment ; it is said part of the money had been paid, which might not be so much as was really lent ; and it was only a *nisi prius* opinion ; but the answer is, the verdict in an action on the statute could not be given in evidence, in a suit to recover the surplus.

But the case here is different from what it is at law ; this Court lays hold of it by way of relief against the penalty of the bonds ; and in order to that relief an account must be directed, and on the account the Court cannot allow more than is due in conscience. The rule of equity, *æquitas sequitur legem*, does not follow in all cases ; in cases of young heirs, and marriage brokerage bonds. Suppose upon a mortgage there had been an agreement to accumulate interest, which had been paid on an account, it would be decreed to be refunded. Where there was an oppressive accumulation of interest, the Court decreed a refunding, *Broadway v. Morecraft*. (Moseley's Reps. 247.)

Second Objection. That the two bonds which have been delivered up are to be considered as a separate independent transaction.

Answer. It will appear that the £10,000 has always been considered as one gross sum, and the interest paid on it entire ; the securities being different will not vary the case. The £2000 was paid on those bonds in July 1724, the note was given in 1710 ; as to the account insisted upon, it was not stated ; there was nothing conclusive.

Besides, the *Cottons* were at the time in such circumstances that they could not dispute the account.

March 10th, 1738.—*Lord Chancellor*. It comes out upon the account, that a sum of money will be to be refunded to the plaintiffs, and therefore the defendants have reheard this cause as to that part of the decree. I am not satisfied that this decree is wrong, either in point of law or equity.

It is said that the bonds discharged are a distinct security, and therefore that the matter is at an end.

If this were a separate independent transaction from the other bonds, then that would be true ; but the note or agree-[604]-ment in 1710, makes all the bonds one entire transaction, and one usurious contract in equity.

For he was not content with the interest reserved on the bonds themselves, but afterwards when he found the *Cottons* in distress for money, obtained this note from them, whereby he was to be allowed £10 *per cent.* on the whole sum, secured by all the bonds till it was paid.

Therefore I must consider it as one entire loan at £10 *per cent.*, and the agreement extended to the subsequent bonds, and accordingly £10 *per cent.* interest has been paid on a subsequent bond.

The receipts given are likewise for money due on all the bonds.

The argument therefore of its being an independent transaction falls to the ground.

There is nothing in this decree which contradicts the cases cited at law, nor is it necessary for me to determine how the Court would decree if the whole sum, with all the interest after the rate of £10 *per cent.* had been paid, and all the cases cited go to that point only.

So was the case of *Tomkins* and *Barnet* by *Treby*, the case upon which Lord *Treby* founds his judgment, because there he who paid the money was *particeps criminis*, and the law would punish both equally. But that is not the case of one who borrows money at usury, the penalty by statute is only on the lender.

But I have no occasion to determine that point, and as to the objection that the law by permitting the party who borrows to be evidence after money paid in an information on the statute has consequently determined that there shall be no refundment ; that holds only where all the money and usurious interest has been paid as contracted for ; and there is no case where it has been determined that he might be evidence where only the principal sum and legal interest has been paid.

Besides the verdict in the criminal proceeding could not be given in evidence on an action to recover the money paid, and that because the party himself may be evidence in the criminal proceeding.

In this case it is not pretended that all the money, with the usurious interest too has been paid, and here is a ground to found the jurisdiction of the Court ; the account

and relief against the penalties, which would not hold, in case the whole was discharged.

[605] The jurisdiction of this Court being therefore founded, the Court must do complete justice, and let the party have no more than is his due in conscience, and therefore it is like the case of bargains with young heirs, and in many of those cases, there has been express usury, and yet the Court has decreed accounts and refundments.

But this case differs likewise from the usurious cases cited at law.

For here the bonds were not originally usurious but good, and made usurious by the subsequent agreement, and therefore if an action had been brought on them, the statute could not have been pleaded to them, or to the subsequent bonds.

Oppression therefore arises singly upon the note, and therefore the case comes out that there has been money paid as interest on bonds, which is not due on the bonds, but paid in pursuance of a void agreement only.

The nature of this case shews distress on one hand, and oppression on the other, and therefore comes directly to the case of young heirs.

Decree affirmed.

(1) This case, except the judgment upon the merits, is taken from Lord *Hardwicke's* Note-book; the judgment which corresponds with the short heads of it in Lord *Hardwicke's* Note-book, from a manuscript report.

[606] JOHN HOPKINS late DARE, *Plaintiff*; (1) and JOHN HOPKINS, SARAH and his four other Daughters and Others, *Defendants*.

[S. C. Cas. T. Talbot, 44; 1 Atk. 581; 1 Ves. Sen. 268. See *Nicholl v. Nicholl*, 1777, 2 W. Bl. 1162 (n); *Vanderplank v. King*, 1843, 3 Hare 12; *East v. Twyford*, 1853, 4 H. L. C. 556. Explained and corrected, *Bective v. Hodgson*, 1869, 10 H. L. C. 656. See *Abbiss v. Burney*, 1881, 17 Ch. D. 217.]

March 5th and 12th, 1738-9.

J. H., by his will, devises his real estate to trustees and their heirs, to the use of them and their heirs, upon trust for *Samuel Hopkins*, only son of *John Hopkins*, for life, and after his decease, in trust for the first and other sons of his body successively in tail male, and in default of such issue, in case *John Hopkins* should have any other son or sons of his body, then in trust for all and every such other son and sons respectively and successively, for life, with like remainders to their several sons, as are limited to the issue male of *Samuel Hopkins*, and for default of such issue, then in trust for the first and every other son of *Sarah*, the eldest daughter of *John Hopkins*, successively for life, with remainder to the heirs male of their respective bodies, with similar limitations to the sons of three other daughters of *John Hopkins*, or to the sons of any other daughters, which he might afterwards have born, and for default of such issue, in trust for the first and every other son of *Hannah Dare*, successively and respectively for life, with like remainders to the heirs male of every such son, and after other remainders, with the ultimate remainders in trust for his own right heirs; and the testator declared that none of the persons to whom his estates were limited for life, should be in the actual possession thereof, and in the enjoyment of the rents and profits of any other part thereof, than is provided by his will, until they should have respectively attained their ages of twenty-one years, and in the mean time his trustees and their heirs and executors, were to make allowances for their maintenance and education, and the overplus of the rents and profits above such allowances, and after payment of his debts and legacies, should go to such person as should be entitled to or come into the actual possession of his real estate; and the testator gave to *James Hopkins*, one of the trustees, an annuity of £300 until some person under his will should come into the actual possession of his real estate by attaining his age of twenty-one years, and the rest and residue of his personal estate, after payment of his debts and legacies, he gave to his executors in trust, to be laid out in the purchase of lands, to be conveyed to his executors upon the same trusts as he had declared concerning his real estate; *Samuel Hopkins* having died in the lifetime of the testator, and *John Hopkins* since the death of the testator having had *William*, another son born, who had died, and there being no issue male of *John Hopkins*, or of any of his daughters, the plaintiff *John Hopkins*, late *Dare*, brought this bill claiming to be entitled to the estates devised, and to be purchased with the surplus of the personalty as tenant in

tail male ; held that there was a sufficient estate in the trustees to support the contingent remainders to the male issue of *John Hopkins*, and of his daughters living at the testator's death, and that the plaintiff was not entitled to the relief sought by his bill.

John Hopkins, the testator, makes his will, dated 10th of November 1729, in the following words :—

“As to such temporal estate as it hath pleased God to intrust-me with, I give and dispose thereof as follows. I will that all the just debts which I may happen to owe at the time of my decease, and my funeral charges be thereout in the first place paid and discharged.

“*Item.* All that my farms and lands called *New Place Farm*, now in the occupation of (the defendant) *John Hopkins*, [607] the son of my late uncle *Samuel Hopkins*, deceased, and let to him at the yearly rent of £100. I give and devise to my said cousin *John Hopkins*, for his life, and from and after his decease, I give and devise the same to *Elizabeth*, his wife, for her life, and from and after the decease of the survivor of them, I give and devise the same to my trustees and executors hereinafter named, and to their heirs and assigns upon the trusts and for the purposes hereinafter limited and declared, touching the residue of my real estate, and as to all other my real estate whereof or whereunto I or any person or persons in trust for me or to my use, am is or are seised or intitled in possession, reversion or remainder, or otherwise howsoever, situate lying and being in the several counties in the will mentioned, I give and devise the same to my trustees and their heirs, to the use of them and their heirs upon the several trusts, and to the several purposes hereinafter mentioned and declared (that is to say), upon trust for *Samuel Hopkins*, only son of my said cousin (the defendant) *John Hopkins*, for his life, and from and after his decease in trust for the first and every other son of the body of the said *Samuel*, lawfully to be begotten successively, and according to priority of birth, and the heirs male of the body of every such son respectively, and successively, the elder and the heirs male of his body to take before the younger and the heirs male of his body issuing, and for want of such issue, in case my said cousin *John Hopkins*, shall have any other son or sons of his body lawfully begotten, then in trust for all and every such other son and sons respectively and successively, for their respective lives, with the like remainders to their several sons successively and respectively, as are therein before limited to the issue male of the said *Samuel Hopkins*, the son of the said *John Hopkins*, and for default of such issue, then in trust for the first and every other son of the body of *Sarah*, the eldest daughter of my said cousin *John Hopkins*, lawfully to be begotten successively and respectively, and according to priority of birth, for their respective lives, with remainders to the heirs male of the body of every such son respectively and successively the elder and the heirs male of his body, to take before the younger, and the heirs male of his body issuing.”

The will then contained similar limitations to the sons of *Mary*, *Elizabeth*, and *Hannah*, the three other daughters of *John Hopkins*, and to the sons of any other daughter which he might afterwards have born, and for default of such issue, [608] then in trust for the first and every other son of his cousin *Hannah Dare*, daughter of his said uncle *Samuel Hopkins*, deceased, successively and respectively, according to priority of birth, for their respective lives, with the like remainders to the heirs male of the body of every such son respectively and successively the elder and the heirs male of his body to take before the younger and the heirs male of his body issuing, and for want of such issue, then in trust for *James Bennett*, the only son of another daughter of his said uncle *Samuel Hopkins* deceased, for his the said *James Bennett's* life, with remainder to his first and every other son lawfully to be begotten successively, according to priority of birth, and the heirs male of every such son respectively and successively, the elder, and the heirs male of his body to take before the younger and the heirs male of his body issuing, and in default of such issue, then in trust for his own right heirs for ever. And the testator thereby provided, that in case the said estates should at any time thereafter by virtue of the limitations thereinbefore contained descend or come to any person or persons who should not bear the name of *Hopkins*, then all and every such person or persons as soon as they should respectively come into, and be in possession of the premises by virtue of the limitations aforesaid, should assume and take his surname, and coat of arms, and in case any such person or persons neglect or refuse to assume his surname and arms, then it was his will that the said estates should not go or descend to any such person or persons so neglecting or refusing ; but every such person should be considered

as if naturally dead, and in every such case the said estates should go and descend to the next person in succession, according to the limitations aforesaid, and the will contained the following proviso : " provided also, that none of the persons to whom the said estates are hereby limited for life, shall be in the actual possession thereof, and in the enjoyment of the rents and profits, or of any greater or other part thereof than as hereinafter is mentioned, until he or they shall have respectively attained his or their age or ages of twenty-one years, and in the mean time until his or their severally attaining to such age, my said trustees, and their heirs or executors shall make such allowances thereout for the handsome and liberal maintenance and education of such person or persons respectively, as they shall think suitable and agreeable to his estate and fortune, and it is my will that the overplus of the said rents and profits over and above the said annual allow-[609]-ances, or of such part thereof as shall remain after all my debts, legacies, and funeral expences shall be first paid, with the payment whereof I have charged my real estate, in case my personal estate shall not be fully sufficient for those purposes, do go to such person as shall first be entitled unto or come into the actual possession of my said real estate, according to this my will."

The testator then gave several pecuniary legacies, and appointed Sir *Richard Hopkins*, *John Rudge*, and *James Hopkins*, joint executors of his will, and gave to the said *James Hopkins* £500 in money, and £20 for mourning, and also an annuity of £300 to commence from his death, and to be continued and paid to him half yearly, until some person under his will should come into the actual possession of his real estate by attaining his age of twenty-one years, if the said *James Hopkins* should so long live, and continue to act in the said trust, and in case the said estate should so come into possession in a less number of years than ten years after his decease, then he willed that the annuity of £300 should be continued and paid to the said *James Hopkins*, for so long after the said estate should so come into possession, as with the time he should before have received the said annuity, would make up the whole time of his receiving thereof ten years, if the said *James Hopkins* should so long live ; and he declared his will to be, that if his personal estate should prove deficient fully to answer and pay all his debts, funeral charges, and the legacies and annuities thereby by him given, that then such deficiency should be made good out of his real estate, or the rents and profits thereof : and all the rest and residue of his personal estate, in case there should be any such after the payment of his debts, funerals, legacies, and annuities, he gave to his executors in trust for the same, to be by them or the survivors or survivor of them with all convenient speed, laid out in the purchase of messuages, lands, and tenements of inheritance in the kingdom of *England*, to be conveyed to his said executors and their heirs upon the same trusts, and for the same purposes as were thereby declared, touching the estates he was then seised of, and which he had thereby devised.

Samuel, the son of the defendant *John Hopkins*, died in the testator's lifetime, on the 25th of April 1732. The testator died, leaving the defendant *John Hopkins*, his heir at law.

Upon the testator's death, two bills were filed, the one [610] by the defendant *John Hopkins* and his daughters, in which he claimed as heir at law to be entitled to the profits of the estates until some person should come *in esse* capable of taking by the will ; and the other by the trustees, praying that the profits might be laid out and accumulated to increase the estate.

In both these causes the present plaintiff was a party defendant.

Both causes came on to be heard together before the then *Master of the Rolls*, on the 25th of October 1733 ; when his Honour declared that the plaintiff *John Hopkins*, being the testator's heir at law, was entitled to the profits of his real estate, devised to the trustees, upon the trusts of the said testator's will accrued due since the said testator's death, until some person should come in being who should be entitled to an estate for life according to the limitations in the will, and that he was in like manner entitled to the surplus produce of the testator's personal estate after payment of the annual sums charged thereon, and decreed accordingly.

This decree was affirmed upon appeal by the Lord Chancellor *Talbot* on the 18th of November 1734, with this addition, that the words " in possession " should be inserted next after the clause " until some person should come in being who should be entitled to an estate for life."

On the 18th of June 1736, the defendant, *John Hopkins*, had another son born named *William*, who died on the 24th of December in the same year.

Upon his death, there being no issue male of *John Hopkins*, or any of his daughters, the plaintiff, the eldest son of the testator's cousin, *Hannah Dare*, being of the age of twenty-one years, assumed the name of *Hopkins*, in pursuance of a direction in the testator's will, that every person not of that name who should come into possession of the premises thereby devised, should take the name of *Hopkins*, and brought the present suit claiming to be entitled to the estates devised, and to be purchased with the surplus of the personalty, as tenant in tail male, and therefore praying that the real estates devised might be conveyed to him in tail male, and that the surplus of the personal estate might be paid to him or laid out in the purchase of lands in pursuance of the directions in the will.

Mr. Chute, Mr. Noel, Mr. Green, and Mr. Murray for the plaintiff.

The *Master of the Rolls* was of opinion, that by the death [611] of *Samuel* in the lifetime of the testator, all the subsequent estates became executory, in support of which *Pag's* case, Cro. El. 828 (see this case differently reported, Noy. 43), was relied upon; but upon the birth of *William*, admitting that the devise to an unknown son of *John Hopkins* was good as an executory devise, an estate of freehold vested in him, and thereupon all the subsequent limitations became remainders, and the remainder to the eldest son of *Hannah Dare* is the first vested remainder. If *Samuel* had lived, he would have taken an estate for life, and *William* took the same estate which *Samuel* would have taken. A devise cannot be vested as to the particular estate and remain executory as to the limitations, expectant upon it; therefore, there can be no executory devise where the freehold does not descend in the mean time; but in this case the freehold has once been vested; the moment a son of *John Hopkins* was born, there was an end of the right of the heir at law to the rents and profits.

It is objected, that by force of the proviso as to the actual possession, no estate vested in *William*, the infant, before he attained the age of twenty-one years, but the devise to him operated as a disposition of the estate, and the proviso only imposed a restraint as to the enjoyment of the profits, the object being to appoint a kind of guardian, *Taylor v. Biddall*, 2 Mod. 289, and the direction is that the surplus rents and profits shall be laid up for such person as shall come into actual possession; nothing therefore was left undisposed of for the heir at law.

It is said that this is a trust executory, and to be moulded by a Court of Equity; but this Court always governs itself by the rules of law as to the vesting of estates in the first taker, although it has gone further in construing the extent of interest which he is to take. In *Papillon v. Voice*, 2 P. Wms. 471, the only question was as to the nature of the estate and interest. In *Bale v. Coleman*, 1 P. Wms. 142, Lord *Harcourt* held that in wills the devise of a trust must be taken according to the legal effect of the words, and in the case of *Howard v. the Duke of Norfolk*, 3 Ca. in Ch. 1, the Court disclaimed any authority to set up a different rule of property from that which prevails at law.

It is objected, that the plaintiff having been a party to the former suit, is bound by that decree in that cause, and that by the words introduced therein by Lord *Talbot*, the defend-[612]-ant, *John Hopkins*, is entitled to the rents and profits, until some person shall come *in esse* who will be entitled to an estate for life in possession; but the object of those words was to prevent *John Hopkins* from being turned out of possession by some of his daughters having a son, who might himself be disappointed by *John Hopkins* having a second son.

If these subsequent limitations cannot take effect as executory devises, neither can they be good as contingent remainders, because they are not come *in esse*, within that compass of time which the law allows; and there is no estate to support them, the legal estate in the trustees is clearly not sufficient for that purpose, being of a totally different nature. This Court applies the same rules to equitable estates which Courts of law do to legal estates, and a contingent remainder of a trust estate requires a particular estate to support it as much as a legal estate.

Mr. Attorney-General, Mr. Browne, Mr. Fazakerley, and Mr. Clarke, for the defendant *John Hopkins* and his daughters.

There are two things to be considered distinctly,

1st. As to the legal estate devised by the will.

2dly. As to the personal estate given to be laid out in land.

As to the first there are two points:

1st. What was the testator's intention.

2dly. What objections there are to that intention being carried into effect.

As to the intention nothing can be more plain than that the testator intended that the issue of *John Hopkins* should take before the plaintiff, or any who may claim under the subsequent limitations ; but,

2ndly. It is said that this limitation cannot take effect ; because

1st, That the limitations after that to *William Hopkins* are to be considered as contingent remainders, and that there are no trustees to preserve them, and,

2ndly, That these contingent remainders are not good in law, being remainders after limitations to persons not *in esse*.

3dly, That these limitations if to be considered as executory devises are too remote.

It is contended that though the limitation to the second son of *John Hopkins* was declared to be an executory devise ; yet that upon its taking effect all the subsequent limitations became remainders. It may be, that when a legal estate is once vested, all the subsequent estates are to be considered as contingent remainders, though [613] where necessity requires it, it may be otherwise ; but this case turns upon the estate being a trust estate, and it may be considered upon the ground of the trust having been executed by the birth of *William*, and of all the subsequent limitations having been thereby turned into remainders. The question is the same as if *Samuel* had survived the testator. We admit that an estate of freehold vested in *William* notwithstanding the proviso postponing the actual possession till the age of twenty-one.

Two points were made before Lord *Talbot*.

1st, That the limitations were executory devises.

2dly, That if contingent remainders, the legal estate vested in the trustees was sufficient to support them. His Lordship having decided in favour of the first proposition, gave no opinion upon the 2d point ; but in a subsequent case he held that a general legal estate in trustees, without any particular limitations, was sufficient to support contingent remainders ; *Chapman v. Blissett*, Ca. Temp. Talb. 145, which has since been affirmed by your Lordship. In the general case a trust might have been declared to preserve the contingent remainders, but the trust actually vested in the trustees amounts to the same thing. The testator clearly intended that the estate given to them should support all the limitations.

The testator knew that he had created contingent remainders, and gave the estate to the executors for all the purposes of the will ; any estate of freehold, though no particular trust be declared, will be sufficient to support contingent remainders. In *Salter's case*, Yelv. 9, 10, though the rent ceased by the death of the tenant for life, yet the estate being held by the terretenant, though discharged of the rent, was decided to be sufficient to support the remainder. The system of introducing trustees to preserve contingent remainders was adopted because the law required that the freehold should be in some person who might be tenant to the *præcipe*, but in the present case, the trustees have the freehold, and can answer both in law and equity.

It is said that this Court will never support the limitations of a trust, which if it had been of a legal estate would have been void ; but the trusts of a term may be limited by deed, otherwise than the term itself, *Chalfont v. Okey*, 1 Ch. Cas. 329. The rule of conveying trust estates has never followed the rule of conveying legal estates. If *William* had attained the age of twenty-one, and had brought a bill to have a conveyance, the Court would have directed the estate to be [614] conveyed so as to preserve the contingent remainders, *Massenburg v. Ash*, 1 Vern. 234 ; but now the Court is not asked to give to trustees a legal estate which they have not, but to use a legal estate which they have. The Court is desired to do no more than the testator might have done by strict legal rules. In *Carrick v. Errington*, 2 P. Wms. 361, 3 Bro. P. C. 412, there happened to be a chasm in the trust, and the Court gave the profits in the interim to the heir at law as undisposed of.

We admit that the subsequent limitations to the sons of sons unborn are bad, but that will not affect the present question. They may be altogether struck out, or may more properly be considered as creating estates tail, *Humberston v. Humberston*, 1 P. Wms. 332. As to the limitations being void as executory devises, if they are so with regard to us, they must be equally so with regard to the plaintiff.

The remaining point, as to the personal estate, is free from most of the difficulties to which the other parts of the case are subject. It is a mere executory trust which the Court will execute, as near to the intention of the testator as possible, and if necessary

will direct trustees to be interposed, *Hobart v. Stamford*, 1 Bro. P. C. 288. *Humberston v. Humberston*, and *Sandys v. Dixwell*, lately decided. (See ante, page 536.)

Reply.

It was not decided in *Chapman v. Blisset*, that trustees of the whole legal estate were sufficient to support contingent remainders, for in that case the limitation was good as an executory devise, there being no immediate estate for life given to any person *in esse*. We contend that a general legal estate is not sufficient to support contingent remainders limited of the trust of such estate; but, independently of that, it would not have been possible in the present case to have interposed trustees in a conveyance, so as to have preserved these contingent remainders. That *William Hopkins* would have been tenant for life, and not tenant in tail, cannot be disputed; it is so expressed in the will, assumed in the proviso, and understood in the decree. How then could these remainders have been preserved during all the lives of all the unborn sons and daughters of *John Hopkins*? The plans suggested would tie up the estate for one generation longer than the rules of law admit.

March 12th, 1738.—*Lord Chancellor*, after stating the case, gave the following judgment:—

[615] Two bills brought in 'this Court, one by defendant *John Hopkins* and his daughters, for an account of the testator's estate, and an execution of the trusts of the will.

By this bill Mr. *J. Hopkins* prayed, that he might have the profits, till some person came *in esse* capable of taking by the will, as part of the trust undisposed.

The other bill, by the trustees, to have the profits laid up and accumulated to increase the estate.

These causes came on to be heard, before the late *Master of the Rolls*, 25th of October 1733; on that hearing a very considerable question arose.

It was admitted on all hands, that if *Samuel Hopkins* had survived the testator, he would have taken an estate for life in the trust in possession, and that all the subsequent limitations, intermediate between the devise to him and the devise to the now plaintiff, the first son of *Hannah Dare*, would have been contingent remainders; but it was insisted for the plaintiffs, in the original cause, that by the death of *Samuel Hopkins* in the testator's lifetime, the devise was become void, and consequently should be considered as not written in the will; that if the subsequent limitations could not take effect as contingent remainders, that they might notwithstanding as an executory devise, and that they should take effect as they could, *ut res magis valeat*, and that the intention of the testator might be fulfilled.

On the side of the now plaintiff, who was then a defendant, it was insisted, that by the death of *Samuel Hopkins*, the estate of freehold devised to him in the trust becoming void, and never taking effect the contingent remainders dependent upon it were become void, and that the law would not admit that a limitation, which in its original creation was a contingent remainder, should by an accident happening, one way or the other, be turned into an executory devise.

The opinion of the *Master of the Rolls* upon that point, affirmed by Lord *Talbot*, is not now to be disputed, and indeed the plaintiff founds his present bill upon it, but since the making of that decree, two events have happened which have given occasion to the present suit. On the 18th of June 1736 *John Hopkins* had a second son born named *William*, and on the 24th of December 1736 that son died aged about six months and one week.

Upon his death, the plaintiff, who has attained his age of twenty-one years, has brought the present bill to have a settlement of the trust estate made by the trustees, and to [616] have the first estate made therein limited to himself in possession, and to have an account of the profits during the life of *William*, the infant, and the surplus profits paid to himself. Whether he is entitled to such an immediate conveyance or not, will depend upon the determination of the points insisted upon on both sides?

On the part of the plaintiff it has been contended, that by the birth of *William*, the infant, the estate became vested in him, and was no longer executory, and that consequently all the limitations subsequent thereto became remainders, either contingent or vested, according to the nature of the respective limitations, and as the persons to take were *in esse* or not. That such of them as were contingent, not having become vested, either during the continuance or at the instant of the determination of the particular estate were fallen and void, and can now never take effect, and that

from thence it follows, that the plaintiff is entitled to the estate in possession, as having the first remainder vested.

On the part of the defendant, this has been endeavoured to be answered three ways :

1st, That there is no necessity for considering the limitations subsequent to the second son of *John Hopkins*, as contingent remainders, but that they may subsist as so many distinct executory devises, and that in default of one taking effect the other shall.

2dly, Another answer, and that which was relied upon, was that, admitting that by the vesting of the estate in the infant, *William Hopkins*, the subsequent limitations were now to be looked upon as contingent remainders, yet that they are not now destroyed by not vesting during his life, but that the legal estate in the trustees is sufficient to support them.

3dly, That a determinable freehold in the trust is descended to the heir at law, and that is sufficient to support the contingent remainders of a trust estate.

These points have been well argued at the bar, and some things, I think, are clear.

1st, That if these had been contingent remainders of a legal estate, or a use executed by the statute 27 Hen. 8, and no trustees inserted to preserve contingent remainders, they would have been void.

2dly, I think it is clear that these subsequent contingent limitations cannot be supported as so many distinct executory devises.

[617] Even the case of *Higgins v. Derby* (1 Salk. 156), before Lord *Cowper*, Mich. Vac. 6 Anne, hinted at by Mr. *Attorney-General*, did not go so far as that upon the limitation of the trust of a term ; the utmost that was said was, that where the limitation to the son and the heirs male of his body never took effect by there never being a son, the limitation over to the daughters might possibly be good ; but here the trust estates vested in *William*, the infant, at least for life ; that was capable of supporting a remainder, and consequently according to the doctrine in the case of *Purefoy v. Rogers*, 2 Saund. 380, all the subsequent limitations must be considered as remainders (*Reeve v. Long*, Skin. 431 ; *Carth. 310* ; 4 Mod. 282, S. C. *Nealtby v. Bosville*, Reps. temp. *Hardwicke*, 258. *Walter v. Drew*, Com. 372. *Doe v. Morgan*, 3 T. R. 763. *Ives v. Legge*, in note, 3 T. R. 488) ; and in truth they were so many parts of the same executory devise, and when that once became vested in the first taker, it could be no longer executory.

The case then is brought to this question, and I think was in effect admitted to be so by the counsel for the defendants, whether the legal estate vesting in the trustees will support these remainders.

Before I proceed to consider this, I would observe, that it is not necessary to bar the plaintiff from having an immediate conveyance, that all the contingent limitations intervening between the estate limited to *Samuel Hopkins*, and that to the plaintiff, should be good subsisting contingent remainders ; it is sufficient if some of them are good, for then so long as they continue, the plaintiff cannot be let in.

Upon considering this question, I am of opinion that the legal estate in the trustees is sufficient to support some at least of these contingent remainders (so *Chapman v. Blisset*, ante, p. 328. *Robinson v. Robinson*, 2 Ves. 230). For this I go upon two grounds :—

First. The plain intention of the testator, as declared by his will.

Secondly. That this intention is consistent with the rules of law, and the common principles of equity.

First. As to the intention of the testator, the plaintiff comes before the Court in a very unfavourable light, claiming under the will and bounty of the testator, and at the same time endeavouring to defeat it. This indeed has been [618] retorted on the defendant, the heir at law ; but the case of the heir at law is very different, for he does not claim by the will or intention of the testator, but only asks what is not given from him. The testator could not have framed his will so that nobody should take any part of his estate ; if it could have been done, it would have been as likely to have happened in this case as in any.

But to consider and apply the testator's intention to this point. [He devises his real estate to trustees and their heirs, to the use of them and their heirs, so that it is a clear use executed by the statute, upon the several trusts, and to the several purposes thereafter mentioned and declared ; these words were properly and strongly relied upon for the defendant, as declaring his intention that the legal estate so given should be used to serve and support all the trusts and limitations after

declared; he then proceeds to limit the trusts, and when he comes to the after born sons of *John Hopkins*, he says, "In case my said cousin *John Hopkins* shall have any other son or sons, then in trust for all and every such other son and sons respectively for their lives, with the like remainders to their several sons as are hereinbefore limited to the issue male of *Samuel Hopkins*, son of the said *John Hopkins*; so that he expressly declares that they should be trustees for such after born sons, and consequently the Court is to make a construction to support it in such manner as they can." (This part of the judgment within brackets is taken from another manuscript; in Lord *Hardwicke's* manuscript there appears only the following words: "state the several expressions in the will material to this purpose.") But though this was his actual intention, if it is contrary to the rules of law and equity, it must be overruled and rejected.

Let us therefore consider in the second place, whether it is consistent with the rules of law, and the common principles of equity.

The great objection to this has been, that by law a contingent remainder must vest during the continuance of the particular estate, or *eo instanti*, that it determines, or else it is destroyed, according to *Archer's* case, and all the authorities. That the only method found out to avoid this, since the resolution in *Chudleigh's* case, has been to create a particular estate of freehold, and vest it in trustees, to support the contingent remainder; and that there is no such limitation in this case; and that it is the maxim of this [619] Court, that trust estates, which are the creatures of equity, shall be governed by the same rules as legal estates, in order to preserve the uniform rule of property; and that the owner of the trust shall have the same power over the trust as he would have had if he had the legal estate for the like interest or extent.

This is undoubtedly true in general, but it affords no just conclusion to the present case, and that for three reasons:

First, Because the ground and foundation which the common law goes upon, in making a contingent remainder void in such a case, does not hold in the case of a trust.

Secondly, Because to allow of this, will not affect or restrain any rightful power of alienation in the *cestui que trust*, which the law allows to the owner of a legal estate, and consequently does not tend to a perpetuity.

Thirdly, Because to require a more distinct limitation to support the contingent remainders in such a case of a mere trust would be wholly vain and nugatory.

1. As to the first of these reasons: the ground upon which the common law requires a contingent remainder to vest either during the continuance of the particular estate, or *eo instanti*, that it determines, is that a freehold cannot be in abeyance; there must be a tenant of the freehold to perform the services due in respect of the land, and to answer in a *præcipe*, and to all writs to be brought concerning the realty, otherwise there would be a failure of justice.

But this cannot hold in the case of a trust or equitable estate. The trustee is tenant of the freehold liable to perform all services, to answer to all *præcipes*, and though a similar mischief was endeavoured to be shewn in equity from the want of a proper person to answer to demands and to be bound by decrees here, that consequence will not follow; for let there be ever so many limitations in contingency upon the trust, it is sufficient to bring the trustees before the Court together with the first person who has a remainder of inheritance vested, and the estate itself, and all parties that may hereafter become interested, will be bound by the decree unless there be fraud or collusion.

There is a very great opinion, that this maxim of the common law, that there must be a tenant of the freehold, was never drawn over and applied to the case of uses before the statute 27 Hen. 8, whilst they remained mere trusts.

[620] It is laid down by Mr. Justice *Gawdy*, in *Chudleigh's* case, 1 Co. 135 a., that before the statute, if a man had made a feoffment to the use of one for years, and afterwards to the use of the right heirs of *J. S.* who was then living, this limitation had been good, for the feoffees remained tenants of the freehold; but such a limitation after the statute is void.

This is a plain authority that the freehold in the feoffees to uses before the statute, who were then mere trustees, was sufficient to support the contingent remainder of the trust. (Note in Lord *Hardwicke's* handwriting, 1 Williams, 56. In the case of *Bampfild v. Popham*, it is said that *Trevor, C. J.*, in his argument cited a case of *Penhay con. Hurrall*, in Canc. 1699, wherein it was held that if there be *cestui que*

trust for life, remainder to his first and other sons in contingency, that *cestui que trust* for life cannot destroy the contingent remainders. This is in point, but at the time of my delivering this opinion that book was not published.)

2ndly, My second reason is, that to allow of this, will not affect or restrain any rightful power of alienation in the *cestui que trust*, which the law allows to the owner of a legal estate, and consequently will not tend to a perpetuity. If this were otherwise it would create a very considerable objection indeed.

Before the statute 27 Hen. 8, the judges and sages of the common law gave uses very hard names, and called them the product of fraud, and subversive of the rules of real property.

To remedy these mischiefs the statute was made to execute and bring the estate to the use that after the statute the *cestui que use* might be seised of the estate at law in like manner as before the statute he was of the use in equity.

This the judges at first professed to adhere to, but notwithstanding that, the necessities of mankind, the reasonable occasions of families to make use of their estates compelled them in a little while to give way to such limitations of uses as would by no means be admitted of a common law fee. Future contingent uses, springing uses, executory devises, powers over uses, all foreign to the notions of common law were let in by the construction of the judges them-[621]-selves; but still they adhered to their doctrine that there could be no such thing as a use upon a use, but where the first use was declared to any person there it was executed and must vest for that estate.

Therefore if a man limited land to A. and his heirs, to the use of B. and his heirs in trust, for or to the use of C. and his heirs, the use was executed in B. B. had the estate by the statute and C. could take nothing.

Of this construction courts of equity laid hold, and said however, the intention of the party was to be supported; it was plain B. was designed to take no benefit to himself; the conscience of B. was affected, and it was still a trust in equity to be executed by *subpœna*. To this the reason of mankind assented, and it has stood ever since. So that a statute thus solemnly and pompously introduced, has by this strict construction to avoid a use upon a use at law been reduced to have no other effect, but to add two or three words at most to a conveyance.

It is true this could not have been endured, if courts of equity had not in general allowed those trust estates to have the same consequences in point of property with legal estates, and given the owner of the trust in equity the like power of alienation over the trust estate, as he would have had over the use if it had been an use executed by the statute.

Therefore tenant in tail of a trust may bar the issue by fine.

Tenant in tail of a trust, with remainders over, may dock those remainders by common recovery (*North v. Champemoon*, 2 Ch. Ca. 78. *Carpenter v. Carpenter*, 1 Vern. 440); nay, some have gone further, and said by bargain and sale enrolled (*Carpenter v. Carpenter*, 1 Vern. 440. *Beverley v. Beverley*, 2 Vern. 133. *Contra*, *Legatt v. Sewell*, 2 Vern. 552, but now a recovery to bar equitable estates is necessary, *Radford v. Wilson*, 3 Atk. 815. *Kirkham v. Smith*, 1 Ves. 268. *Burnaby v. Griffin*, 3 Ves. 277. *Fletcher v. Tollet*, 5 Ves. 13.)

All these are common assurances, and rightful methods of conveyancing.

But it has never yet been allowed, that in a trust estate, the like estates may be gained or transferred by wrong, as might be by the common law of the legal estate:

Therefore upon a trust in equity, no estate can be gained by disseisin, abatement, or intrusion. It is true there may be a disseisin, abatement, or intrusion upon the trustee, and [622] that may consequentially affect the *cestui que trust*, but that is as it affects and binds the legal estate; but of the mere trust or equitable interest, there can be no such thing whilst the trustee continues in possession of the land.

To apply these instances to this case the destruction of contingent remainders by the act of the tenant for life is considered in law as a wrong without a remedy, the law books call it a tortious act; and it is so strongly such, that it is a forfeiture of his own estate, and from that cause works the destruction of the remainder. Now, if equity has never yet suffered any other of the wrongful acts already mentioned, or any thing similar to them, to gain or transfer an estate in a trust, whilst the trustee continued in possession; what reason can be given why this should take place, or why the Court should strive to preserve this power to the *cestui que trust* for life, the execution whereof the law itself calls a wrong.

[It is in this respect to be compared to the cases of merger, for though it is the doctrine of this Court, that the rules of property and convenience hold in the same manner with respect to trusts as to legal estates, to prevent perpetuities ; yet in the cases of merger there are many instances where there would be mergers of legal estates, and yet courts of equity have never suffered mergers of trusts, where the legal estate continued in the trustees, but have been against the merger, if the justice of the case required it.] (This part of the judgment within brackets is taken from *Atkyns* ; in Lord *Hardwicke's* manuscript the following words are only used "Cases of Merger."

The third reason I relied upon was, that in the case of a mere trust where the whole fee is in the trustees, to require a new distinct limitation to support the contingent remainders, would be wholly vain and nugatory.

This is almost self-evident. Suppose the testator had in his will, after the limitations to *Samuel Hopkins* and his issue, gone on and said, remainder to *J. N.* and *J. S.*, and their heirs in trust to preserve contingent remainders, could *J. N.* and *J. S.* have taken any estate either in law or equity ?

It is plain they could not ; not in law, use upon an use, not in equity, for the trustees first named having the whole fee, are trustees for all the *cestui que trusts* that can take [623] under this will, and they must have the profits so far as it is disposed.

Suppose he had made this limitation to Sir *R. Hopkins, &c.*, the first trustees, could they have taken any thing more ? No, it would have been repetition and tautology ; and they must have been in by the first devise of the fee simple.

The principal objection to this has been, that the legal estate in the trustees, and the equitable estate in the *cestui que trusts* are things entirely of different natures, and you cannot draw over and apply the one to support a contingent remainder of the other ; and you might as well make use of the estate limited to trustees to uses executed by the statute to support a contingent remainder of the use, after the determination of the particular estate in the use.

Answer. I admit the legal estate in the trustees is of a different nature.

But still it remains in them to serve and support all the trusts.

But upon the statute, it is quite otherwise.

The words are, "Every person that shall have any such use shall be seised of and adjudged to be in the lawful seisin and possession of the lands, to all intents, constructions and purposes of such, and the like estates as they might have had in the use ; and that the estate that was in such person that should be seised to the use of another person shall from thenceforth be clearly adjudged to be in him or them that have such use."

By the operation of these words, the legal estate is executed to the uses, and the *cestui que trust* has the legal estate limited just in the same manner as the use was to him.

The consequence of this is, that as to persons *in esse*, it vested and became executed immediately ; as to persons not *in esse*, where the uses were contingent, it vested as they came *in esse*, provided they came *in esse* in such time as the law required they should do to take the legal estate, for now it was become a legal estate.

It they did not come *in esse* in due time, the estate must go on immediately to the next remainder-man as it would have done if it had been a common law fee, for so the statute required.

Thus the Judges construed it in *Chudleigh's* case, and if the estate once goes over to any person by virtue of the deed or will, so that he takes as a purchaser, it can never be drawn back again.

[624] This shews that, as to this question there can be no reasoning from the cases of uses executed by the statute to the case of a mere trust not executed by the statute. They stand on different foundations.

These are the reasons which govern my judgment upon this point, and I own I can see no inconvenience from it.

It must be admitted that the testator might have done this (I mean at least as to part of these remainders) if he had used proper words for it ; and if he has clearly expressed his intention, this Court, which is to direct a settlement of his estates according to his intention, as far as it may stand with the rules of law, is to take the proper methods to supply the defect.

The authorities for this are very strong, Sir *John Hobart v. The Earl and Countess of Stamford*, adjudged in this Court before Lord Chancellor Cowper the 19th of December 1709.

[Notwithstanding the distinction taken upon it, it is a strong authority for this purpose.

Serjeant *Maynard* "devised his estate to trustees, and their heirs, and declared after "his wife's death, they should convey the estate to the uses of, and in trust for Sir *H. H.* "for life, remainder to the first son for ninety-nine years, if he so long live, remainder to "the heirs male of such first son, remainder to the Countess of *Stamford* for life, remain- "der, &c. A conveyance was directed according to the will, exceptions were taken to the "draft of the conveyance; Lord *Cowper* declared, that where articles or a will were "improper or informal, the Court was not to direct a conveyance according to such "improper directions, but in a proper and legal manner, which might best answer the "intention of the parties, and conceived the intention to be, that the estate should be "secured so far as the rules of law will admit before cross-remainders should take place; "and therefore ordered accordingly upon an appeal to the House of Lords, alledging "that this was making a different settlement, the order was affirmed upon that principle, "that a trust estate being in its nature executory, it is incumbent on the Court to follow "the intention of the parties as far as the rules of law will admit."] (This part of the judgment within brackets is taken from *Atkyns*, in *Lord Hardwicke's* manuscript, the following words are only used, "*Vide Case.*")

[625] *Humberston v. Humberston*, 25th January 1716, Reg. Lib. 1716, Lib. A. 529 (2 Vern. 737; 1 Eq. Ca. Ab. 207, pl. 8; S. C. 1 P. Wms. 332, n. 1), in this Court before Lord Chancellor *Cowper*; *Matthew Humberston* devised his real estate to the Draper's Company and their successors, in trust to convey it to the plaintiff for life only, and after his decease to his first, &c., sons for their lives only, and the issue male of their bodies successively for their lives only, and for want of such issue to fifty other persons of the name of *Humberston* for life only, with remainders to their several sons, and their issue male of such sons for their lives only successively.

A bill was brought in this Court for execution of the trusts, Lord *Cowper* of opinion that an attempt to make a perpetual succession of estates for life was vain and not practicable, but however there ought to be a strict settlement made, and the intention of the testator followed as far as the rules of law would admit, and decreed that the master do see a settlement made of the trust estate, pursuant to the will, with limitations to the several parties named to be tenants for life in the will, and to the heirs males of their bodies in strict settlement according to the course of law; and if any of the parties who are made tenants for life have any issue male living, their names are to be inserted in the deed of settlement.

The words in this decree—a *strict settlement according to the course of law*, necessarily import a direction to insert trustees to preserve contingent remainders.

The cases of *Sandys* and *Dixwell* (see *ante*, page 536) followed this, but as that is so lately determined and rests only on my own opinion, I don't mention it as an authority.

It may be observed on these cases that how improperly and inartificially soever a testator makes his will, this Court takes notice whether he intends a strict settlement, and will direct such a settlement, as far as the lawful methods of conveyancing will admit, although he might design or direct something further.

Objection. Distinction taken between those cases and the present.

Those were executory trusts, where the will directed a conveyance.

Here no such directed, but an immediate trust executed, and declared by the will.

[626] Answer. Such expression sometimes used, but seems a distinction almost without a difference.

All trusts not executed by the Statute of Uses, are executory in this Court, and whether the will or deed expressly directs a conveyance, this Court must decree one, when assisted by proper parties at a proper time, according to the nature of the trust.

But allowing all the weight to this distinction that can be desired, here are plain declarations of the testator's intention that this should be an executory trust, and a strict legal conveyance be made in due time by his trustees.

Vide the will. *Proviso as to the profits till any tenant for life attain the age of twenty-one.*

Clause giving the £300 per annum to James Hopkins till some person comes into possession.

Clause as to the personal estate which is clearly executory, and directed to be laid out in lands, and the lands settled upon the same trusts, and to the same purposes.

But be this point as it may, the case of *Chapman and Blisset*, decreed by Lord *Talbot*, 24th November 1735, is a clear authority, that the legal estate in the trustees will support the contingent remainders even of a trust declared by a will, where no conveyance was expressly directed.

[The case was, *J. Blisset*, "after several directions and charges upon his real estate, devised all other his real estates to trustees and their heirs, in trust to pay his son *J. B.* quarterly £37, 10s. during his life, and if there were any child or children, he gave the rest and residue of his real estate for the education and benefit of such child or children, and if his son married with such consent as the will mentions, £100 *per annum* to his wife; if without, £10 *per annum*, and after his said son's decease, gave one moiety of the said trust estate to such child or children, their respective heirs, executors, and assigns, the survivor of them, &c., and the other moiety to the child or children of *Joseph*, &c., and if *J. B.* died without issue, to such child, &c., of my daughter, &c., with a remainder over; the testator dies; *J. B.* marries, and has a son, then died; *Joseph*, who was the testator's grandson, had no son born at the time of the death of *J. B.* but had a son four years after, and upon this a bill [627] was brought by the heir at law, insisting that these limitations were void, particularly as to the son of *Joseph*, not being born till four years after the death of *J. B.*"

The first question was, whether it was to be considered as a legal estate subsisting in the trustees, or whether it was not a use executed by the statute? Lord *Talbot*, and myself on a rehearing, were of opinion, "that the legal estate in fee was in the trustees, and all the limitations, in the subsequent interests, were trusts."

The next question was, whether the limitation to the son of *Joseph* was good? and if so, whether as an executory devise or a contingent remainder? Lord *Talbot* "was of opinion, that it might be good even as an executory devise, in a legal limitation, and the only objection was, that the limitation was *in verba de presenti*: but he said the words were to be considered as the testator meant them, that he knew *Joseph* was an infant and young, and devising a moiety to his child, knowing he had none, must necessarily intend it future, and therefore it was impossible to shew an intention more clearly of children thereafter to be born. But he went on, that when *J. B.* had a child born, that had a freehold in the trust during the life of *J. B.* whether, after that, it was to be considered as an executory devise, or a contingent remainder, the child of *J. B.* having a kind of freehold in the trust itself? He held, that if taken as a remainder, in case of a limitation of legal estate, it was clearly void, for the freehold would be in abeyance for four years, between the death of the son of *J. B.* and the birth of the son of *Joseph*; but he said, the reason of that rule failed in the case of trusts, and was of opinion, that the first estate in the trustees preserved the whole trust, and therefore, whether it was to be considered as an executory devise, or contingent remainder of a trust, that it was good, and that the plaintiff was entitled to a moiety." (This part of the judgment within brackets is taken from *Atkins*; in Lord *Hardwicke's* manuscript the following words are only used, "*Vide the case of Chapman and Blisset, and state it.*")

There is a third question remaining, which is this:

While the contingent remainder subsists, the equitable right to the profits must be in the heir at law, and that will in equity be a freehold in the trust, determinable upon the birth of any other son, it was insisted that may be sufficient to support the contingent remainder.

I shall not lay much stress on this point, because I think it is not wanting, and I own I took it to be clearly otherwise when it was mentioned at the bar: but by reflecting upon it [628] I apprehend more may be said to maintain it than I was then aware of.

The objection to it is this, that the particular estate, and the remainder, must be created at the same time, as making parts of the same estate. This the general rule; but it is equally the rule that where the ancestor has an estate for life, and an estate is limited to the heirs of the body when they are to make one estate tail, that must be by the same conveyance.

And yet this has been held to be, when the estate for life has not been limited by the conveyance, but by way of resulting use.

This was resolved by three Judges; *Hale*, C. J., *Wyld*, and *Rainsford*, against *Twisden*, in the case of *Pybus and Mitford*, 1 Vent. 372.

The case was, *Michael Mitford* covenanted to stand seised of the lands in question, to the use of his heirs male, begotten or to be begotten on the body of his second wife, and died; at the time of making the deed he had issue *Ralph*, a son by the second wife.

Hale, *Wyld*, and *Rainsford* held, that in this case the use returned or resulted by operation of law to *Michael*, the covenantor, for life, which being conjoined to the estate limited to the heirs male of his body, made an estate tail; and that this estate for life arising by operation of law was as strong as if it had been expressly limited to him for his life, and after his decease to the heirs male of his body.

Now, if the estate for life, which was part of the old use remaining in *Michael*, might unite and be connected with the limitation in tail created by the conveyance, so as to make one estate tail, why may not the resulting trust of the freehold support the contingent remainders, though not created together with it ?

There seems to me to be no greater objection to the one than to the other.

There is in that case a saying of my Lord *Hale's* so applicable to the present case, that I cannot pass it by ; he says ; This is plainly according to the intent of the parties ; and if we can by any means serve the intent of the parties, we ought to do it as good exposition ; for as my Lord *Hobart* says, Judges in the construction of deeds and wills do no harm, if they are *astuti* in serving the intent of the parties without violating any law.

[629] But upon this point I would not be understood to give any absolute opinion.

There was an objection made on the part of the plaintiff which deserves an answer.

That in the present case it would be impossible to frame such an express limitation as would support the contingent remainders.

And this may be true as to some of them, but not as to all.

It may be to trustees and their heirs, until John Hopkins shall have a son born either during his life or after his decease.

It may be to trustees and their heirs, until Sarah the daughter, and so on as to any of the daughters in being at the death of the testator, shall have a son born.

But as to the sons of daughters, not *in esse* at the death of the testator, I do not see how it can be carried so far.

Upon this some further objections were grafted :

First, That this will be a new invented limitation to preserve contingent remainders, and it has never yet been carried further than during the life of the tenant for life of the land, and the birth of a posthumous son.

Answer. That is the common case ; but there have been others ; and it is not material to restrain it to be during the life of the tenant for life, if it be confined to a life in being.

Second Objection. That all the trusts on such limitations as to the profits have been hitherto to give them to a tenant for life ; this would be to create a new trust for the heir at law, and give the estate back again.

Answer. This is but a common case of a resulting trust for the heir at law, and it is not material whether it is expressed or implied.

[(1) And so it was allowed in the case of *Carrick v. Errington*, 2 P. Wms. 361. "*Edward Errington* had made two settlements of his estates, one by fine in the lifetime of his ancestor, which, if at all, could only operate by estoppel ; he afterwards made another settlement to trustees, to the use of himself for life, &c., remainder, &c., and by a conveyance executed another day, they, to whom the fee was limited, executed a declaration of trust for *Thomas* [630] *Errington* for life, without impeachment of waste, remainder to trustees to preserve contingent remainders, during the life of *Thomas Errington* : in the conveyance trustees to preserve contingent remainders, were unnecessarily made, it being a trust estate ; *Edward Errington* died without issue. and the whole legal estate was admitted to be in the trustees : in the second deed they were only trustees of the beneficial interest, and *Thomas*, who was to take the first estate in the trust, was a Papist, and disabled by the statute to take any beneficial interest ; and it was insisted that, by the statute, both the trust and legal estate were void, and therefore the estate to go over by that conveyance to the next remainder-man, who should be a Protestant, and capable of taking.

"First question, whether the deed was obtained by fraud ?

"Second question, whether the legal estate in the trustees, who were only trustees under the first deed, was void, because this remainder-man was a Papist, and incapable of taking ?

"Lord *King*, and afterwards the House of Lords, held, that the trust being not only to receive rents, &c., but also to preserve contingent remainders, and possibly a person capable of taking might come *in esse*, that *that* was a further trust, which the statute did not make void ; it had indeed avoided that for life, but as there was another trust upon the legal estate, which might by possibility be capable of being enjoyed, the estate should remain in the trustees, to support the contingent remainders ; and as to the profits in the mean time (for the remainder-man could not take them, nor the trustees, they being only mere instruments) the heir at law should have them, till

"some person came *in esse*, capable of taking under the contingent remainders." (This part of the judgment, within brackets, is taken from *Atkyns*; in Lord *Hardwicke's* manuscript the following words only are used, "Vide *Carrick v. Errington*, in "this Court, and afterwards in the House of Lords, 28th of March 1729.")

The last thing to be considered.

Devise of the personal estate.

If this opinion is right as to the land devised, still stronger as to the personal estate to be laid out, and the land settled, *Papillon v. Voice*. (2 P. Wms. 471, S. C. and see *Fearne's* Contingent Remainders and Executory Devises, 83, 95, 97, and 110.)

The consequence from hence. Plaintiff cannot have such a conveyance as he prays by his bill. Neither is he entitled to the surplus profits during the life of *William*, the infant.

[631] Remains to be considered, whether he can have any other relief. According to this opinion, no conveyance ought to be made of the legal estate, but it must remain in the hands of the trustees till it shall be seen whether *John Hopkins*, or any of his daughters living at the testator's death shall have a son, who shall attain twenty-one, for so long there are trusts to be performed by them, and by the plain intent of the will none of the *cestui que trusts* are to come into possession before that time.

Declare that the plaintiff is not entitled to have a conveyance of the trust estate made to him according to the prayer of his bill; therefore dismiss the bill without prejudice to the plaintiff's applying under the former decree for further directions pursuant to the reservation in that decree. (Reg. Lib. A. 1738, fol. 367.)

(1) The will is taken from the papers in the cause. The statement of the case, and the arguments of counsel from Lord *Hardwicke's* Note-book, and the judgment verbatim from a manuscript in Lord *Hardwicke's* handwriting.

ANONYMOUS.(1)

March 24th, 1738. 1 Atk. 51.

After publication plaintiff cannot amend without withdrawing his replication.(2)

It was said by the Lord Chancellor, that after publication is past, there is no instance of a plaintiff's obtaining an order to amend his bill, without withdrawing his replication.

(1) This case is taken from *Atkyns*. It does not appear in Lord *Hardwicke's* Note-book.

(2) Except in the case of an infant, who has been permitted to amend after the cause has been brought on to be heard, *Fawkner v. Watts*, 1 Atk. 405. *Pritchard v. Quinchant*, Amb. 149; or to add parties, *Goodwin v. Goodwin*, 3 Atk. 370; or where the matters in the bill have not been put in issue with sufficient precision, *Filkin v. Hill*, 2 Bro. P. C. 194 [4 Bro. P. C. 640, 2nd ed.]; or where it has been necessary to strike out parties, or to amend the prayer of a bill, *Woodlands v. Crowcher*, 12 Ves. 174. *Palk v. Clinton*, ib. 66; or where there has been a mere clerical mistake, *Attorney-General v. Newcombe*, 14 Ves. 6.

[632] JONES v. BOURGET.(1)

March 30th, 1739. 1 Atk. 298.

A person aggrieved by, or interested in a sentence in the Ecclesiastical Court, may have a commission of delegates, though he was no party to the original suit.

Mr. Bourget instituted a suit in the Ecclesiastical Court, upon a contract of marriage, against *Mrs. Ann Jubert*, who pending that suit, intermarried with the appellant; a sentence was pronounced in favour of the contract, a child of that marriage was born, and the wife was dead.

C. v.—36

Mr. *Jones*, who with the child was very much interested in this sentence, though no party to the original suit, petitioned for a commission of delegates to review the sentence on the statute of the 25th Henry 8.

Upon citing several authorities from the canon and ecclesiastical law, where persons aggrieved by, and interested in a sentence, may have a commission of delegates to review, though no parties to the original suit.

A commission was directed.

(1) This case is taken from *Atkyns* ; it agrees with Lord *Hardwicke's* Note of the same case.

[633] *Ex parte* CAPOT.(1)

April 4th, 1739. 1 Atk. 219.

An assignee upon refunding what he had received under two dividends, allowed to make his election, to proceed at law against the bankrupt.—The old laws considered bankrupts as fraudulent insolvents, but the more modern, as unfortunate ones, and upon these statutes have the applications been made to compel creditors who proceed in a double way, to make their election.

After a commission of bankruptcy issued, and two dividends made in consequence, one of the assignees brought an action against the bankrupt, and laid him in execution for the residue of the debt, and upon application to the *Lord Chancellor*, three questions were made by his lordship.

1st. If the creditor was entitled to pursue the person of the bankrupt, and yet receive a proportionable benefit under the commission, which he said he thought was by no means to be done, as the law of bankrupts now stands : the old law considered bankrupts as fraudulent insolvents, and they are often called offenders (see *Bromley v. Goodere*, 1 Atk. 77), but the more modern laws have considered them as unfortunate insolvents, and upon these statutes, these applications have been made to the Court, which has obliged creditors who were proceeding in the double way, to make their election.

The next question was, if he was now at liberty to make his election, or whether he had not made his election by taking the dividends.

But upon refunding what he had received as dividends, his lordship gave him leave to make his election. (But by the stat. of 6 G. 4, c. 16, s. 59, proving or claiming any debt under the commission shall be deemed an election to take the benefit of such commission.)

The third question was, if he upon refunding, and electing to proceed against the person, should have liberty to come in under the commission and prove his debt, so as to dissent from, or assent to his certificate. (See *Ex parte Lindsey*, 1 Atk. 220, and *Ex parte Dorvilliers*, 221. *Ex parte Ward*, 1 Atk. 153 ; but now by s. 59, of 6 G. 4, c. 16, unless the creditor relinquishes his action or suit, he shall not prove his debt under the commission.)

Lord Chancellor said, several such orders were made [634] by *Lord Chancellor Talbot*, and accordingly such order was made in the present case, and he said the reason of the Court for such order was, to make the remedy against the person effectual ; for otherwise the person may, by the rest of the creditors, be absolutely discharged from the remedy which this creditor has elected to take.

(1) This case is taken from *Atkyns* ; it does not appear in Lord *Hardwicke's* Notebook.

Ex parte PLUMMER.(1)

April 4th, 1739. 1 Atk. 103.

A landlord may distrain for his whole rent even after assignment or sale by the assignees, if goods are not removed.(2)—Assignment has a retrospect so as to avoid any means acts done by the bankrupt.

The question was, whether after a commission of bankrupt taken out, and the messenger in possession, the landlord should distrain the goods upon the premises.

and so be satisfied his entire debt, or whether he should come in *pro rata* with the rest of the creditors under the commission.

Lord Chancellor. If any goods remain on the premises, they are liable to the distress of the landlord, and he may distrain them for his entire debt, even after assignment or sale by the assignees, if the goods are not removed; and this is the reason, because no provision is made in the case of bankruptcy in the statute, which gives the landlord a year's rent on executions.

Before assignment, the property remains in the bankrupt (and the commissioners have only a power) though the assignment has a retrospection, so as to avoid any meane acts done by the bankrupt.

The rent is here a year and a quarter, and I am of opinion that the landlord is entitled to distrain the goods remaining on the premises for his whole rent, notwithstanding the commission of bankruptcy, and the proceedings thereon. [635] There was a case before the Lords Commissioners of the Great Seal, where the landlord, though he had made no distress, yet was considered to be within the equity of the statute, which gives him a year's rent upon executions; a commission of bankrupt being an execution in the first instance.

The two following cases were cited, *Ex parte Jacques*, December 14, 1730. *The landlord distrained, when the messenger under the commission of bankrupt was in possession before the assignment; afterwards the assignees were chosen, and petitioned the Lord Chancellor King to have the goods restored, but the petition was dismissed.*

Ex parte Dillon, February 27, 1733. *The assignees of the bankrupt were in possession, and the landlord distrained; upon the application of the assignees to the Lord Chancellor to be relieved, and the goods to be re-delivered, his Lordship confirmed the right of the landlord to distrain, and dismissed the petition.*

(1) This case is taken from *Atkyns*; it does not appear in Lord *Hardwicke's* Notebook.

(2) By 6 G. 4, c. 16, s. 54, no distress for rent made and levied after an act of bankruptcy, whether before or after the issuing of the commission, shall be available for more than one year's rent accrued prior to the date of the commission.

Sir JOHN ROBINSON, Bart. and ANN ROBINSON, an Infant, his Daughter, *Plaintiffs*; (1) and JOHN CUMYNG and Others, *Defendants*.

May 12th, 1739. 1 Atk. 473.

S. C. Ca. Temp. Talbot, 164.

R. S. devises his estate to *J. C.* and his heirs to the use of him and his heirs, in trust to pay debts and afterwards in trust for his grand-daughter *Mary Morgan*, and the heirs of her body, remainder to *J. C.* and his right heirs upon condition that he married *Mary Morgan*; recovery suffered by *Mary Morgan* barred the remainder to *J. C.* being the remainder of a trust estate; for the remainder of a legal estate cannot be barred by the recovery of a *cestui que trust*.

Robert Sheffield by his will of the 1st of March 1724, devises all his lands and tenements to *John Cumyng* and his heirs to the use of him and his heirs in trust nevertheless for the payment of all his debts, and afterwards in trust for his grand-daughter *Mary Morgan* and the heirs of her body, remainder to his worthy friend *John Cumyng* and [636] his right heirs, on condition he should marry his grand-daughter, *Mary Morgan*, which was his chiefest desire.

Mary Morgan married the plaintiff, and she and her husband suffered a common recovery wherein she and her husband were vouched, and the uses of the recovery were declared to be to the issue of the marriage with remainder to *Mary Morgan's* right heirs.

Mary Morgan died leaving issue by the plaintiff, two children, and the object of the bill was to make the defendant convey according to the uses declared by the recovery.

Lord *Talbot* decreed the defendant to convey accordingly.

Upon this decree the cause came on to be reheard before Lord *Hardwicke*, and the objection to the decree was that it directed the defendant to convey the remainder

in fee, on the ground that the remainder in fee was a remainder of a legal and not of a trust estate.

Mr. Noel, Mr. Floyer, and Mr. Moreton, for the defendant *Cumyng*.

Our objection to the decree is as to the direction touching the remainder in fee, defendant is not obliged to convey it.

This cannot be construed a trust throughout, for a man cannot be a trustee for himself. It is a trust for the benefit of creditors. A trust of the estate tail; but as to the fee it is a legal estate. *Chapman v. Blissett*, was construed a trust throughout in order to perform the intention.

If the testator had gone no further than the devise in tail, the reversion in fee would have been a resulting trust for the heir; then the subsequent disposition of the fee is only a disposition of that resulting trust.

Mr. Attorney General, for the plaintiffs.

I admit that the testator had the whole legal estate vested in him; but the question is concerning the trust.

But this cannot be a legal remainder because there is no particular estate upon which it can depend.

This must be a remainder of a trust estate, because the whole legal estate was in him before.

Lord Chancellor. The question depends upon this point, whether the remainder to *C.* be a remainder of a legal estate, or of a trust? For a remainder of a legal [637] estate cannot be barred by a recovery of *cestui que trust* (so *Salvin v. Thornton*, 1 Bro. C. C. 73, in note, S. C. Ambl. 545. *Shapland v. Smith*, 1 Bro. C. C. 74. *Philips v. Brydges*, 121), but all the remainders which are trusts only are. (So *North v. Champemoor*, 2 Ch. Ca. 63, 78; 1 Vern. 13, S. C.; 1 P. Wms. 91, S. C. *Carpenter v. Carpenter*, 1 Vern. 440. *Beverley v. Beverley*, 2 Vern. 131. *Boteler v. Allington*, 1 Bro. C. C. 72. Lord Grenville *v. Blyth*, 16 Ves. 224. *Wykham v. Wykham*, 18 Ves. 395.)

It has been said, that it is impossible for a man to be a trustee for himself; but that is not the point here, for as the legal estate and use is wholly in *C.* by virtue of the first part of the devise, the remainder cannot be in him, for that is part of the estate he had before, and unless the testator had given *C.* the remainder of the trust, it would have resulted to his heirs at law: he has therefore given him an interest distinct from either the legal estate or the use, which is the remainder of the trust, and he has given him that *on a condition* which would be entirely defeated if he had taken the remainder of the legal estate by the former part of the devise; and therefore his Lordship decreed, that the recovery of *D.* barred the remainder to *C.* (Reg. Lib. B. 1738, fo. 291.)

(1) The statement of the case and the arguments of counsel are taken from Lord Hardwicke's Note-book; the judgment from *Atkyns*, which corresponds with a manuscript report of the same case.

[638] PROBERT v. CLIFFORD:—ESTHER PROBERT, Widow of HENRY PROBERT the Younger, Plaintiff; (1) and THOMAS CLIFFORD and Others, Defendants.

May 11th and 12th, 1739. 1 Atk. 440.

In marriage contracts when the fortune of the wife is paid to the father, or to clear incumbrances, or to the son; and the father and the son who are parties to the marriage contract, covenant jointly that the wife's jointure shall be of a certain value, in case of a deficiency the wife has a lien both upon the estate of the father and son.

And where a person having a power to charge an estate with £2000 after the death of his wife, gives her £1000 payable with interest three months after his own death; held that the gift of the £1000 was a good execution of the power, though it could not be raised at the time appointed; and that the interest could not be made good until it amounted to £2000, for that would be to charge the estate with the principal sum of £2000.

A widow is entitled in respect to her *paraphernalia* to marshal assets as against real estates descended (*Tipping v. Tipping*, 1 P. Wms. 729. *Snelson v. Corbet*, 3 Atk. 369); but not as against a devisee.(2)

This was a bill brought by the plaintiff to have the deficiency of her jointure made good according to the covenants in her marriage settlement, to have £1000 with interest from three months after her husband's death, raised and paid to her pursuant to his will, and to have her *paraphernalia* delivered to her or satisfaction for the same.

By a settlement made on the 3rd of April 1700, on the plaintiff's marriage with *Henry Probert* the younger, in consideration of the marriage and £3000 portion paid to *Henry Probert* the younger, by the consent and direction of his father *Henry Probert* the elder, and in consideration of £1600 to *Thomas Morgan*, and £1400 paid to *Thomas Morgan* and *John Morgan* by *Henry Probert* the younger, by direction of *Henry Probert* the elder, to be applied to particular trusts mentioned in a former settlement, *Henry Probert* the elder, and *Henry Probert* the [639] younger, granted certain premises from and after the death of *Henry Probert* the younger, to the use of the plaintiff for her life, for her jointure and in lieu of dower, with remainder to such of the sons by her as *Henry Probert* the younger, should appoint, and both the father and son covenant for themselves, their heirs and executors, that the premises limited for her jointure, are and shall continue during her life of the clear yearly value of £300 *per annum*, over and above all charges and expenses whatsoever, public taxes to the king or government excepted.

By a settlement made in 1706, and to which *Henry Probert*, the elder and younger were parties; the remainder in fee of the lands comprised in the first settlement were limited to *Charles Probert*, a son of *Henry Probert*, the elder, by a second marriage; and a term of 500 years on the same premises was limited to trustees to commence after the death of *Henry Probert* the younger and the plaintiff, to raise £2000, and pay the same within two years after such commencement as *Henry Probert* the younger, should by deed or will appoint, and in default of such appointment to pay £500 a-piece to his two sisters, *Elizabeth Morgan* and *Rachel Clifford*, in such case the payment of the other £1000 was to cease.

Henry Probert the younger, by his will of the 8th of December 1726, did thereby firmly charge all his real estate with the sum of £1000 to be paid by his sisters out of their respective shares of his estate, unto the plaintiff in three months after his decease; and devised all his estate given him by his cousin *Henry Probert* to *Francis Jenkins* and *Thomas Clifford*, and the survivor; but if his personal estate fell short of the legacies thereby given, such deficiency to be made good by disposal of that part of the estate given to *Jenkins* and *Clifford*.

Henry Probert the younger, survived his father, and died without issue; and *Charles Probert* was dead, having devised his reversion in the jointure estate to his sisters.

The executor of *Henry Probert* the younger, had taken possession upon his death, of the *paraphernalia* of the plaintiff, which consisted of diamonds, rings, and earrings.

The estate in jointure was proved to be only of the value of £240 *per annum*, after all deductions, except taxes.

Mr. *Browne* and Mr. *Noel*, for the plaintiff, insisted that the £1000 ought not to be considered as a satisfaction for [640] the deficiency of the jointure; the legacy being intended by the testator as a legacy of bounty.

As to the £1000, it is objected that it cannot be raised until after the plaintiff's death; the will directs it to be raised three months after the testator's death, and it is only a £1000, which is less by one-half than he had the power of raising, and the other £1000 may be applied by way of interest.

As to the *paraphernalia*, it is objected that the personal estate is deficient by reason of debts.

But the plaintiff is entitled by way of circuitry to stand in place of the specialty creditors to have a satisfaction out of the real estate.

Mr. *Chute* for the executor of *Henry Probert* the elder, insisted that the assets of the father were not liable to make good the covenant, but if liable not until the assets of the son had been first applied; the father was only a surety for the son; the covenant is joint, and the charge survived against the son.

The Attorney-General for the executors of *Henry Probert* the younger, and for

those entitled to the estate in jointure expectant upon the plaintiff's death, insisted that the father and son were both equally contracting parties to the plaintiff's settlement, and though the son survived the father, this Court would, by the rules of equity, make both their estates liable. And he likewise insisted that his will was not a good execution of his power. The estate which he had a power to charge was not his estate, if so, that the £1000 would go between the sisters.

May 12, 1739.—Lord Chancellor. In marriage contracts, when the fortune of the wife is paid to the father, or to clear incumbrances, or to the son; and the father and the son are parties to the marriage contract, the wife has a lien both upon the estate of the father and son.

As to the woodland part of the estate, it appearing that notwithstanding a valuation was made of what arose from the felling of timber and cutting wood every year, a deficiency still remained to satisfy the jointure. An account of assets was decreed, and that the deficiency in the jointure should be made good out of the personal estates of the father and son, pursuant to their covenant, and in case that should be deficient, out of their real estates, liable to their debts by specialty.

Lord Chancellor held, that the legacy of £1000 given [641] by will to the wife, ought not to be considered in this case as a satisfaction for the deficiency of her jointure, because that did not arise till after his death, and therefore could not at that time, be in his consideration; and as the jointure lands are covenanted by the marriage settlement to be worth so much clear of all reprises, the testator plainly intended the £1000 as a bounty to her.

There was another question, out of what fund this legacy was to be paid? For by the settlement, the husband had a power to charge the estate with £2000 after the death of his wife, and a term of years was raised for that purpose.

The words of the husband's will were, "*First, I charge all my real estates,*" &c.

Lord Chancellor. If a man has a power to charge an estate, it is not necessary, in the execution of it, he should refer to the deed out of which the power arises; for in a court of equity it is enough that his intent appears, and if in the execution he sufficiently describes the estate he had a power to charge, the estate is certainly bound, especially where the person charging is a purchaser of the power.

He has indeed mistaken a circumstance with respect to the time of raising it, but that will not make it void.

It is insisted for the plaintiff, that as the husband by his will left her the £1000 payable with interest, the interest should be made good till it amounts to the sum of £2000 which he had a power to raise.

But his Lordship said as to that, the £1000 being the only charge upon the estate, he was of opinion that the interest should not be made good out of the power, for that is to charge the estate with a principal sum of £2000.

With regard to the *paraphernalia*, it was strongly insisted upon by the counsel for the defendant, that the wife cannot stand in the place of bond creditors; and the case of *Tipping v. Tipping*, 1 P. Wms. 729, was cited for that purpose.

Lord Chancellor. Where there are real estates descended, the wife may be entitled to her *paraphernalia* (In *Lord Hardwicke's* Note-book, there are the following words:—"Paraphernalia; if real assets descended liable"); [642] but otherwise in this case, where the real estates came by the husband, and said the case in 2 Vern. 246, had been carried full far enough, for though it is there laid down that where A. dies intestate, or by will doth not dispose of the jewels, his wife may claim, in case there be no debts, the jewels suitable to her quality to be worn as the ornaments of her person; yet by the old law they were absolutely in the power of the husband; and if he by will devised away the jewels, such devise should stand good against the wife's claim of *paraphernalia*, Cro. Car. 343, and 1 Roll. Abr. 911, sect. 9.(3)

His Lordship referred it to the Master to inquire how much the clear yearly value of the jointure lands had fallen short of £300 *per annum* over and above all charges and reprises, taxes excepted from the time of the plaintiff's husband's death, and by what means such deficiency was occasioned, and what the clear value was then; and directed the deficiency to be made good out of both the personal estates of *Henry Probert* the elder and *Henry Probert* the younger, and in case the respective personal estates were deficient, then their respective real estates liable to specialty debts, or so much as should be sufficient, were to be sold or mortgaged in order to make good such deficiency; and his Lordship declared that the plaintiff is entitled to £1000 given

her by the will of her husband, to be raised out of the lands comprised in the 500 years' term, to be raised according to the trusts of that term, but that the principal cannot be raised until two years after the commencement of such term in possession. And his Lordship reserved liberty for the representatives of the plaintiff to apply to the Court for directions touching the same, and his Lordship reserved the consideration of interest upon the £1000 from the end of three months after her husband's death, to be made good out of the real estates descended or devised until after the accounts were taken, when it might be seen whether the same were sufficient to answer his debts; and as to the plaintiff's [643] demands of her *paraphernalia* in case the personal estate of her husband should be found sufficient to answer his debts, it was ordered that such *paraphernalia* as had been possessed by any of the defendants should be delivered to her by such of the defendants as had possessed the same, and in case such his personal estate should be exhausted by the payment of his debts, his Lordship declared that the plaintiff was entitled to have a satisfaction for her *paraphernalia* out of his real assets descended to his heir at law, that should be remaining after all his debts are paid. (Reg. Lib. B. 1738, fo. 310.)

(1) The statement of this case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book; the judgment from *Atkyns*.

(2) So *Ridout v. Lord Plymouth*, 2 Atk. 105. See *Tynt v. Tynt*, 2 P. Wms. 542, *contra*; but if estates are devised subject to the payment of debts the Court will in respect of *paraphernalia* marshal the assets against estates devised. *Inclendon v. Northcote*, 3 Atk. 430. *Ridout v. Plymouth*, 2 Atk. 105. *Boynnton v. Parkhurst*, 1 Bro. Ch. Ca. 576. *Aldrich v. Cooper*, 8 Ves. 397.

(3) The *paraphernalia* of the wife, which have a preference over legacies, and are liable to the husband's debts, *Tipping v. Tipping*, 1 P. Wms. 729. *Snelson v. Corbet*, 3 Atk. 369. *Campion v. Cotton*, 17 Ves. 272, though they may be sold or given away by the husband, cannot by his will be devised during his wife's life, *Tipping v. Tipping*, 1 P. Wms. 729. *Seymour v. Trevilyan*, ante, page 109. *Northey v. Northey*, 2 Atk. 77. But if the presents be made to the wife either before or after the marriage by a relative or friend they are to be considered as gifts made to her separate use, *Graham v. Lord Londonderry*, 3 Atk. 393.

HANS STANLEY, and ELIZABETH, ANN, and SARAH STANLEY (his Sisters) infants, by EDWARD HOOPER, their next Friend, *Plaintiffs*; (1) and PHILLIPPA STANLEY, Widow, and ANNE STANLEY, Widow, *Defendants*.

May 14th, 1739. 1 Atk. 455.

William Stanley, and *Anne* his wife, had two sons, *George* and *Hoby*, who severally married in their father's lifetime; *William* the father dies, *Anne* his wife survives him; *George* afterwards dies, and leaves several children, who are still living, then *Hoby* dies intestate, leaving *Phillippa* his wife possessed of a very large personal estate.

The children of *George* bring a bill against *Phillippa*, who has administered to her husband, and also against *Anne* their grandmother, insisting, that, as the representatives of their father, they were entitled with their grandmother to one half of the moiety of the intestate's estate, the wife being entitled to the other moiety, by the 22 and 23 Car. 2, c. 10.

The residue of the intestate's estate, after satisfaction of debts, directed to be divided into four equal parts, two fourth parts thereof to be retained by *Phillippa* the intestate's widow, one fourth part to be paid to *Anne Stanley* the intestate's mother, and the remaining fourth part to be laid out in South Sea Annuities, in the name of the *Accountant General*, subject to the order of the Court, for the benefit of the children of *George*, equally to be divided.

William Stanley, and *Anne*, his wife had two sons, *George* and *Hoby*, who severally married in their father's lifetime; *William* the father dies, *Anne* his wife survives him, *George* afterwards dies, and leaves several children, who are still living; then *Hoby* dies intestate (leaving *Phillippa* his wife) possessed of a very large personal estate.

[644] The children of *George* bring this bill against *Phillippa*, who had administered to her husband, and also against *Anne* their grandmother, insisting that, as the representatives of their father, they were entitled with their grandmother to one-half of the moiety of the intestate's estate, the wife being entitled to the other moiety by the 22d and 23d Car. 2, c. 10.

It was insisted for the plaintiffs by the *Attorney-General*, Mr. *Chute*, and Mr. *Banks*, that by the statute of the 1st Jac. 2, c. 17, s. 7, it is enacted, that if after the death of the father, any of his children should die intestate, without wife or children in the life of the mother, every brother and sister, and the representatives of them, shall have an equal share with the mother.

In this case there is a wife left, but the intent of the act was to put the intestate's brothers and sisters and their representatives, in the same light and condition with the mother; so that whenever the mother was entitled, the brothers and sisters, and their representatives (*per stirpes*) were to have an equal share with her, and cited the case of *Keylway v. Keylway*, 2 P. Wms. 344, Pasch. 12 Geo. [1726], which was as follows: The plaintiff was the widow and administratrix of one that died intestate having no children, but left a mother, a brother and sister, and brother's children, and it was decreed the wife should have a moiety, and the other moiety equally to the mother, brother and sister, and brothers' children (as representatives of the father, *per stirpem*), which case is exactly the same with the present in every circumstance, except that in the present case the intestate had no brother and sister living at his death, which is not material, in regard that the children of the brother take by way of representation.

It was insisted for the defendant, the intestate's mother, by Mr. *Broune*, Mr. *Gundry*, and Mr. *Hopkins*, that these statutes are to receive a favourable construction to exclude representations in a remote degree, in respect of collaterals, agreeable to the case of *Carter v. Crawley*, Raym. 496, and that the words in the statute of James are in the conjunctive, and require a brother or sister to be *in esse*, as well as representatives of brothers and sisters to make a case within that statute.

It has been determined, that when the intestate leaves [645] brother's or sister's children, and no brother or sister, such children take *per capita*, as next of kin, and not by representation, *Walsh v. Walsh*. 1 Eq. Ca. Ab. 249, pl. 7, and that the construction of the statute was the same if a man died leaving aunts and nieces, and no brother or sister, such aunts and nieces would all take *per capita*, and the nieces could not take *per stirpes*; and yet if the father of the nieces had been living, he would have taken the whole, and this was determined in the case of *Durant v. Priestwood*, June 30th 1738. (*Ante*, p. 448, S. C.)

And from hence it was argued, that as there was no brother or sister of the intestate living, if the plaintiffs in this case took anything, it must be necessarily *per capita*, and not by representation; that when brother's children take *per capita*, they must necessarily take as next of kin, because, as they are not in equal degree with the intestate's mother, they could not otherwise take at all.

And it was further urged, that if they were entitled by representation, it might be carried to the fourth or fifth generation, for there was nothing to restrain it in this act, as there was in the statute of distributions, which would create great confusion and fractions in the estates of intestates.

May 14, 1739.—*Lord Chancellor*. There are two questions in this case,

1st. Whether the plaintiffs, who are the nephews and nieces of the intestate, shall share with the intestate's mother, there being a widow of the intestate?

2dly. Supposing they may share, notwithstanding that objection, whether they can come in, in respect that there is no brother or sister of the intestate living?

As to the first, it is directly within the case of *Keylway v. Keylway* [2 P. Wms. 344], and I am satisfied with the reason of that case. It depends upon the construction of the proviso in the statute of James, which is very incorrectly penned, and so is the statute of distributions; and therefore a construction is to be made upon the second statute, according to the intent and meaning of the legislature.

Upon the statute of distributions, the descending line excluded all collaterals, and afterwards went to the next of kin; so that the father or mother would take all. As, sup[646]pose a rich citizen died intestate, his share would all go to the mother: therefore the subsequent statute intended she should have a provision only equal with a brother and sister of the intestate.

As to the second question, it is a new one ; for the intestate has left no brother or sister for the mother to collate, or share equally with.

The case of *Walsh v. Walsh* [1 Eq. Ca. Abr. 249, pl. 7], is grounded upon the statute of Car. 2, s. 5. The words of the act do suppose that there must be some persons to take in their own right, and others in right of representation ; but the statute of *James 2nd* is of a different kind, and lets in another person.

Here is a mother takes an original share in her own right, and the brother's and sister's children take as if the brother and sister were living ; for the word "*and*," immediately preceding the words, "*the representatives*," must be construed in the disjunctive.

As to the objection, that such representation might be carried to several generations, I think that consequence does not follow, for the proviso in the statute of *James* is to be incorporated into the statute of *Charles*, which expressly says, that representations shall not be carried beyond brothers' and sisters' children, and this is agreeable to the rule my Lord *Hale* lays down in 1 Ventr. that statutes made *pari materia* shall be construed into one another.

I think the statute of *James* intended to let in the rule of the civil law, which contained three lines, ascending, descending, and collateral ; the descending line absolutely excluded all others, the ascending excluded all collaterals except brothers and sisters, and they took alike.

His lordship therefore ordered the residue of the intestate's estate, after satisfaction of debts, to be divided into four equal parts, and two-fourth parts thereof to be retained by the defendant *Phillippa*, the intestate's widow, and one-fourth part to be paid to the defendant *Anne Stanley*, the intestate's mother, and the remaining fourth-part to be laid out in *South Sea* Annuities, in the name of the *Accountant General*, subject to the order of this Court, for the benefit of the plaintiffs the infants, equally to be divided. (Reg. Lib. B. 1738, fo. 283.)

(1) This case is taken from *Atkyns* ; it corresponds with Lord *Hardwicke's* Notebook, and a manuscript report of the same case.

[647] STEVEN UNWIN and MORLEY UNWIN, *Plaintiffs* ; (1) and ROBERT GROSVENOR, Surviving Assignee under a Commission of Bankruptcy against MARTIN UNWIN, *Defendant*.

Shewing Cause against a Decree. May 14th, 1739.

Martin Unwin makes an assignment of debts due to himself, in order to secure the sum of £500 due to the plaintiffs, and for their security against a recognizance entered into by them on his behalf, and a month afterwards becomes bankrupt : Held, that the assignment is good and not fraudulent against the other creditors of the bankrupt. (2)

Martin Unwin being, under an order of the Court, appointed receiver of the Duchess of *Montagu's* estate, and the plaintiffs having entered into a recognizance as his sureties, by way of counter-security *Martin Unwin* in consideration of £500 due to the plaintiffs on balance of accounts, and for their security against the recognizance, assigned several debts due to himself, and a month after the assignment became a bankrupt, and this was a bill brought to compel defendant to account for such monies as defendant had received out of any debts assigned to plaintiffs, and to suffer plaintiffs to make use of his name to secure the residue, and to restrain defendant from recovering the debts.

Mr. *Pilsworth* and Mr. *Mason* for the defendant.

This assignment is fraudulent : Fraudulent assignments bind the bankrupt but not the assignees. There is more recited to be due in the agreement than was really due from *Martin Unwin*. These debts remained in the power of the bankrupt, and there was no notice to the debtors before the bankruptcy, and they relied upon the statute, of the 21 Jac. 1. c. 19, sect. 7.

[648] Lord *Chancellor*, declared it to be clear if the assignment was not fraudulent that it was a good assignment not within the bankruptcy, and that assignees in respect of acts done by the bankrupt which create either a legal or equitable charge on his

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estate stand just in the place of the bankrupt. So is *Taylor v. Wheeler*, 2 Vern. 565, which was determined on great consideration.

Before Lord *Macclesfield* there was a stronger case. *Cock v. Goodfellow*. A widow in 1720, being then very near a bankruptcy, and who became so very soon after, transferred great quantities of stock, and also assigned several debts to secure portions given by her husband to her children. No legal interest, but only an equitable one passed by this assignment, yet the children on a bill brought here, were, on great consideration, decreed to have the benefit of this assignment.

But it is objected that this assignment was made but a month before the bankruptcy. Yet it was made before it, and if a man makes any disposition for securing the payment of debts, or for valuable consideration before he actually becomes a bankrupt, it shall have its effect.

There is no such thing as an equitable bankruptcy, nor any other than the law has made so, and till he is a bankrupt, he may prefer which of his creditors he will in payment. There was a case indeed before Sir *Joseph Jekyll*, which broke in a little upon this rule (*Small v. Cudling*), where the assignees founded their bill on the pretence of an undue preference given by the bankrupt when a failing man, to one set of creditors by such an assignment, and the assignment was set aside. But on an appeal to Lord *King*, the decree was reversed, and an issue directed, whether bankrupt or not, for in that case the bankruptcy happened in a day or two after the assignment, and held that the point turned wholly on that fact, whether actually bankrupt at that time or not.

But the present assignment is clear of all apprehensions of that kind, the bankruptcy not being till a month after. Then it is objected more is assigned than was due, but that is not material, the persons to whom the assignment was made, being liable to be damnified, which is a sufficient consideration. If the sureties are liable to pay the debts, and he is become a bankrupt, that is an absolute damnification at law. It is again objected that this is fraudulent, because no notice is given to the debtors whose debts are assigned. [649] It would be a defence, indeed for them if they had paid it to the assignor, and were afterwards sued by the assignee, but it is no defence on the part of the present defendants; and it is objected that this assignment, according to the doctrine of *Twyne's case*, 3 Co. 81, is fraudulent, because the property remained still in the assignor. But that doctrine extends not to such an assignment as this, but only to an assignment or sale of chattels which lie in livery. *Choses in action* will always remain in some measure in the power of the assignor.

Decree affirmed.

(1) The arguments of counsel in this case are taken from Lord *Hardwicke's* Notebook; the statement of the case and the judgment from a manuscript report.

(2) It seems however that a conveyance made by a trader before an act of bankruptcy and made in contemplation of such act with a view to give a preference to a particular creditor, is void. See *Worsley v. De Mattos*, 1 Burr. 467. *Harman v. Fishar*, Cowp. 117. *Hartshorn v. Slodden*, 2 Bos. & Pull. 582.

[LORD ABERGAVENTNY, *Plaintiffs*; (1) and EDMUND THOMAS, *Defendant*.

May 18th, 1739.

In order to establish a right in a tenant of a copyhold estate for lives to a renewal, he must shew in certain upon payment of what fine he has a right to renew.

This was a bill brought by the lord of a manor against the defendant, who continued in possession of a copyhold estate of the manor, after the lives for which it had been granted had expired, and had confounded the copyhold lands with part of his own freehold lands. The object of the bill was to distinguish the copyhold lands from defendant's freehold lands, and set out the boundaries, and if that could not be done, then that an equal quantity of land might be set out and held to be enjoyed as copyhold, and for an account of rents due after the expiration of the lives for which the copyhold had been granted.

The defendant, by his answer, insisted, that the plaintiff was not entitled to the possession of the copyhold estate, on the ground that though the estate was a copyhold estate for [650] lives, there was a right of renewal upon payment of a reasonable fine.

It was admitted that the boundaries were confounded by a unity of possession, and that the three lives for which the copyhold was granted, had expired.

On the part of the plaintiff, it was proved by the steward of the manor, that he had demanded thirteen years purchase for a full estate; that the last two stewards had only demanded ten years purchase; that since he had been steward, no person had insisted upon a right to renew a copyhold estate after the expiration of three lives except the defendant; and it was likewise proved by a person who had been under-steward for twenty-two years, that he used to compute two lives at seven years purchase, and three lives at ten years purchase, and that he knew of no instance of any person claiming a right to renew.

On the part of the defendant, it was proved, that when any copyhold estate for lives determined, there was a custom in the lord's court to make proclamation for the heir to come in and pay his fine.

The *Attorney-General*, for the plaintiff, insisted that the meaning of the proclamation was to know whether any right was subsisting under the copy, and that there was no custom proved.

Mr. *Chute* and Mr. *Wilbraham* for the defendant, insisted that though it was not ascertained, a Court of Law would ascertain what a reasonable fine was, and they insisted that an issue ought to be directed, and cited 13 Co. 1, 2, and *Middleton and Jackson*, 2 Ch. Rep. 35.

May 21, 1739.—*Lord Chancellor*. All copyhold estates were originally estates at will, but by length of time are become almost equal to freeholds, and are now part of the constitution, and as such are to be supported, and the law has gone so far as to ascertain what shall be a reasonable fine, where the custom has been to renew, upon payment of a fine, uncertain. But it has no where fixed what shall be a reasonable fine upon which to renew copyholds for lives, and therefore if a tenant would set up such a right of renewal, he must shew in certain upon payment of what fine he has a right to renew, as upon payment of three years' value. In the case of the Duke of *Grafton*, where his tenants set up a right of renewing their copyholds for lives, upon payment of a reasonable fine, so as the same did not exceed three years' value *Lord Chancellor King* directed an issue to try the custom, but it [651] was reversed in the House of Lords, because it appeared by the rolls of the manor that there had been no fixed fine, only that the tenants had seen what was the highest had ever been taken, and then set up a custom of renewing upon payment of a reasonable fine, so as the same did not exceed such value. But if this was allowed, such customs might be set up in almost all the manors in the kingdom.

It was proved, that there had been a proclamation in the lord's court, for the heir to come in and renew, or to shew cause why the lord should not enter upon the estate as his own. This is not proof of a tenant's right of such renewal: but done only in order to prefer the heir before any other in case he will agree for the renewal: and the person who has been steward for above twenty years, has sworn that he never knew any tenant insist upon such a right before the present defendant. The decree must therefore be that there be a commission to ascertain the boundaries, and that the defendant pay the plaintiff his costs. (Reg. Lib. B. 1738, fo. 294.)

(1) The statement of this case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book; the judgment from a manuscript report.

BENSON v. BALDWIN.(1)

May 19th, 1739. 1 Atk. 598.

A bill may be brought for rent in this Court where the remedy at law is lost or becomes very difficult, and this court will relieve on the foundation of payment for a length of time.

Lord Chancellor. Where a man is entitled to a rent out of lands, and through process of time the remedy at law is lost, or become very difficult, this court has interfered and given relief, upon the foundation only of payment of the rent for a long time, which bills are called bills founded upon the *sole*: Nay, the court has gone so far as to

give relief, where the nature of the rent (as there are many kinds at law) has not been known, so as to be set forth, but then all the terre-tenants of the lands, out of which the rent issues, must be brought before the Court, in order for the Court to make a complete decree.

(1) This case is taken from *Atkyns*. It appears from the Register's Book, that the plaintiff being entitled to a moiety of certain manors, and to a cer-[652]-tain fee farm rent issuing thereout, brought his bill against *Heath*, and Mr. and Mrs. *Baldwyn*, *Heath* being entitled to the other moiety, part absolutely, and part subject to the life estate of Mrs. *Baldwyn*, who was entitled thereto under marriage articles, alleging by his bill that they ought to pay a portion of the said fee farm rent, but that *Heath* claimed an exemption during Mr. *Baldwyn's* life, and Mrs. *B.* an exemption under her marriage articles; and the bill prayed a discovery whether they were in possession of the lands chargeable with the rent or some part thereof, and an account of the arrears and payment thereof.

The *Master of the Rolls* directed an enquiry as to what lands were charged with the rents, and made an order upon the Master's report, that Mrs. *Baldwyn* (her husband being dead) should pay the arrears of a certain quit rent to the plaintiff, and should pay the same during her life, and after her death, the same should be paid by *Heath*. From this order Mrs. *Baldwyn* appealed, insisting that the order was not warranted by the report, and it appears by the *Lord Chancellor's* Note-book, that the only point in discussion was whether the lands in jointure were alone chargeable with the quit rent, or whether other lands in the possession of *Heath* were likewise chargeable.

The *Lord Chancellor* reversed the order, and directed the Master to review his report. (Reg. Lib. A. 1738, fo. 417.)

[653] BANKS v. WEBB:—JOHN BANKS, *Plaintiff*; (1) and Sir JOHN WEBB, JOHN WEBB, and THOMAS WEBB, *Defendants*. And Sir JOHN WEBB and JOHN WEBB, *Plaintiffs*; and JOHN BANKS, *Defendant*.

May 22d and 23d, 1739.

The ancestors of the plaintiff, Sir *John Banks*, being seised of the manor of *Canford Priors*, and the ancestors of the defendant, Sir *John Webb*, being seised of the manor of *Great Canford*, in 1639 entered into an agreement, whereby after reciting that there were wastes lying intermixed, which belong to both manors, and that one fourth part belonged to *Canford Priors*, and that *J. Webb* and his ancestors had made enclosures thereof, it was agreed that Sir *J. Banks* might inclose fifty acres of the heath, and that *J. Webb* might enjoy the lands formerly inclosed, and that the residue should be divided into four equal parts; one fourth to be enjoyed by Sir *J. Banks*, and the remaining three fourths by *J. Webb*; and the same division should be made in the event of an inclosure; upon a bill brought by the plaintiff for a specific performance of the agreement, or in case the Court should not think fit to execute the agreement, that the limits and boundaries of the waste belonging to each manor might be ascertained; upon the ground that the agreement was made by a tenant for life, who could not bind the remainder-man; that it had not been carried into execution within a hundred years; that the acts of ownership on the part of the defendants' ancestors, inconsistent with the agreement, far outweighed the acts of ownership on the other side, a specific performance of the agreement refused; and the plaintiff not having shewn a title to or possession of the soil, or any impediment why he could not establish his title at law; the Court would not direct a commission or an issue to ascertain the boundaries of the waste; and a cross bill by the defendant, that he might be quieted in possession of the waste, dismissed, being founded upon a mere legal title, and no trials at law having been had to try the right.

The plaintiff, *John Banks*, brought his bill to have a division of a waste called *Canford Heath*, according to the shares to which the plaintiff and defendants were entitled, either according to the terms of an agreement of the 7th of December 1639, or according to the original right which each party had antecedent to the agreement.

Sir *J. Webb*, the plaintiff in the second cause, by his cross bill claimed title to the whole of *Canford Heath*, as the waste of his manor, and prayed to perpetuate the

testi-[654]-mony of his witnesses, and that he might be quieted in the possession of it.

Sir *John Banks*, the great-grandfather of the plaintiff *Banks*, being entitled to the manor of *Canford Priors*, and *John Webb*, the grandfather of the defendant Sir *J. Webb*, being entitled to the manor of *Great Canford*, by an indenture, dated the 7th of December 1639, and made between the said Sir *J. Banks* of the one part, his Majesty's Attorney-General, and the said *J. Webb* of the other part, after reciting that Sir *J. Banks* was seised of the manor of *Canford Priors*, and the said *J. Webb* of the manor of *Great Canford*, to which there were great wastes and commons belonging, lying intermixed, and that one-fourth part thereof belonged to the manor of *Canford Priors*, and *John Webb* and his ancestors had made inclosures of part of the wastes and commons; now for recompense to be made to the said Sir *J. Banks*, for such inclosures, it was agreed, that the said Sir *John Banks* might inclose fifty acres of the said heath, and have the same for his own benefit; and that *John Webb* might enjoy the lands formerly enclosed; and that the residue of the said heath and common grounds should be divided into four equal parts: one-fourth to be enjoyed by Sir *J. Banks* and his tenants, and the remaining three-fourths to be enjoyed by *John Webb* and his tenants; and if any inclosure should hereafter take place, then that one-fourth of what should be so enclosed should be enjoyed by Sir *J. Banks* and his tenants, and the remaining three-fourths should be enjoyed by *John Webb* and his tenants, provided nothing contained in the agreement should prevent either party from inclosing their rateable part. The plaintiff *Banks*, by his bill stated, that the wastes, heaths, and common grounds of the two manors lie undivided, intermixed, and blended together, so that the ancestors of the plaintiff had, time out of mind, and without interruption from the said Sir *J. Webb*, or his ancestors, cut furze, heath, and dug clay, peat, gravel, and sand, depastured their cattle upon any part of the undivided wastes, heaths, and common grounds; and by his bill prayed that the said agreement might be performed and carried into execution, and that he might be quieted in the possession of *Canford Priors*, and of the wastes, heaths, and common grounds thereof; and in case the defendants should controvert the said agreement, and dispute the specific performance thereof, and the Court should not think fit to carry the said agreement into [655] execution, that the limits and boundaries of the wastes, heaths, and common grounds, belonging to each of the manors, might be ascertained and that a commission might issue out of the Court for that purpose.

On the part of the plaintiff *Banks*, the agreement which was not executed was produced. The other evidence produced in the causes is stated in the judgment.

Mr. *Brown* and Mr. *Floyer* for the plaintiff *Banks*.

The agreement is not executed in form; but the parties have ever since enjoyed according to the terms of it. The plaintiff submits to the agreement, though the original right would be more beneficial for him.

The agreement has been affirmed, and carried into execution by acts and enjoyment. It may be objected, that Mr. *Webb* was only tenant for life, and could not by his agreement bind the owner of the inheritance. The subsequent acquiescence and enjoyment of the owners of the inheritance have confirmed it. The agreement of an infant submitted to after he comes of age is made good and shall bind him.

If the agreement is out of the way, then we claim one third of *Canford Heath*, as belonging to the manor of *Canford Priors*.

The Attorney-General, Mr. *Chute*, Mr. *Noel*, Mr. *Taylor*, Mr. *Murray* and Mr. *Henley*, for the defendants, the *Webbs*.

The family of the *Webbs* have enjoyed *Canford Heath*, as their waste of the manor of *Great Canford*, from the time of the purchase till 1639, when *John Webb* being under prosecution for recusancy, and his estate seised on that account, was influenced to come into that agreement. But *J. Webb* was only tenant for life. No step was taken towards carrying this agreement into execution, unless the grants of part of the waste can be so understood. Many new inclosures made, but no part allotted to the *Banks'*, although by the agreement they were to have one-fourth.

The acts of enjoyment, proved by the plaintiff, are only (except the leases) of rights of common, consistent with the ownership of the soil being in another. There are ten leases; four only mention *Canford Heath*; those that mention the waste of *Canford Priors* are not applicable, because there may be other waste belonging to *Canford Priors*.

Such inclosures and leases might be made without the privity or observation of the *Webbs*, or their stewards ; but *John Webb* lived till after the year 1656.

[656] As to the original right claimed by plaintiff at the bar, one third is claimed.

But Sir *J. Banks*, by his own recital, claims only one-fourth. The plaintiff cannot come here for partition, without first establishing his title, or upon confusion of boundaries.

The heath is expressly granted to Sir *J. Webb's* ancestors, or those under whom they claim.

The only evidence of any original right is by the digging peat, and once some stone.

The plaintiff's evidence is in support of a prescriptive right of common, or of estovers, rather than a right of soil.

May 20, 1739.—*Lord Chancellor* : Two bills.

1. The original bill of plaintiff, Mr. *Banks*, founded on a title claimed to some part or share of *Canford Heath*, and praying to establish such title, and to have a commission to set out and settle the boundaries, and to separate and divide his part of the heath from that part which belongs to the manor of *Great Canford*.

2. On the other side, Sir *J. Webb's* cross-bill claims title to the whole of *Canford Heath*, as the waste of his manor, prays to perpetuate the testimony of his witnesses, and to be quieted in the possession of it.

This last bill founded on a mere legal title, proper to perpetuate testimony.

If Sir *J. Webb's* counsel had insisted on any decree upon it, must have directed an issue.

If such an issue tried and found for him difficult to invent, what decree could have been made.

No decree in a court of equity for a perpetual injunction to quiet in possession, on a mere legal title, but after many trials to prevent endless vexation.

But as it is not now insisted on that the Court can make such decree, no colour to direct an issue, or to put it in any method of trial on that bill ; but it must be dismissed.

That being laid out of the case, the questions between the parties will arise wholly on Mr. *Banks's* original bill.

This founded on two general heads of equity : put in the alternative.

1. To have a specific performance of an agreement, and under that a commission.

2. If he fails in that, then to have a commission grounded on his general original title to some share or proportion of [657] *Canford Heath*, and to have it set out and divided by metes and bounds.

Both these are common equities in this Court, provided a sufficient foundation shewn for it.

1. As to the specific performance of the agreement ; it is dated 7th December 1639, now one hundred years ago.

Many objections made against it.

1. Obtained unfairly, and by undue influence.

Answer. These circumstances rather do induce suspicion : not sufficiently made out to ground a decree of this Court.

I would not be understood in the decree which I shall pronounce, to go upon any foundation that may impeach the honour or character of Sir *J. Banks*.

The strong objections, which I think have received no sufficient answers, are :

1. Agreement of tenant for life could not bind the remainder-man or owner of the inheritance.

2. Rested upon and not carried into execution in all this length of time, 100 years after the making of it. This amounts to a waiver.

That alone a sufficient foundation to refuse a decree for a specific performance.

To these it has been answered,

1. That here has been a part performance by the inclosures and leases of part of the heath made by Mr. *John Banks* and Mr. *Ralph Banks*.

Answered. The first of these was in 1648, and the last of them 1656.

Uncertain on what foundation this was done, probably under colour of the agreement.

But on the other side the strength and weight of the evidence is, that it was waived and renounced between the parties.

No fourth part set out.

Multitudes of instances of new inclosures made, new leases granted, and rents

reserved, by Sir *John Webb* and his father, to one-fourth of which, if this agreement had been pursued, Mr. *Banks* and his ancestors would have been entitled ;—not paid, insisted on, or demanded, in any one instance.

All the other acts of a sole exclusive ownership are evidence to the same purpose.

It was said further that the acquiescence of Sir *J. Webb*, and his ancestors amounted to a submission and an affirm-[658]-ance of that agreement ; but these various repeated acts done in contradiction to it, are abundantly sufficient to over-balance that instance of acquiescence.

No ground after this length of time, and under these circumstances to decree a specific performance.

That kind of relief always in the discretion of the Court on the circumstances of the case.

Second point. In the next place plaintiff resorts to that which has been called his original right.

That, part of the heath is the waste of his manor of *Canford Prior* ; that, he is owner of the soil ; that it lies intermixed and confounded with defendant, Sir *John Webb's*, waste of his manor, and therefore entitled to have a commission to set it out.

I take it that whoever comes as a plaintiff into this Court to have a commission to set out and divide lands must do it on one of these grounds :

As claiming,

1st. Some undivided estate as tenant in common or joint-tenant or coparcener with another, or,

2nd. As claiming a several ownership and shewing the boundaries to have been confounded or very difficult to be ascertained ; or at least that there is a dispute about the boundaries.

I must own that in the course of this cause I have not been able to find out on which of these kind of rights the plaintiff puts his case.

He has not said that he is tenant in common of this waste with Sir *J. Webb*.

Not easy to conceive how that should be in the case of two lords of different manors. At least nothing of that kind is shewn, and the bill, which I have read over rather imports the contrary, prays to establish for ever the precise boundaries.

As to any several ownership of any particular divided part of the heath. No part or spot of ground attempted to be marked out or shewn.

No trace of any boundary whatsoever or pretence to it. I never knew a case in which something of that kind was not pretended to at least.

But upon which soever of these rights a plaintiff, who prays a commission of this nature, founds his case, I am of opinion that it is incumbent upon him to go further and to shew

[659] 1. A title.

2. That he is in possession, or if not,

3. Some impediment why he cannot establish his title at law.

1. As to the title.

1. The agreement being only the acknowledgment of a tenant for life, no evidence of any title in plaintiff against Sir *J. Webb*, the remainderman.

2. The only remaining evidence.

1. The leases from 1648 to 1656, and the digging of peat.

Possession and length of time may have given a title to those, where there has been an enjoyment in contradiction to the lord's title, and rent paid to another lord.

But as to any inference of a title to any other part of the waste (supposing all fairly transacted), it amounts to very weak evidence when weighed in the balance against the evidence on the other side.

As to the digging peat the slightest that can be.

Might be by indulgence, by a right of common of turbary or estover, as the vicar is admitted to have.

Whatever it was, has not been exercised these thirty years, so no possession of it.

And to this it is no answer or excuse to say that better peat was found at another place.

If the plaintiff had this right, it might have been sold, and a profit made of it ; and therefore the desisting from digging it there when better was found for his use, shews it rather to be a common of turbary, or estovers to be burnt in his house.

Reputation of one-third most uncertain, inconsistent with the agreement and with the bill.

Discourse at Perambulations. No weight to be laid. The tenants of *Canford Prior* now asserting their own claim, and most probably meant it of a third part of the common rather than of the soil, for the perambulations were for *Great Canford*, and they took in the whole heath into that manor which is inconsistent with a right to a third of the soil.

Let this evidence be compared with that which has been read on the part of Sir *John Webb*.

1. Written evidence, grant and conveyance.

2. By usage and enjoyment.

1. The whole heath conveyed to his ancestor, 9 Jac. 1 [1611-12], by express words. *all that the soil of the great waste in Can-[660]-ford aforesaid, containing, by estimation. 10,000 acres, or thereabouts, and all commons and waste grounds.* No weight to be laid on the deficiency of acres. The entire thing is granted.

This the stronger, because they were so exact as to except some particular inclosures; reasonable to infer from thence that if only two-thirds or three-fourths of the heath had been intended to be conveyed, it would have been so mentioned.

Nothing of this kind in any conveyance on the other side, only the general word *vasta*, which is in all grants of a manor.

It is highly probable this is the chase described in the inquisition, 4 E. 2 [1310-11]; for in the Court-Roll, 35 Eliz. [1593-94], it is presented by the homage; that all the commons are accounted the lord's waste, within which the inhabitants have common for their cattle, and turf and heath.

The four months to be forborne, unless with consent of the keepers.

That the land was accustomed to have two keepers, and the tenants may keep the deer off their common with a little dog and horn.

These are ordinary privileges of a chase.

2. As to usage and enjoyment.

No act of ownership of the soil that can be exercised by a lord of a manor over his waste, that is not proved to have been exercised by Sir *John Webb* and his ancestors without any interruption.

1. Grants and leases of the soil from the 1 Eliz. down to this day under reserved rents, and those rents received.

2. Inclosures made, and cottages built at pleasure down to this time, some of the witnesses speak within these eight years.

3. Wreck, waifes, and strays, seized and brought home to his manor-house.

4. Deodands seized.

5. Contracts and sales of stone dug publicly on the heath from time to time, and some considerable sums of money received for it.

6. Great quantities of peat dug out of *Portmore* part of the heath by his license, for sale about the country, in one instance, for four years together.

7. Leases of a right of digging clay and sand for making bricks and tiles in great quantities.

8. An account of clay and sand dug on the heath by the [661] inhabitants of the town of *Poole* kept by Sir *John Webb*'s agent, and 2d. per load received for it by him.

9. An ancient annual rent of £6, 11s. 7d. paid by the town of *Poole*, in consideration of their common of turbary, and pasture upon *Canford Heath*; this payable and received by Sir *John Webb*.

As to the reputation of the country, that is rather stronger on the part of the defendant than of the plaintiff, when it is considered how some of the witnesses for the plaintiff, who speak of that reputation, account for it.

But be that as it will, it is of the lightest weight against those plain, express, and clear acts of ownership which are proved and have never been interrupted on the part of the plaintiff.

No claim of a third or a fourth part of the new inclosures.

No demand of any account of rents received, of the rent from the town of *Poole*, or of the other profits made.

If this had been in instances trifling and not valuable, it might have been less material, but as these profits appear to have been of greater value than usually arise from a waste, it is a strong evidence against the plaintiff's right.

I have observed upon this evidence hitherto as it affects the title and mere right to the soil.

But it shews further that the plaintiff is out of possession of the soil of *Canford Heath*; for as to the proof of depasturing cattle, it proves no possession of the soil because it is accounted for by a different kind of right, a right of common, which is proved by some of the plaintiff's own witnesses, and admitted by the defendant.

And indeed this seems to be the result upon the whole evidence, that the plaintiff, as lord of the manor of *Canford Priors*, has, by grant or prescription, common of turbary or estovers for himself, and common of pasture for himself and his tenants in the waste of the manor of *Great Canford*.

But I am not to decide the right in all events; I see no impediment why he may not establish his title at law, which in a case of this kind, I think he ought to do before he comes into this Court for a commission.

If he is tenant in common with the defendant of any part of this waste, he may bring an ejectment for any of the new inclosures, and recover his third or fourth, or he may seize a waife or stray, or bring an action against any one for digging stone or clay or peat, by the defendant's license, and this way the title may be tried.

[662] The relief which is now prayed of this Court, is that I should direct an issue; but that, the Court ought only to do upon the submission of the parties, or when it is really in doubt.

But in the present case, on the best consideration I can give the evidence, I have no doubt of the right, and therefore ought not to do it.

I do not know what issue to frame.

Therefore Mr. *Banks's* bill must follow the fate of Sir *John Webb's*, and be dismissed.

As to costs, I think there ought to be none on either side. If Sir *John Webb* had contented himself with perpetuating the testimony of his witnesses, as Mr. *Banks* has examined witnesses also on his part, he would have paid no costs, but as he brought his cause to hearing, and can pray no decree, he ought to have paid costs. And as in my opinion, Mr. *Banks* is entitled to no relief, it is equitable to set the costs of one against the other.

Therefore both bills dismissed without costs.

(1) The statement of this case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book; the judgment *verbatim* from a manuscript in his Lordship's handwriting.

BOYLE and Others v. BOYLE and Another; (1) and GRAVES v. BOYLE and Others; and NICHOLAS and Others v. BOYLE and Others.

May 19th and 26th, 1739. 1 Atk. 509.

Sir *S. Garth* having by his bond given £5000 at his death amongst all the younger children of his daughter, by will directs that the rents and profits of his estates should be paid to them until certain periods in his will mentioned, and gives the produce of his personal estate to his daughter for life, and after her death, to pay £1500 to one of her children, and £3500 amongst her other younger children, as she shall appoint, and in default of appointment, equally amongst them; to daughters at eighteen years of age or marriage, to sons at twenty-one; and declares that the legacies of £1500 and £3500 are in full discharge of the bond; held that a party must elect to claim under the bond or will, but cannot claim under both.

Where a particular thing is given by will in discharge of a demand, and the party insists upon it, he must not only waive that particular thing, but all benefit claimed under the whole will.(2)

Sir *Samuel Garth* on the 21st of December 1716, having entered into a bond to leave at his death £5000 amongst the younger children of *Martha Boyle*, by his [663] will of the 27th of May 1717, devised certain estates to trustees for a term of twenty-one years, if *Henry Boyle* so long lived, upon trust to pay the rents and profits equally amongst all the daughters and younger sons of the said *Martha Boyle*, living at the said testator's death, or born afterwards, till *Henry Boyle* attained his age of eighteen years; and after he had attained that age, then to pay *Henry Boyle* £100

per annum, till his age of twenty-one years, and till such age, to pay and apply the residue of such rents and profits to and amongst *Martha Boyle's* younger sons and daughters equally; and after he attained his age of twenty-one years, or if he died before that age, then the term was to cease, and after the determination or sooner expiration of the said term, he devised the said estates to *Henry Boyle* for life, remainder to his first and other sons, in tail male, remainder to the first and other sons of *Martha Boyle* in tail male, with remainders over; and he gave all his personal estate in trust to pay the interest to *Martha Boyle* for her life, and after her death he gave to *Beaufoy Boyle* £1500 at her age of eighteen years, or on her marriage; and to and amongst the younger sons and daughters of *Martha Boyle*, £3500 in such shares as she should appoint, and in default of appointment, then equally amongst all her children, except *Henry Boyle*, to be paid to daughters at eighteen years of age or marriage, to sons at twenty-one, and the said testator declared that the £1500 and £3500 legacies were in full discharge of a bond dated the 21st of December 1716, given to *Henry* and *William Boyle*, in £10,000 penalty for leaving £5000 amongst *Martha Boyle's* younger children at his death, and he gave all the residue of his estate to *Martha Boyle*.

[664] The first mentioned cause was a re-hearing and appeal from a decree of the *Master of the Rolls*, who had decreed (the bond of *Sir Samuel Garth* not being put in issue in that cause) that *Martha Boyle* should receive the interest of the £5000 for her life; that after her death the £5000 should be paid amongst the children, according to the directions in *Sir Samuel Garth's* will, and that a certain part of the profits of the testator's real estate should be placed out at interest for the benefit of *Elizabeth Graves*.

The bond was deposited by the testator, for safe custody, in the hands of Mrs. *Martha Boyle*, who admitted by her answer, that she had cancelled the bond, apprehending that it was of no use after the will was made.

Elizabeth Boyle having intermarried with *Matthew Graves*, *Harriott Boyle* with *William Nicholas*, and *Beaufoy Boyle* with *John Wilder*, being the daughters, and *Robert Boyle* being a younger son of *Martha Boyle*, claimed to be entitled to a share both of the £5000 under the bond and of the rents and profits devised to them by the will of *Sir Samuel Garth*.

The *Attorney General*, Mr. *Chute*, Mr. *Browne*, and Mr. *Pilsworth*, for *Graves* and his wife.

Mr. *Noel*, Mr. *Fenwick*, and Mr. *Wilbraham*, for *Martha Boyle* and Sir *J. Rushout*.
Mr. *Booth* and Mr. *Green*, for *Nicholas* and his wife, and *Robert Boyle*.

Mr. *Floyer* for *Wilder* and his wife.

May 26, 1739.—*Lord Chancellor* at the hearing of the cause had declared, that the plaintiff *Elizabeth Graves*, might choose to claim either under the will, or under the bond, but if she claimed under the bond, she must take no benefit at all under the will; but next day conceiving a doubt, on account of the devise being of a real estate, and the bond being a personal debt, gave orders to be attended with precedents, and this day delivered his opinion in support of his former decree, and mentioned the case of *Jenkins v. Jenkins*, Nov. 5th, 1736, before Lord *Talbot*, as a case in point, where a particular thing was given in discharge of a demand, the party insisted on his demand, it was decreed he should waive not only that particular thing, but all benefit which he claimed under the whole will. The case of *Shepherd v. Philips*, at the *Rolls*, Dec. the 15th, 1738, was determined on a similar point. But at the same time the *Chancellor* took notice, that in the present case the devise was expressed [665] to be in satisfaction of the bond, and when he gave orders to be attended with precedents, he would not extend the construction of devises in satisfaction, further than they had already gone.

The following note appears in Lord *Hardwicke's* note-book: "Decree varied as to the interest of plaintiff *Graves* and his wife's share of the £5000, and also as to their share of the profits of the testator's real estate, which being only given by the will. plaintiff *Graves* and his wife ought not to have, in respect of their claiming the £5000 under the bond in contradiction to the will: afterwards conceived some doubt as to excluding plaintiffs from their share of the profits of the real estate; but satisfied on search of precedents, particularly in the case of *Jenkins v. Jenkins*, (3) and affirmed the directions.

[666] His Lordship directed the decree of the *Master of the Rolls*, to be varied and declared that the plaintiff *Graves* and his wife electing to claim by virtue of the said

bond, contrary to the disposition made by Sir Samuel Garth's will, ought not to take any benefit by the devise of the rents and profits of the real estate, and he decreed upon the evidence in the cause that the sum of £5000 arising from the said bond be equally divided amongst all the younger children of *Martha Boyle*, whether born before or after the death of Sir Samuel Garth. (Reg. Lib. A. 1738, fo. 602.)

(1) The statement of this case is taken from Lord Hardwicke's Note-book; the judgment from *Atkyns*.

(2) See *Noys v. Mordaunt*, 2 Vern. 581. *Streatfield v. Streatfield*, Ca. temp. Talb. 176. *Kitson v. Kitson*, Prec. in Ch. 351. *Cookes v. Hellier*, 1 Ves. 234. *Boughton v. Boughton*, 2 Ves. 12. *Cull v. Showell*, Amb. 727. *Highway v. Banner*, 1 Bro. C. C. 584. *Lewis v. King*, 2 Bro. C. C. 600. *Hoare v. Barnes*, 3 Bro. C. C. 316. *Finch v. Finch*, 4 Bro. C. C. 38. *Stratton v. Best*, 1 Ves. jun. 285. *Whistler v. Webster*, 2 Ves. jun. 367. *Wilson v. Townsend*, 2 Ves. jun. 693. *Wilson v. Mount*, 3 Ves. 191. *Rutter v. Maclean*, 4 Ves. 531. *Blount v. Bestland*, 5 Ves. 515. *Webb v. Lord Shaftesbury*, 7 Ves. 480. *Moore v. Butler*, 2 Sch. & Lef. 249. *Birmingham v. Kirwan*, 2 Sch. & Lef. 444. *Sheddon v. Goodrich*, 8 Ves. 481. *Rich v. Cockell*, 9 Ves. 369. *Welby v. Welby*, 2 Ves. & Bea. 187. *Green v. Green*, 2 Mer. 86. *Tibbits v. Tibbits*, ib. note 96. *Lord Ranccliffe v. Parkyns*, 6 Dow, 150. *Dillon v. Parker*, 1 Swan. 359. *Gretton v. Haward*, ib. 409. Whether forfeiture or compensation be the effect of an election to take against an instrument; see Mr. Swanston's learned note upon this subject in *Gretton v. Haward*, 1 Swan. 433.

(3) The following case of *Jenkins v. Jenkins*, is taken from Lord Hardwicke's papers, being corrected by Lord Hardwicke in his own hand-writing:—

20th November 1736. On appeal from the Rolls, case was *David Lewis* by will, in 1699, gave to his grand-daughter *Ann Jenkins*, £300 to be paid her within five years after his death, and to his other four grand-children £200 a-piece (whereof plaintiff is one) to be paid them within five years after his death, and no interest to the time of payment, and in case either of the said children should die before time of payment, his or her legacy should go amongst the other brothers and sisters of the whole blood, share and share alike, and made his son-in-law, *Thomas Jenkins*, executor, and died.

Ann Jenkins, the grand-daughter died within five years after the testator, and after the death of *Ann*, and before the five years expired, defendant another grand-child was born.

Thomas Jenkins, the executor, laid out for plaintiff, his eldest son, £110 to put him out apprentice, and maintained him in his infancy.

In 1731, *Thomas Jenkins*, made his will, and devised amongst other things, in these words: "Whereas, I am executor to my late father *David Lewis*, who by his will gave my son *Thomas Jenkins* £200, and there being also due to him, on the death of his late sister, *Ann Jenkins* £50, which I am by the said will obliged to pay, I do therefore, in discharge of my said executorship, and out of affection to my said son give him the said £250, notwithstanding, I paid him £110 to put him apprentice, and maintained him; and I give the interest of the said £250, to my executor (his other son defendant) in satisfaction of the money I have so disbursed for my son *Thomas*"; and in another part of the will gives his son *Thomas* (plaintiff) a debt due to him the testator from one *Prince* about £100, and a close of land to *Thomas* and his heirs worth about £45, and made (defendant) *Benjamin Jenkins*, executor and residuary legatee.

Plaintiff, *Thomas Jenkins*, brought his bill, and 10th of February 1735, *Master of the Rolls* of opinion and decreed that defendant who was born after the death of the testator *Lewis*, and before the said legacy of £300 became payable, was entitled to an equal share thereof with the other children of *Eleanor Jenkins*, and that plaintiff was entitled to interest for his share thereof being the sum of £50, and for his said legacy of £200 as well as to the principal sums, and that he was likewise entitled to the land and money devised by his father's will.

Defendant appealed and insisted first that plaintiff ought to abide by the will throughout and ought not to insist upon the £250 as a debt, and the £250 and other legacies when it is expressly declared by the will that it was intended by testator in satisfaction, and defendant's counsel cited the case of *Noys v. Mordaunt*, 2 Vern. 581. 2ndly, That plaintiff ought to allow for the £110 and maintenance.

Lord Chancellor. As to the first point plaintiff must abide by the will *in toto* or

not at all, according to the case of *Noys v. Mordaunt*. A difference was then offered, where a personal legacy is only given in satisfaction of a personal demand, and where lands besides are given as in this case. But by Lord *Chancellor*, *non allocatur*, for the intent of the testator is entire, and the whole is his will and must be submitted to entirely or not at all. And therefore he decreed plaintiff to have five weeks to make his election whether to abide by the will or not; and plaintiff afterwards electing not to abide by the will, he was decreed to have satisfaction for the legacy of £200 and £50 his share of his sister *Ann's* legacy under the will of *David Lewis*, with interest at £5 *per cent.* from five years after *David Lewis's* death, and to convey to the defendant the close of land devised to him the plaintiff by his father's will and to account for the profit she had received. As to the other point about the maintenance; in regard this £250 was all the provision plaintiff had who was the eldest son, and the father as was proved had an estate in land about £240 *per annum* and £5000 in money and as was proved by one witness had declared he would pay the plaintiff the interest for his £250; his Lordship thought it too hard in such case for his father or his executor to deduct the interest of the £250 which was but £12, 10s. *per annum*, and therefore interest was decreed to be paid for the £250 for five years after the death of testator, *David Lewis*.

[667] GLOVER v. BATES.(1)

June 2nd, 1739. 1 Atk. 439.

In articles before marriage it was declared that the provision thereby made should be in full satisfaction and recompense of and for all dower, or thirds, parts, or shares, and right, title, or claim of dower, which the wife might have to any of the real or personal estate of the husband by the common law custom of the city of *London* or any other law custom or usage whatsoever; the wife being an infant when she signed the articles had her election at her husband's death, which she made by accepting since his death the provision secured to her by the articles.

By articles before marriage 22nd May 1716, *William Bates* covenanted to settle a leasehold estate upon his intended wife, and by will or deed to leave her £1000, and it was thereby declared that the provision mentioned in the articles should be in full recompense of and for all dower, or thirds, parts, or shares, and right, title, or claim of dower which she might have or claim to have in or to any of the estate of the said *William Bates* real or personal by the common law of this realm or custom of the city of *London*, or any other law custom or usage whatsoever.

Bridget Glover, who was then an infant, intermarried with *William Bates* and survived him, and *William Bates* by his will gives his wife all his household goods, diamonds, and plate, and to other persons several specific legacies; but makes no disposition of the residue of his estate.

Bridget Glover, who survived her husband some years, accepted the provision made for her by the articles, and died intestate, and the plaintiff as her personal representative brings her bill against the personal representatives of *William Bates* for the share of the residue of his personal estate to which his wife was entitled at his death.

Mr. *Chute* and Mr. *Cay*, for the plaintiff.

The wife is clearly entitled to her share of the surplus of her husband's estate unless she is barred by her marriage articles. This case differs from all other cases as we do not claim in opposition to any disposition made by the husband of his estate.

[668] Mr. *Attorney-General*, for the defendant.

The wife entered upon the leasehold estate and accepted the £1000 provided for her by the marriage articles, as she was an infant at the time of the marriage, she might make her election; and she has in fact elected by her acceptance.

Then if she has accepted the articles what is the intent and construction of the articles. The words could not have been stronger unless she had been barred from any benefit arising under the statute of distributions; but she is barred from claiming under any law, and the statute of Distributions is a law. On the custom of *London*, if the wife be barred, the estate is divided, as if there were no wife at all. In *Badcock v. Lovell*, 25th October 1726, and *Pitt and Leigh*, coram *Cowper, C.*, where a wife was to have no benefit by the custom of *London*, or otherwise, the words or otherwise held to bar the distributive share, and he likewise cited *Davila v. Davila*, 2 Vern. 724, and *Lockyer v. Savage*, 2 Str. 947.

June 2, 1739.—*Lord Chancellor*. The first question is, if the wife is bound by these articles.

This demand of the wife (if she had in her life demanded it), though not properly the subject matter of a release, yet may certainly be extinguished by agreement; she was an infant at the time of entering into this agreement, therefore at the death of the husband, she had her election, and she has made it by accepting what was designed by the articles as a satisfaction, which plainly shews her sense of the articles.

The next question is, if upon the construction of this agreement it can extend to bar her distributory share? And it is objected that this proviso was only to leave the estate in the power of the husband to dispose of, in case he had made a will, and so this claim not inconsistent; and indeed, with respect to the custom of *London*, it generally is thus understood; but where such express words are used as here, *any law, usage, or custom notwithstanding*, it is plain he intended his estate should go to his relations, exclusive of any claim of his wife, and as she must claim under the statute of Distributions, which is a law, it is expressly provided against.

His Lordship therefore ordered the plaintiff's bill to stand dismissed with costs according to the course of the Court.

(1) The statement of this case and the arguments of counsel are taken from *Lord Hardwicke's Note-book*; the judgment from *Atkyns*.

[669] SMITH and Others, *Plaintiffs*; (1) and LOW and Others, *Defendants*. And BRIDGET LOW and SAMUEL LOW, Executors of SAMUEL LOW, *Plaintiffs*; and All the other Parties, *Defendants*.

June 26th, 1739. 1 Atk. 489.

Richard Lloyd devised some cottages and a mill to his six children; the mother as guardian of the children and the eldest son demised the premises for forty-one years; they all attained twenty-one, and accepted the rent for ten years after the youngest came of age, and then brought an ejectment against the persons claiming under the lessee;

Under the circumstances of the lease being beneficial to the family, and of the long acquiescence of the parties; The Court decreed the lease to be established during the residue of the term.

Richard Lloyd devised certain cottages, and a fulling mill and all the streams of water belonging thereto, to his six children, and their heirs, equally to be divided between them. *Elizabeth Lloyd*, the widow of the testator *Richard Lloyd*, intermarried with *Samuel Low*, and by indenture of the first October 1704, and made between *Samuel Low*, and *Elizabeth* his wife who was the guardian to the children and executrix of *Richard Lloyd* deceased of the first part, *Richard Lloyd* the eldest son of the second part, and *John Atkinson* deceased of the third part, the said *Samuel Low*, *Elizabeth* his wife, and *Richard Lloyd* demised to the said *John Atkinson* all the before mentioned premises for a term of forty-one years, to commence from the 25th March 1708, yielding yearly to the said *Samuel Low* and his assigns, for so much of the term as he should live, to and for the use of all the said children £25 *per annum*, payable half-yearly, and after *Samuel Low's* death during the remainder of the said term, to the said *Elizabeth* her heirs and assigns, or to such other person as should be the lawful owner of the premises, the like rent above all taxes, and all other payments whatsoever; and *Atkinson* covenants to keep the premises in repair; and there was a covenant from *Samuel Low*, *Elizabeth* his wife, and *Richard Lloyd* for quiet enjoyment. *Richard Lloyd* the eldest son at the time of granting the lease was [670] nineteen years of age, and the rent was paid to the children up to the year 1733, ten years after the youngest child came of age.

The testator *Richard Lloyd* died greatly indebted, and in very bad circumstances, and the mill at the time of the lease was in a ruinous condition. *Atkinson* laid out £232 upon the mill, and converted the fulling mill into a rape mill. *Atkinson*, in December 1712, assigned the mill to *Neville*, for £225, and at a rent of £25 *per annum*.

Two of the children of the testator having died, their shares in the premises descended

upon their eldest brother *Richard*, and *Richard* having died, three-sixth parts of the premises descended upon his eldest son *Richard*.

There was evidence in the cause to shew that the premises in question were worth £60 *per annum*, and that they were much out of repair, and would cost £50 and upwards to put them into a proper state of repair. *Richard Lloyd* and the surviving children of the testator brought an ejectment against the plaintiffs, representatives of *John Atkinson*, and the representative of *Neville*, and the plaintiffs brought their bill for the purpose of establishing and confirming the lease, or that the executors of the said *Samuel Low* might make satisfaction out of the assets of *Samuel Low* deceased, for being evicted on the foot of the covenants; and *Bridget Low* and *Samuel Low* brought a cross bill to compel a confirmation of the lease and to indemnify them against the same.

Mr. *Chute* for the plaintiffs in the original bill.

Mr. *Attorney-General* for the plaintiff *Low*. 1st, he insists that this lease is binding on the defendants, the infants. 2ndly, If not, and the plaintiff in the original cause receives satisfaction on the foot of our covenants, we are entitled to be indemnified by the children for whom we became sureties.

1st, The acceptance of rent by *Richard* is a confirmation of the lease by him as to his part, and so it is as to the two-sixths, descended to him afterwards, and he having joined in a lease by indenture, it is an estoppel; as to the other children, it is a confirmation of an agreement in equity by them after they came of age.

Mr. *Brown* and Mr. *Noel* for the defendant *Lloyd* and the children.

The houses were at the time of the lease worth between [671] £25 and £30 *per annum*. These premises were not let at half their value, and *Atkinson* had plain notice of the title. There was no occasion for so long a term. There was nothing of building in the lease, only the common covenants. In point of law no rent was reserved to *Richard Lloyd*, so the lease was not made for his benefit; as to the two-sixths nothing passed from him. Then the only consideration is in equity, and the court will not decree relief, where the agreement is unreasonable, and not for the benefit of the infant; an abuse of this trust is likewise a reason for not establishing it, for the tenements are now out of repair.

June 26, 1739.—*Lord Chancellor*. First question on the original bill, whether this lease ought to be established in a court of equity, if not, the plaintiffs are clearly entitled to satisfaction out of the assets of *Samuel Low*.

2. If so, on the cross bill, whether the plaintiffs in that suit are entitled to be indemnified. If the first question be decided in favour of the plaintiffs, it puts all the other questions out of the case. First, it was insisted, that it was good in law for *Richard Lloyd's* share, and good in equity as to the whole; as to *Richard Lloyd's* share not very material, whether it is good in law, for the plaintiff by coming into equity, admits it to be void in law; but it is clearly not good in law, as to the two parts descended to him, from his brothers *Henry* and *William*, though doubtful as to the other. But the equitable relief against him is quite clear. 2nd question, whether it is good in equity for the whole.

1st, It is a lease for a valuable consideration. 2nd. It was beneficial for the family, the father greatly indebted and died in bad circumstances, the cottages were in tolerable repair at the time of the lease, but the mill was in a ruinous condition, and a considerable sum was laid out by the lessee in the repair of the mill; but then it was objected that the [672] original lessee was reimbursed by his assignment to *Neville*; but *Neville* must stand in the place of the original lessee. 3rd. Acceptance of rent for a great number of years affirms the agreements.

There are several cases where this Court binds infants to contracts made on their behalf, as marriage contracts where infants are married with the consent of guardians.(2)

Then it is objected, that the defendants might not know, the terms of the lease, and that they might have received the rent as from a tenant at will; but the plaintiffs being in possession was notice to them, and it must be presumed that they knew it. It was sufficient notice to put them upon enquiry. The proceeding at law is contrary to conscience especially after so long an acquiescence.

His Lordship therefore declared that the plaintiff, under the circumstances of the case, is entitled to have the lease established during the residue of the term, and decreed accordingly, and he decreed that they pay the rent and put and keep the said premises

in repair according to the said lease ; and as it was against conscience to bring ejectments after these transactions, ordered that the plaintiff should have costs at law, and in equity. And it was ordered that the said cross cause do stand dismissed without costs. (Reg. Lib. B. 1738, fo. 475.)

(1) This case is taken from Lord *Hardwicke's* note book. The premises in question were not let upon a building lease, as Mr. *Atkyns* has stated in his report of this case.

(2) The agreements of female infants by their guardians or themselves in consideration of marriage, are binding in respect of their personal property. *Harvey v. Ashley*, 3 Atk. 607. *Williams v. Chitty*, 3 Ves. 545. *Ainslie v. Medlycott*, 9 Ves. 19, but it seems doubtful whether female infants can be bound by their marriage contract, as to real estate, see *Cannel v. Buckle*, 2 P. Wms. 244. *Harvey v. Ashley*, 3 Atk. 607. *Williams v. Williams*, 1 Bro. C. C. 152. *Caruthers v. Caruthers*, 4 Bro. C. C. 500. *Lucy v. Moor*, 3 Bro. P. C. 514. *Clough v. Clough*, 5 Ves. 717. *Milner v. Lord Harewood*, 18 Ves. 275. *Lechy v. Knox*, 1 Ba. and Be. 210.

[673] CHARLES SHEFFIELD v. The DUCHESS of BUCKINGHAM and Others.(1)

On Exception to the Master's Report.

June 30, 1739.

The Duke of *Buckingham* devised his real and personal estate to trustees, upon trust for his only son, *Edmund*, and his issue ; and in case he died without issue, upon the like trust for *Charles Sheffield* ; and in case he died without issue, in like manner to *Charlotte* and *Sophia Sheffield*.

In Easter Term 1721, Duke *Edmund* instituted a suit against the trustees and executors of his father's will, *Charles Sheffield*, *Sophia* and *Charlotte Sheffield*, for an account of the rents and profits of the estates devised by his father's will, and an allowance thereout for maintenance.

In the July following, another suit was instituted by *Charles Sheffield*, *Sophia* and *Charlotte Sheffield*, against Duke *Edmund* and the trustees and executors under the will, for carrying into execution the trusts of the will ; and by a decree made in both causes, it was declared, that the will was well proved, and that the trusts ought to be carried into execution.

On the 30th October 1735, Duke *Edmund* died an infant.

On the 13th March 1735, the suit was revived by *Charles Sheffield*, against *Charlotte* and *Sophia Sheffield*, and their husbands, the same having become abated by their marriages.

And on the 8th May 1736, the decree made in both causes was signed and enrolled—Held, though Duke *Edmund* was dead at the time of the enrollment of the decree, and before the suit had been revived against his heirs at law, that the enrollment was regular, there being material parties living at the time of the enrollment of the decree.

The Duke of *Buckingham* by his will dated the 9th of August 1716, after the payment of certain legacies therein mentioned, gave the whole of his real and personal estate to trustees, upon trust for his only son, *Edmund*, and his issue ; and in case he died without issue, upon the like trusts, for *Charles Sheffield* ; and in case he died without issue, in like manner, to *Charlotte* and *Sophia Sheffield*.

In Easter Term 1721, Duke *Edmund* having survived his father, instituted a suit against The Duchess of *Buckingham*, *Charles Sheffield*, the trustees and executors, and *Sophia Sheffield* and *Charlotte Sheffield*, for an account of the rents and profits of the estates devised by his father's will, and an allowance out of the estate for maintenance.

In the July following, another suit was instituted by *Charles Sheffield*, *Sophia Sheffield*, and *Charlotte Sheffield*, against *Edmund*, Duke of *Buckingham*, the Duchess of *Buckingham*, and the trustees and executors under the will, for the purpose of carrying into execution the trusts of the will.

On the 22nd December 1721, by a decree made in [674] both causes, it was declared that the will was well proved, and that the trusts thereof ought to be performed and carried into execution.

On the 30th October 1735, Duke *Edmund* died, before he had attained the age of 21 years.

The suit having become abated by the marriage of *Sophia Sheffield* with *Joseph Cox*, and of *Charlotte Sheffield* with *John Walker*, on a bill of revivor filed by *Charles Sheffield*, in the month of February 1735, against the Duchess of *Buckingham* and the surviving trustees and executors, and the said *Joseph Cox* and *Sophia* his wife, and *John Walker* and *Charlotte* his wife, an order was made on the 13th March 1735 that the suit should stand revived against them.

On the 8th of May 1736, the decree made in both causes was signed and enrolled.

On the 28th of June 1736, Lord *Mountjoy*, Sir *Digby Legard*, *Thomas Worsley*, *Thomas Fairfax*, *John Shafto*, *Thomas Dawson*, and *Walter Walsh*, claiming to be heirs at law of both the Dukes, exhibited their bill against the Duchess of *Buckingham*, *Charles Sheffield*, *Joseph Cox* and his wife, *John Walker* and his wife, and the surviving trustees and executors under the Duke's will, for a discovery of the estates of the said late Duke, and other purposes therein mentioned. *Charles Sheffield* put in his answer, insisting on the said decree, and that the same was enrolled, and that the plaintiffs were bound by such decree.

By an order of the 18th December 1736, the said *Charles Sheffield* amended his bill of revivor, by making the heirs at law of both Dukes defendants thereto, and by an order of the 27th of May 1737 an order was made for reviving the suit against them.

On the 16th January 1737, Lord *Mountjoy*, and the other persons claiming to be heirs at law of both the Dukes, presented a petition to the *Chancellor*, insisting, that as the decree in both causes was enrolled whilst both the said causes were abated, they were not bound thereby, and praying that they might be at liberty to amend the bill brought in the name of the infant, or bring a new bill, or put in a new answer to the cross-bill, instead of the said infant's answer, or to amend the same.

On the petition coming on to be heard, the *Lord Chancellor* referred it to the Master, to see whether the said decree was regularly signed and enrolled; and the Master by [675] his report, certified that it appearing that the order of the 8th of May 1736, for signing and enrolling the said decree, *nunc pro tunc*, was made in two causes, in one of which the said infant Duke was mentioned to be plaintiff, and in the other defendant, although he was then dead, and before the said suit was revived against the defendants, his heirs at law, therefore he conceived that the said decree was not regularly signed and enrolled.

Exceptions being taken to the Master's report, the same came on to be argued.

The *Attorney-General*, Mr. *Noel*, Mr. *Hamilton*, and Mr. *Ord*, for Mr. *Sheffield*.

It is not necessary that all parties should be living at the time of the enrollment of the decree. By the report, the Master seems to lay some weight on the suit being described in the order for enrollment, with the name of the Duke *Edmund* as a defendant thereto, when he was dead. But that is a proper description: it could not be described in any other manner, otherwise no order could possibly be made in a suit before revivor.

The rule of the Court is to enroll within six months; but that of course dispensed with, and orders are made to enroll *nunc pro tunc*. So orders to revive in a certain time, otherwise injunctions to be dissolved; and orders for a *subpoena scire facias*.

The enrollment of a decree is a ministerial act done by the clerk of the Court. There can be but one enrollment, and that cannot be good against one, and bad against another. No notice is given to any person of the signing and enrolling a decree; it is the decree which has the effect. It is as much a *lis pendens* without enrollment, as with it. There is no difference between enrolling a decree in this Court, and entering a judgment at common law.

Admitting the contrary doctrine, would be productive of bad consequences: for in a decree of dismission, a defendant cannot revive, and it would be very strange if he could not enroll it, so as to enable him to plead it, if plaintiff should die. This point determined in *Yeavely v. Yeavely*, 3 Ch. Rep. 25, 41. *Anon.* 2 Ch. Ca. 7. *Slingsby v. Hale*, 1 Ch. Ca. 122.

Decrees are constantly entered after abatement by death of parties, then, why should they not be enrolled?

Mr. *Chute*, Mr. *Boote*, Mr. *Idle*, Mr. *Wilbraham*, and Mr. *Murray*, for Lord *Mountjoy* and others.

[676] None of the precedents come up to this case. As to the case of *Yeavely v. Yeavely*, it was first sent to be tried at law, and afterwards the Court was attended with precedents. The question there was not whether the enrollment was or was not regular, but whether it was error for which the decree should be reversed. As to the cases of entering orders after the parties' death, orders are supposed to be entered in Court on the day on which they are pronounced. But in the cases of signing and enrolling, there is a day mentioned in the docquet. The general rule of the Court is, that no decree shall be enrolled after six months, without special leave of the Court. Three of the clerks in Court declare that they have always taken the practice of the Court to be, that after the death of a material party, the decree cannot be signed and enrolled against that party, and they have known bills of revivor brought for that purpose.

Lord Chancellor (July 4, 1739). After hearing several of the clerks in Court, most of whom that were heard this day, certified that they thought that the enrollment was regular. I argued the case at large, and delivered my opinion, that the enrollment was regular, and that the authorities produced supported it; and that it was like the case of entering up a judgment at law after the death of the party, on the Roll. I took notice, that here were material parties living at the time of the enrollment, so that the cause was still in Court; that it was agreed to be regular as to the parties surviving, and I know no instance of two enrollments of the same decree.

Exception allowed, and petition dismissed.

(1) This case is taken from Lord *Hardwicke's* Note-book.

[677] WIGGE v. WIGGE.(1)

[See *In re Kirk*, 1882, 21 Ch. D. 435.]

July 2nd, 1739. 1 Atk. 382.

E. W. devises to his second son *Thomas Wigge*, and his heirs, certain lands, upon condition to pay to his grandchildren (the children of the said *Thomas*) £90, to be equally divided amongst them, and on default of payment, then that they might enter, hold, and enjoy the premises. *Thomas* died in the testator's lifetime; the son of the eldest son of the testator entered on the lands as heir at law, and sold them. The legacy to the children of *Thomas*, the testator's second son, is a continuing charge on the lands in the hands of the purchaser, and they are entitled to be satisfied for the same with interest. (*So Hills v. Wirley*, 2 Atk. 605. *Oke v. Heath*, 1 Ves. 136.)

Edward Wigge, by will dated the 18th of November 1710, devises to his second son, *Thomas Wigge*, and his heirs, certain lands, upon condition to pay £6, 10s., which he had agreed to pay the wife of *Thomas* on her marriage, in lieu of dower, with power of distress; and upon this further condition, to pay to particular grandchildren £45 to be divided amongst them; and on this further condition, to pay amongst his six other grandchildren (the children of *Thomas*) £90, to be equally divided amongst them; and in default of payment, then that they might enter, hold, and enjoy the premises.

Thomas the devisee died in the lifetime of the testator; the son of the eldest son of the testator entered on the lands as heir at law, and sold the lands to a purchaser for a valuable consideration, who had notice of the will after the payment of his purchase-money, but before the execution of his conveyances.

Three of the legatees bring their bill against *Edward Wigge* the grandson, and heir at law of the testator, and against the purchaser of the estate, for payment of their legacies out of the estate charged with the payment of them.

Mr. *Attorney-General*, Mr. *Lloyd*, and Mr. *Smart*, for the plaintiffs. Defendant, the purchaser, insists that this sum of £90 is no charge upon the estate, but the devisee dying in the lifetime of the testator, it became lapsed; it is admitted that the devise is lapsed, but still the charges on the es[678]tate will subsist. A devise to a trustee

in trust for *J. S.* trustee dies in the life of the testator, the devise of the trust is good, *Prec. in Cha.* 602. *Northcote v. Underhill*, 1 Salk. 199.

Mr. Browne, *Mr. Noel*, and *Mr. Owen*, who were counsel for the defendants, insisted, that this was only a personal condition on *Thomas*, the devisee, and his heirs, there being no words in the will to give a legacy to his children, otherwise than depending on such personal condition, and that where a person claims under a will, but claims nothing except under an estate given by that will to another person, if such estate did never arise (as here it never did), nothing intended to be annexed to it can survive, that this was an estate given upon express terms of condition, and not within the rules of being construed a conditional limitation, as not being to be performed by him who could receive a benefit from the non-performance, and that as it is not limited over, it ought to be construed strictly, as being to disinherit an heir at law, and that the beneficial interest cannot be separated from the condition, but they must both stand and fall together; and relied principally on the case in *Dyer's Reps.* 348: (2) and they insisted, that the plaintiffs ought not to come into this court, but ought to take the remedy at law; that the plaintiffs were mere volunteers; that if there was no remedy at law, they ought not to come into this court to make it good; it was like supplying the defective surrender of a copyhold in favour of a grandchild. The defendant, the purchaser, insisted that the sum of £90 was no charge upon the estate, [679] but the devisee dying in the lifetime of the testator, it lapsed.

Lord Chancellor. I think the plaintiffs have a strong case, both for their legacies and interest. There are three questions.

First, If the plaintiffs have any continuing charge on the lands.

Secondly, If they are proper to come into this Court.

Thirdly, If there is sufficient notice to affect the purchaser.

The two first depend on the will, and a great deal arises from the nature of the disposition in favour of the plaintiffs. It manifestly appears, that the testator intended not only to make a provision for *Thomas* and his heirs, but also to make a provision for the six children who were then in being; and it would be very unfortunate, if not only *Thomas's* heirs should lose the benefit intended, but the six children also lose their small provision by the act of *God*; and this is such a construction as the court never will make but when necessitated to do it. But on the contrary the present is a case so circumstanced, as will induce a court of law, as well as equity, to make as strong a construction as possible to support such a charge.

The defendants insist, that this is only a condition annexed to the estate of *Thomas*, and his estate not taking effect, is void.

But this is not a mere condition, but a conditional limitation, there being an express limitation, that in case of non-payment, the legatees were to enter, hold and enjoy, and they have an interest in the nature of tenants by *elegit*; and there are many nice distinctions on these conditions, arising by wills. *A.* devises lands to *B.*, on condition to pay *C.* a sum of money, and no clause of entry; this is no charge on the estate, to give the legatee of the money a lien on the lands; but if the heir at law enters, and takes advantage of the breach of the condition, in this Court he shall be considered only as a trustee for the legatees. (*Avelyn v. Ward*, 1 Ves. 423.)

But then the question will be, as *Thomas* died in the testator's lifetime, and the estate descended to the heir at law, if the charges continue on the lands?

I think it is the same thing; whoever entered, it was to be only till the payment of the legacy, and the heir at law might in this Court redeem them; but the Court will not [680] put the legatees to such a circuity, but permit them to bring a bill to have the lands sold, and the money raised.

This has been compared to a defective surrender of a copyhold pursuant to a will; but here it is different, for there the will is void; but sure a man may, by will, make an equitable as well as a legal charge on his estate, and this Court will maintain it against the heir at law, and therefore the children are entitled.

As to the second question, *whether the remedy is proper in this Court?* it is consequential, from what has been laid down before, to prevent circuity.

As to the third question, *of notice to the purchaser*, it appears he had notice; for though he had no notice before he paid his purchase money, yet he had notice before the execution of the conveyance, and it is all but one transaction. (See *Tourville v. Naish*, 3 P. Wms. 306.)

I do therefore declare that the plaintiffs are entitled to the sum of £45, being one

moiety of the sum of £90 charged by the testator's will on his estate with interest for the same, to be raised out of the estate. Let an account be taken of what is due to the plaintiffs for the £45, with interest for their respective shares from the time the plaintiffs *Anne, Sarah, and Edward Wigge* attained their ages of twenty-one; and in case the defendants shall not pay unto the plaintiffs what shall be so found due, then I direct the estate, or a sufficient part thereof to be sold, and out of the money arising by such sale, the plaintiffs to be paid what the master shall certify to be due, and the residue of the money arising by such sale to be paid to the purchaser; but this, without prejudice to any remedy, he may have against the defendant, the heir at law, to be indemnified under the covenant in the purchase deed.

(1) This case (with the exception of the will and some additions to the arguments of counsel, which are taken from Lord *Hardwicke's* Note-book) is taken from *Atkyns*; the judgment in *Atkyns* corresponds with Lord *Hardwicke's* minutes of the decree.

(2) A man having no issue, devises certain tenements in *London* to two of his friends in fee, to hold in common, upon condition that they and their heirs should pay an annual rent of £7, 6s. 8d. out of the said tenements, at four quarter-days, to the wife of the devisor during her life; and that if the rent should be in arrear, by the space of six weeks after any of the days of payment (and lawfully demanded), that it should be lawful for his wife to distrain upon the tenements. The rent is in arrear, and no demand made upon the tenements by the wife; and for that cause, the heir of the devisor entered, and the question upon a special verdict in ejectment was, if his entry was lawful, or whether the penalty of the express condition annexed to the estate of the devisees be qualified, and altogether destroyed by the penalty of the distress, and by that means a limitation of payment of the rent to the wife, and the heir to take no advantage of the breach of the condition. The majority of the Judges clearly of opinion, that the entry of the heir was lawful; and that both the penalties (that is to say), the condition and re-entry, and the distress given to the wife for non-payment, are good remedies, and sureties for the firm payment of the rent to the wife, according to the intent of the husband.

[681] GUNTER v. HALSEY.(1)

[See *Alderson v. Maddison*, 1881-83, 7 Q. B. D. 178; 8 App. Cas. 478. *Humphreys v. Green*, 1882, 10 Q. B. D. 154.]

July 4th, 1739. Amb. 586. *Hawkins v. Holmes*, 1 P. Wms. 770.

Equity will decree performance of parol agreements, if it is admitted in the answer, or if material and unequivocal acts have been done in part performance.

This bill was brought for a specific performance of an agreement for sale of lands and houses, which was by parol, but reduced into writing by a person present, but never signed by the parties.

The defendant insisted on the statute of frauds, and there was evidence of facts to prove a part performance.

Lord Chancellor, in this case, said, the rule for agreements by the statute, was very plain; but that since the statute this Court has, by construction, laid down some rules by way of exception to it, and will in some cases decree a performance, though the requisites of the statute are not observed.

As where the agreement is parol, and admitted by the answer, because here it is out of the mischief of the statute; so when there has been material acts done in part performance.

... *Foxgrave v. Lyster*.

But the general rule of those cases has been, where the acts have been such as would be a prejudice to the party who has done them, if after that the agreement was to be void.

And in all those cases where the ground of the decree has been part performance, the terms of the agreement must be certainly proved.

Then he went into the particular circumstances of this case, and as to the certainty

of agreement he thought it was not certainly proved, by reason there were queries in the margin, though no proof who made them.

As to the acts done in performance, they must be such as could be done with no other view or design than to perform the agreement; and said, in this case it did not appear but that the acts done by the defendant might be done with other views. (Lord *Hardwicke* has added the following note:—"The bill dismissed, because uncertain from whence the agreement was to commence, and that the acts done by the defendant were not shewn to be in pursuance of the agreement.")

Dismiss bill, but without costs.

(1) This case is taken from *Ambler*; it corresponds with Lord *Hardwicke's* note of the same case.

[682] SHEFFIELD v. Duchess of BUCKINGHAM.(1)

July 4th and 6th, 1739.

Bills of review of two kinds, one for error apparent on the face of the decree, and of course on a deposit of £50, the other discretionary, upon matter existing before, but come to the knowledge of the party subsequent to making the decree, and is granted upon petition or affidavit.

The circumstances of this case not sufficient either in point of form or upon the merits, to grant a petition for a bill of review.

And in order to support such a petition, the affidavit of the solicitor to the heirs at law of the infant tenant in tail, that he or the heirs at law had no knowledge of the matter before the decree, is not sufficient; the only question is, whether the infant tenant in tail or his guardians or agents had no knowledge of such matter existing before the decree.

Lord *Mountjoy* and others being the heirs at law of *Edmund*, the late Duke of *Buckingham*, presented a petition for a bill of review with new matter.

The petition was founded upon the following suggestions:

1st. That there was error in the former decree, because no day was given to the infant Duke to shew cause against the decree when he came of age.

2dly. That the will was established on the examination of but two of the witnesses; and the third, though supposed to be dead, was in fact alive, in parts beyond the seas, and is since come into *England*.

3dly. That in Duke *John's* will, established by the decree, there were several rasures and obliterations, which if made, as it was contended they were, after the will, were a revocation of the will, and that this came to their knowledge since the decree, and the solicitor for the heirs at law made an affidavit that he did not know of such rasures and obliterations before the decree.

Mr. *Chute*, Mr. *Bootle*, Mr. *Wilbraham*, Mr. *Idle*, and Mr. *Murray*, for the heirs at law.

No day is given to the infant to shew cause against this decree. In the case of *Lady Effingham*, in the House of Lords, a day was given to the infant to shew cause against the decree. Four trustees are first written upon the will, then by a rasure five are named. Unless the legal estate be properly devised to the trustees, no trust can arise upon it. This amounts to a revocation, for an estate cannot be revoked [683] as to two joint tenants, and stand as to the others without a new execution of the will. But then it is objected that the affidavit is not made by the parties, that rule only applies when a bill of review is brought by the same parties; it does not extend to privies in representation.

Mr. *Attorney-General*, Mr. *Nosl*, Mr. *Hamilton*, and Mr. *Ord*, for the defendant.

1st Objection. That no day is given to the infant to shew cause; no occasion to apply to the Court for leave to bring such a bill of review. Petitioners may do it without leave, but there is no rule for a day for an infant to shew cause on his own bill.

2d Objection. That new matter has been discovered since the decree.

It must be new matter of fact discovered since the decree.

The will and codicils were read and produced, and the rasures must have appeared. It is not material whether they know the consequence of law. The case of an infant

not different from adults ; for it it were otherwise, the representatives of an infant might bring bills of review *in infinitum*.

Supposing the rasures to be made after the execution of the will, and no person has sworn that they so much as believe that the rasures were made after the will was executed ; yet an alteration of the trustees' names cannot revoke the trust. But then it is said that this decree passed by consent, which is construed to be by collusion. The objection would disturb many decrees made for the quiet of families.

July 6th, 1739.—*Lord Chancellor*. I think that neither in point of form, or on the merits, the petitioners can have a bill of review.

Bills of review are of two kinds.

The one in nature of a writ of error, *coram vobis*, for error apparent on the face of the decree, and this is of course on making a deposit of £50.

The other, which is now an established proceeding, though not of course, but discretionary, and is upon matter which though existing before the decree yet came to the parties knowledge since, and this is on petition and affidavit that it did so and must appear to be such matter as will overturn the decree or doubtful.

This kind of proceeding was first in Lord *Bacon's* time, and was disputed so late as in Lord *Harcourt's*, and is taken from the courts of the civil law.

[684] The present application is for a bill of this last kind, for the first there is no occasion for an application to the Court.

Let us consider then the grounds of it.

As to the first that no day is given.

This, if it is error, is error on the face of the record ; therefore may be taken advantage of without such a bill of review as this is.

And it is a new doctrine to me, that on a bill to have the trusts of the will only performed, to have a day given when the infant is plaintiff, and the decree is according to the prayer of the bill.

The case of Lady *Effingham* and Sir *J. Napier*, in the House of Lords, is the only case, and the reason the Lords went on there was, that it was for relief on a kind of fraud, and it was to convey the infant's estate. It was therefore a very particular case, and not to be argued from.

And let this decree be founded on which bill it will, no conveyance of the real estate is directed, and I take it to be the course of the Court not to give day, unless a conveyance is directed either in form or substance.

As to the other two grounds, there is not the least evidence that the matter has come to knowledge since the decree.

For the affidavit is made by the solicitor, and not by the parties, and even their knowledge is not material, for the question is whether Duke *Edmund*, or his guardians or agents knew of it, for as to his representative's knowledge, that must be a ground in every case, for they were not then before the Court, nor at all concerned.

But it is objected that he was an infant at that time, and died before he came of age, and an infant is not presumed to know any thing.

But if that was so, the consequence will be, that in every case where an infant is concerned, there may be a bill of review, and though an infant is not presumed to know, yet the knowledge of his guardians or *prochein amy* is his. And if there is any collusion in them, it is a ground for a relief of another kind. As to the witnesses not being examined, it is said all the witnesses must be examined to prove a will, and that is a general rule, but then there is a deposition that the witness was dead, or out of the process of the Court.

I lay the death out of the case, and certainly a will proved by two witnesses, and another out of the process of the Court, is a sufficient proof, and there is nothing laid before me to shew that the depositions were false.

[685] And as to the objections to the will itself.

The Court will do all it can to support such a will as this.

It is all under the testator's own hand ; therefore one should expect almost demonstration to overturn it, and one would never presume against it.

How then can it be proved these rasures were after the execution ?

For as to the rasures and mistake of the trustees.

They were trustees in the will, as mentioned in the codicil, to some purposes, though not of the estate ; *viz.* guardians of his children.

And when he made the codicil he might not recollect the will as to them how it stood, and the codicil will be a republication of the will.

And therefore if the rasures were made after the execution of the will, and before the execution of the codicil, still the will would be good.

And can any one believe any jury would make any such presumptions as these to overturn such a will.

But if the rasures were made after execution both of the will and codicil ; unless the rasures were made *animo revocandi*, it would not hurt it.

For though the statute of Frauds speaks of revocations by rasure, obliterations, &c., yet it is not every rasure that is a revocation ; and at most they are revocations *pro tanto*.

And the case, 2d Vern., of the cancelled will is a much stronger case.

I think, therefore, this is neither sufficient knowledge, or matter shewn to support the petition.

As to its being a cause by consent, and the same solicitor on both sides, that is a strange reason, and would be very mischievous, and in causes by consent it often is so.

And if there was any fraud or collusion in any party, in obtaining this decree, that is not proper matter for a bill of review, but for an original bill grounded on the fraud.

Richmond and *Taneur* by Lord *Macclesfield* ; when infant came of age, brought an original bill to set aside a decree, obtained by collusion in a cause by consent during his minority ; but fraud is not error, and will annul the proceedings of courts of justice, as well as any other transactions.

Petition dismissed.

(1) The statement of this case, and the arguments of counsel, are taken from Lord *Hardwicke's* note-book ; the judgment from a manuscript report of Mr. *Forrester's*.

[686] SANDERS v. SANDERS :—MARY SANDERS, *Plaintiff* ; (1) and THOMAS SANDERS and Others, *Defendants*. *Cross cause* : THOMAS SANDERS, *Plaintiff* ; and MARY SANDERS and Others, *Defendants*.

July 9th, 1739.

J. S. devises certain estates to trustees upon trust for his grandson, *John Sanders*, for life, with remainder to his first and other sons in tail male, with like remainders to his grandson, *Thomas Sanders*, and he declared that as his grandsons should come to be in possession of the estates, they might make a jointure for his or their wives respectively, not exceeding £100 *per annum* for every £1000, and he directed his personal estate to be applied by his executors in purchasing lands to be settled to the same uses as his real estate.

John Sanders, the grandson, enters on the estate upon the death of his grandfather, and by articles covenants that his wife shall have as her jointure certain specified parts of the estates, amounting in the whole to £320 *per annum*, in consideration of £3200 for marriage portion, £3000 of which her mother covenants to pay to *John Sanders*, in addition to the £200 he had already received, with interest in the mean time, with a power of revocation to *John Sanders* and *Jane Bailey*. *John Sanders* dies, having in his lifetime received £1700 in part payment of the portion, and having purchased certain real estate : held, that the power of giving the jointure of £320 *per annum*, was well executed by way of covenant or agreement (so *Coventry v. Coventry*, 2 P. Wms. 222. *Francis's Maxims*, last case, Gilb. Eq. Rep. 160. *Alford v. Alford*, cited in 2 P. Wms. 230 ; and see *Saint Paul v. Lord Dudley and Ward*, 15 Ves. 172) ; but that the deficiency in value, the estates on jointure not amounting to the £320 *per annum*, was not to be made good against the remainder man ; and that the purchase of the real estate could not be considered as a purchase in performance of the trust, there being no proof that the purchase was made out of the personal estate of the grandfather, or in performance of the trust.

John Sanders, by his will of the 5th November 1727, gave certain lands and hereditaments to trustees and their heirs, upon trust that they should receive the rents and profits thereof for four years, for levying and raising £1500 for portions to be divided amongst his three youngest grandchildren, share and share alike, at the age of twenty-one years, and after raising and payment of the said £1500, subject to certain annual payments therein mentioned, in trust for his grandson, *John Sanders*,

for his life, and after his death in trust for his first and other sons successively [687] in tail male ; and for want of such issue, in trust for his grandson, *Thomas Sanders*, for life, with remainder to his first and other sons, in like manner, successively, in tail male ; and it was provided and declared, that the testator's will and meaning was, that his said grandsons, and their heirs, as they should respectively come to be in the actual possession of the said premises, or any part thereof, by virtue of the limitations therein contained, might make a jointure or jointures, for his or their wives respectively, not exceeding £100 *per ann.* for every £1000, and so proportionably for every greater or less sum ; and he ordered that his ready money, and securities for money, except what is therein excepted, with his corn, cattle, and stock on the ground, should be applied by his executors for purchasing of lands, and to settle the same to such uses as his real estate was limited and appointed.

In November 1727, the testator died, and immediately upon his death, his grandson, *John Sanders*, entered into the possession of the estates, and received the rents and profits, and applied them to his own use, and continued in the possession of the estates, and the rents and profits thereof until his death.

In the year 1721, *John Sanders*, the grandson, intermarried with the plaintiff *Mary Sanders* ; and on the 1st of October 1733, articles were entered into, whereby the said *John Sanders* covenanted and agreed that the plaintiff, *Mary Sanders*, in consideration of £3200, her marriage portion, should have and enjoy as her jointure, in pursuance of the power given by his said late grandfather's will, certain specified premises in the articles mentioned, not including all the premises mentioned in the will, amounting in the whole to £320 *per annum* ; and *Jane Bailey*, the mother of *Mary Sanders*, covenanted that she would pay to the said *John Sanders*, his executors and administrators, £3000 above the £200 he had then received, making up £3200 ; and *Jane Bailey* covenanted, until payment of the said sum of £3200, she would pay 4 *per cent.* for every £100 that should remain in her hands for interest ; and there was a power reserved to *John Sanders* and *Jane Bailey* to revoke the covenant for the payment of the portion.

Under a decree, dated the 4th of December 1735, made in an original cause instituted by the grandson, *John Sanders*, on the 13th of June 1729, against the parties interested [688] under his grandfather's will, to have the trusts of his grandfather's will performed, and to have a jointure settled upon his wife according to the articles, and pursuant to his power under his grandfather's will, and which was afterwards revived against *Mary Sanders* and *Jane Bailey*, it was referred to the Master to settle a proper conveyance according to the directions contained in the will of the grandfather, wherein a power was to be inserted to give to the plaintiff a power of making a jointure according to the direction contained in the will ; and it was referred to the Master to see what portion the said *John Sanders* had or was to have with his wife *Mary Sanders*, and that a proper settlement should be made upon the said *Mary Sanders* out of the said trust estate.

The said *John Sanders*, the grandson, having died on the 18th March 1735, the suit was revived by *Mary Sanders* for the purpose of carrying into execution the said decree, and that she might have the benefit of the said articles ; and if the said tenements therein mentioned were not of the yearly value of £320, as in the articles expressed, then that the deficiency might be supplied out of the estate of the grandfather, *John Sanders*.

Jane Bailey had only paid, in the lifetime of the grandson, *John Sanders*, £1700 in part of the £3200 mentioned in the articles ; but she submitted to pay the remainder upon a jointure of £320 being secured to her daughter.

Thomas Sanders, by a cross bill, set up various claims against the estate of *John Sanders* the grandson, and amongst others, that the said *John Sanders* had laid out his grandfather's money, and the produce of his securities, chattels and stock in the purchase of an estate which he insisted ought to be conveyed to him.

The estate had been purchased by *John* the grandson, but no proof was given that it was paid for out of the personal estate of the grandfather.

The *Attorney-General*, Mr. *Lloyd*, Mr. *Wilbraham*, and Mr. *Ford* for plaintiff, *Mary Sanders*.

The first objection to *Mary Sanders* being entitled to her jointure is, that the portion covenanted to be paid by her mother was not paid either before or at the execution of the articles, but money, *bona fide*, secured to be paid, is the same as paid. If the compact

is fair, and the money covenanted to be paid, and interest in the mean time, then it is considered that the portion is paid from that time. *Mary* [689] *Sanders* is likewise entitled under the articles, if it turns out that the premises are not worth £320 *per annum*, to have the deficiency in value made up out of the other estates comprised in the will of the grandfather. The statement in the articles that the lands therein mentioned are of the value of £320 *per annum*, amounts to an agreement that they should be of that value, *Lady Clifford v. Lord Burlington*, 2 Vern. 379.

Mr. *Chute* and Mr. *Talbot* for the younger grandchildren of the testator contended, that the grandchildren were entitled to have the sum of £1500 raised out of the rents and profits of the estate charged therewith by the testator's will, and they cited *Smith v. Smith*, 1 Eq. Ca. Ab. 267, pl. 5.

Mr. *Browne*, Mr. *Capper*, Mr. *Murray*, and Mr. *Yorke* for *Thomas Sanders*.

The jointure was not good for the lands specified in the articles. The terms of the power were not pursued. Two things were necessary ; 1st. A marriage portion ; and 2dly, It must be had and received. There are circumstances of fraud, a power of revocation contained in the articles by which the covenant to pay the portion might be revoked. Plaintiff has no right to have the deficiency of her jointure made good. There is no covenant in the articles that the lands were of the value of £320 *per annum*. As to the case of *Lady Clifford* and *Lord Burlington*, it differs from this case. Particular lands were not specified in the covenant. The charge of £1500 for the grandchildren cannot be carried further than the term of four years from the decease of the testator.

The case of *Smith v. Smith* was decided upon circumstances of fraud.

The grandson has purchased land as we say, with the personal estate of the grandfather directed to be laid out in land ; and then these lands ought to be settled according to the will. The Court will presume the land was purchased with the grandfather's personal estate ; and they cited *Lechmere v. Lechmere*, 3 P. Wms. 211.

The *Attorney-General* in reply.

The reference to the Master shews there was no fraud intended. The power of revocation could not in any way injure the remainder-man. As to the deficiency, it was the plain agreement of the trustees that the jointure should be £320 *per annum*. This case is stronger than the case of [690] *Lady Clifford* and *Lord Burlington*, for the covenant there was to settle £1000 *per annum* without reference to the power. In the case of *Lechmere v. Lechmere*, the Court took it to be the intention of *Lord Lechmere* to purchase for that purpose.

Between July 9 and 18, 1739.—*Lord Chancellor*. In this case there were three points : 1st was ; where an estate was limited to trustees to raise portions, for children for a term of four years, remainder to A. for life, remainder to B. in fee, if A. receives all the profits during his life, and the trustees let the term elapse without raising the money ; A. dies insolvent, and question was, whether the children for whose benefit the trust term was created have any right to have the money raised on the lands, as against B., the remainder man ?

And to prove they had, *Smith v. Smith*, in Eq. Ca. Ab. and in 2 Vern. 178, was cited.

Second question was, where there was a power in tenant for life to make a jointure on any wife he should marry not exceeding £100 *per annum* for every £1000 *bona fide* had and received as a marriage portion with such wife, and he did not receive any portion at the time of such marriage ; but the power being executed after the marriage in consideration of a portion part in hand paid, and the rest covenanted to be paid by the wife's mother, whether this was a good execution of this power ?

Third question was, person receives trust-money which, by the trust, he was to lay out in lands ; he purchases lands, but there was no proof that he intended this purchase should be in performance of the trust, or that it was done with the trust-money : question, whether the Court will consider this as the trust-estate ? and it was said that this is different from where such a purchase is a breach of trust, for there the land will not be liable, because a breach of trust is a personal lien, and like a simple contract debt ; and *Lechmere v. Lechmere* was cited to prove that the Court would intend it done in execution of the trust.

These points arise, some on the original bill, and some on the cross bill. That on original bill is with relation to the jointure made in pursuance of the power which depends on the construction of a power, and the execution of it, which power is on an equitable, not a legal estate.

And it is executed by way of covenant, which since the case of *Coventry* and *Coventry* is good by way of agreement [691] or covenant, though no direct appointment made, and that case was stronger, because it was there of a legal power and estate.

It would be too strict a construction of such a power to say the portion must be paid at the time of the marriage, and I think such a portion might be paid by any body, and at any time, and it will be a good consideration, and it is the same thing to the remainder-man. Vide *Holt* and *Holt*, 2 P. Wms. 648.

It is said this would extend it to any fortuitous sum of money that came to the wife, which would defeat the intent of such a power.

But even in that case, if it was such an interest as the husband could not be entitled to, and get into his hands, unless he made a settlement, I think it would be a good portion, though perhaps it would be otherwise if the husband would be at all events entitled to the money; for then as to the remainder-man, the jointure might be considered as voluntary.

Objected, That as to part, it was never paid.

But I think that will not alter the case; for as it was covenanted to be paid, it must in equity be considered as if actually paid; for part is paid, and she is liable to pay the rest.

And if there was any fraud or collusion in the covenant, as if the party who covenanted was insolvent, it would be another thing, and it cannot be construed so briefly as that the husband must actually receive it himself.

Case of *Lady Clifford* and *Lord Burlington*, 2 Vern. 379 (see *Evelyn v. Evelyn*, 2 P. Wms. 668, and *Marchioness of Blandford v. Duchess of Marlborough*, 2 Atk. 542), I have often heard quoted, and always treated as no authority; and it was a cause by consent.

As to the question on the trust-money, and the relief against the remainder-man.

The children are not exactly in the same case, as if the trustees had entered and misapplied, for then the estate had been clearly exonerated against A. and B., but now they have clearly a remedy against A.'s representatives, vide 1 Salk. 153.

But I doubt much how they can have any remedy against B. the remainder-man, for here the provision made for the portions is a term only, and that expired.

As to the case of *Smith* and *Smith*, which comes nearest, [692] that decree was founded on the fraud. Sir T. was tenant in tail, and a fine was levied, by which he became tenant in fee; and perhaps had he continued tenant in tail, the decree had not been as it was. But being tenant in fee, his charge descended on the estate, and the defendant claimed as his heir in privity under him, and not as issue in tail.

Here is no fraud that can affect the remainder-man, and I cannot see how that case came to be compared to Sir *Andrew Corbet's* case, in Co., for it is not the least like it.

But I will give no opinion till I see how the assets of A. turn out.

As to the 3d question: I can see no grounds how they can be considered as the trust-estate.

It is a tender point, to say money can be followed into lands.

Lechmere's case was quite different, for he himself had covenanted to lay out the money, and that depended on the proofs in the cause of his intent.

If there was any proof that the very money was applied from any circumstances, it might be otherwise.

It appears by the decree in the Register's-book, that Lord *Hardwicke* declared, that the plaintiff, *Mary Sanders*, was entitled to have the lands particularly specified in the articles of the 1st October 1733, settled on her by way of jointure; but his Lordship declared "that he was of opinion, that *Mary Sanders* was not entitled to have any deficiency in point of value in the said lands directed to be settled, made good against the remainder-man."

And his Lordship "reserved the consideration, whether the £1500 should be made good out of the real estate of the grandfather; and his Lordship ordered the Master to take an account of what was due from the defendant, *Jane Bailey*, for the said sum of £1500 and interest, at the rate of 4 per cent. from the date of the said articles of the 1st October 1733, and what should be found due was to be paid by her." (Reg. Lib. B. 1738, fo. 485.)

(1) The statement of this case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book; the judgment from a manuscript report of Mr. *Forrester's*.

C. v.—37

[693] CALVERT v. SAUNDERS :—JOHN CALVERT and SUSAN his Wife, and MARY WHITHALL, *Plaintiffs*; (1) and Dame ANN SAUNDERS, THOMAS REVELL and JANE his Wife, SETH, JEREMY, and ANNA MARIA EGERTON, HENRIETTA EGERTON and ANNE EGERTON (representing and claiming under Sir GEORGE SAUNDERS), ROBERT PROOF, ROBERT ROSE, WILLIAM DODD, THOMAS DART and SHADRACH VINCENT (claiming under MARY PROOF), JAMES COLBY, who claims to be sole Heir of Sir THOMAS COLBY, GILBERT KNOWLER, Dr. WILLIAM KNOWLER, GILBERT BOUCHERY, Executors of GILBERT KNOWLER, FRANCIS POWELL and ELIZABETH BOUCHERY, SARAH BOUCHERY and ROBERT KNOWLER (claiming under GILBERT KNOWLER), *Defendants*.

July 18th and 19th, 1739.

Perpetual injunction decreed against a defendant from proceeding against plaintiffs, to recover, in ejectment, possession of premises, the right to which had been established against him upon a trial at bar, and upon a decree made in both the causes (to one of which he was a party) for giving effect to the verdict; though he insisted by his answer that many witnesses had not been examined, and an entry in a Registry-book not produced at the trial at bar, through the neglect of his attorney; but it appeared likewise in the cause, that there were strong grounds for believing that an entry in the Registry book, to prove his title, was forged by his procurement. And it is no objection to the plaintiffs instituting a suit against the defendant for a perpetual injunction, that they were only co-defendants with him in that suit to which he was a party.

The plaintiff, *Susan Calvert*, then *Susan Whithall*, *Mary Whithall*, *Robert Proof* and *Mary* his wife, on the 19th January 1729, filed their bill against *F. Apsley*, the administrator of Sir *Thomas Colby*, deceased, *Thomas Bullock*, Sir *George Saunders*, *James Colby*, and *William Warrington*, setting forth, that in 1729 the said Sir *Thomas Colby* died, without issue, possessed of real estate, which descended upon them, as his heirs at law; and praying that the said defendants might set forth their respective titles, that they might be restrained from setting up any terms for years, or other incumbrances; and that the plaintiffs' title to the real estate might be established. All the defendants appeared to the bill, except *James Colby*, who denied that he had been served with a *subpoena*.

Interrogatories were filed in the cause in the Examiner's Office, for the examination of witnesses against *James Colby*.

In Hilary Term, 1729, Sir *George Saunders* filed his bill against the said *F. Apsley*, *Robert Proof* and his wife, the said *Susan* and *Mary Whithall*, and the said *James Colby*, praying a discovery of the titles of the said defendants. To which bill the defendant, *James Colby*, and the other defendants, appeared and answered; and the said *James Colby*, by his answer, insisted that he was descended from *James Colby*, who was one of the brothers of *Philip Colby*, the father of the said Sir *Thomas Colby*; and witnesses being examined on both sides, both causes came on to be heard together, before the Master of the Rolls, in the presence of counsel, both for the said *James Colby* and other parties, when it was ordered, that the parties should proceed to a trial at bar, wherein *Robert Proof* and *Mary* his wife, and *Susan Whithall* and *Mary Whithall* were to be plaintiffs; and Sir *George Saunders*, *F. Apsley*, *Thomas Bullock*, and *James Colby* were to be defendants, upon this issue, whether the said *Mary Proof*, *Susan* and *Mary Whithall*, were the sole heirs of the said Sir *Thomas Colby*, on the part of the father, or not; and if the jury should find that they were not, then they were to enquire whether Sir *George Saunders* was sole heir of the said Sir *Thomas Colby*, or not; and if they were to find that neither of them were sole heirs, then they were to enquire whether they were joint-heirs of the said Sir *Thomas Colby*, and if they found that they were neither sole or joint-heirs, then they were to enquire whether *James Colby* was the sole heir of the said Sir *Thomas Colby*, on the part of the father, or not. At the trial, the parties to the issue, and particularly *James Colby*, appeared by counsel, and two witnesses were examined on his part, and the jury found that Sir *George Saunders*, *Mary Proof*, and *Susan* and *Mary Whithall*, were the co-heirs of Sir *Thomas Colby*, on the part of the father; and that Sir *George Saunders* was entitled to a moiety, *Mary Proof* to [695] one-fourth, and *Susan* and *Mary Whithall* to the other fourth of the real estate of Sir *Thomas Colby*.

On the 16th May 1732, the cause coming on upon further directions, possession

was decreed to be delivered according to the verdict, and a commission of partition was directed to issue accordingly, and afterwards the parties were respectively let into possession.

In Easter Term, 1732, *Gilbert Knowler* filed his bill against Sir *George Saunders* and the representatives of *Mary Proof*, deceased, and *Susan Calvert*, and *Mary Whithall*, praying a discovery of Sir *Thomas Colby's* real estates, and that he might be let into possession thereof, to which the defendants appeared and answered, and the cause being at issue, was heard, when a trial was directed in K. B., when upon the trial it was found, that the said *Gilbert Knowler* was a co-heir of Sir *Thomas Colby* with Sir *George Saunders*, *Mary Proof*, *Susan Calvert* and *Mary Whithall*, and as such entitled to a third of his real estate.

On the 8th of February 1736, the cause was heard upon the equity reserved, when it was ordered, that the defendants should pay a third part of the rents of the real estates of Sir *Thomas Colby* to *Gilbert Knowler*; and a commission of partition was directed to issue, to divide the estates amongst the parties, according to the said last mentioned verdict, who were to hold and enjoy the same accordingly.

James Colby having delivered ejectments to nearly all the tenants of Sir *Thomas Colby's* freehold estates. The plaintiffs filed their bill against *James Colby*, and against all the parties in possession of the real estates of Sir *Thomas Colby*, for the purpose of having the benefit of the said decrees, and of the verdict, and for a perpetual injunction against *James Colby*, and to be quieted in the possession of such part of the said real estates as they are in possession of under the said decrees and verdicts.

James Colby, by his answer, denied that he was served with a subpoena, or appeared to the bill filed by the plaintiffs, on the 19th of January 1729; but he admitted that he was a party to the suit brought by Sir *George Saunders*, and that he appeared at the trial at bar, and witnesses were examined on his part; but he said that he was not fully prepared with all his witnesses, and the proper registry was not produced which would have clearly made him out to be the nearest of kin, and sole heir at law to Sir *Thomas Colby*, which was occasioned by his attorney not doing his [696] duty, and neglecting to examine several material witnesses for him, which was the reason he failed in the trial. That the pedigree under which he claimed his right to the estate in question was as follows: that *Philip Colby*, late of *Kensington*, yeoman of the guards, and grandfather of Sir *Thomas Colby*, had issue four sons, *Thomas*, *Philip*, *James*, and *Samuel*, which said *Thomas* and *Samuel* died without issue as he has heard; but the said *Philip* intermarried with *Elizabeth Lewellin*, and they had issue Sir *Thomas Colby*; that the said *James Colby*, the other of the said sons of the said *Philip Colby*, and brother of Sir *Thomas Colby*, intermarried with *Beatrice Harrison*, by whom he had issue him the defendant; and he said, that he had not, since the trial at bar, found out or made any discovery of any new or further evidence of his title and pedigree.

On the hearing of the cause the registry-book of the births and burials of the parish of *St. Peter, in the East, in Oxford*, was produced, in which there was an entry stating *James Colby* to be the son of *Philip Colby*. There were strong grounds for believing, from the proofs in the cause that the entry was forged by the procurement of *James Colby*.

Mr. *Browne*, for the plaintiffs.

1st. To carry on the former decrees is of course.

2nd. We pray a perpetual injunction.

A final decree has been made establishing the title and for dividing the estate between proper parties; the defendant *James Colby* was a party to the issue and final decree.

Forgery appears in this case. New examinations are dangerous. In *Coton* and *Lutterel* (ante, page 438), tampering and ill practices allowed as a reason against directing an issue; but *James Colby* objects that he had not an opportunity of examining all his witnesses, four of which he names and three of those he has not examined now.

If he had not an opportunity of examining all his witnesses he should have applied for a new trial.

But still he objects that one verdict should not bind his right.

That is frequently done on an issue directed.

In *Acherly v. Vernon* perpetual injunction decreed.

Mr. *Chute*, Mr. *Boote*, Mr. *Murray*, and Mr. *Comyns*, for the defendant, *James Colby*.

The defendant *James Colby* was not a party in the cause [697] wherein the present plaintiffs were plaintiffs, he was a party in Sir *George Saunders's* cause, and only as a

co-defendant with the present plaintiffs. But a co-defendant cannot bring a bill for a perpetual injunction.

By the ill conduct of defendant's attorney, witnesses were not examined.

This not a ground for a new trial in ejectment because ejectments may be brought *toties quoties*.

Leighton v. Leighton (1 P. Wms. 671, and 2 Bro. P. C. 217 [2nd ed. 4 Bro. P. C. 378]. *Blacket v. Waddington*, proceeded on this principle, that the inheritance should not be concluded by one trial.

At common law there is no limitation to the number of trials.

Mr. Lloyd and Mr. Clarke for the defendants claiming under *Gilbert Knowler*.

Mr. Hamilton, for defendant *Saunders*.

Mr. Attorney-General in reply.

As to the objections to the method of proceeding :

1st. That one trial is not conclusive; that is in the discretion of the Court; and what we found ourselves upon is, that this Court has made a determination and a decree on the finding of this verdict, the ejectment therefore is contrary to the decree. This is the ground in *Acherley v. Vernon*. And the affirmance in the House of Lords made no difference.

2nd. Objection that the defendant was not a party to the plaintiff's original bill.

The answer is that all parties are bound by the decree.

3rd. Objection that the verdict in favour of *Knowler* shakes the former verdict.

The answer to that objection is that the last verdict does not make any difference to the defendant *James Colby*.

July 19, 1739.—Lord Chancellor ordered that as between plaintiffs and all the defendants except the defendant *James Colby*, that the said decree of the 16th May 1732, so far as it is not varied by the said decree of the 8th of February 1736; and also the said decree of the 8th of February 1736, be carried into execution, and that what is thereby decreed to be performed or paid by the plaintiffs and the defendant *Robert Proof*, and by the other defendants claiming under the said *Mary Proof*, and Sir *George Saunders* and *Gilbert* [698] *Knowler*, or the defendants claiming under them be performed and paid to and by the plaintiffs and defendants in this cause, except by defendant *James Colby*, respectively; and as between plaintiffs and defendant, *James Colby*, it is ordered and declared that the injunction already granted for stay of defendant's, *James Colby's*, proceedings at law for the matters in the said bill complained of be made perpetual. And that the said defendant, *James Colby*, be restrained from proceeding at law against the defendant, Lady *Saunders*, and the other defendants, who claim under the said Sir *George Saunders*, and against the defendant *Robert Proof*, and the other defendants claiming under the said *Mary Proof*, to recover the estate in question or any part thereof. And it appearing to the Court from the proofs in the cause that there are strong grounds to believe that there is a forgery in making an entry in the registry book of *St. Peter's*, in *Oxford*, committed by *Benjamin Cuile*, by the procurement of the defendant, *James Colby*; his Lordship recommended it to the plaintiffs and defendants, the representatives of Sir *George Saunders*, *G. Knowler*, and *Mary Proof*, to prosecute the defendant *James Colby* and *Benjamin Cuile*, for the forgery committed in the registry book of the parish of *St. Peter's in the East*, in *Oxford*.

And it is ordered that the registry books do stay in the hands of the register of this court, until the further order of this Court. (Reg. Lib. A. 1738, fo. 658.)

(1) This case is taken from Lord *Hardwicke's* Note-book.

[699] VAN v. CLARKE(1)

July, 21st, 1739. 1 Atk. 511.

M. C. by her will devises all her real and personal estate not otherwise disposed of to *G. C.* and directs that out of the real and personal estate *Thomas Lewis* should be paid £2000 upon trust until his daughter attained eighteen or was married to place it out at interest; but when she attained that age or was married to pay the same with interest to his daughter; and she directed that the £2000 should be paid within

one year and a half after her decease, and she charged her house in Lincoln's Inn Fields, in the first place with the payment of the said sum of £2000, *Mary Lewis*, the daughter of *Thomas Lewis*, having died half a-year after the testatrix; held that the legacy of £2000 was not a vested legacy and her representative was not entitled to it.

Dame *Mary Craven*, made her will as follows :

"I give to *Godfrey Clarke*, my messuage in or near Lincoln's Inn Fields, and all the furniture, and all other my real and personal estate not herein otherwise disposed of to the uses and purposes following (that is to say) that out of the said real and personal estate so given to *Godfrey Clarke* (after giving certain sums to his sister) that the said *Thomas Lewis* may have, receive, and be paid £2000 on trust and to the intent and purpose that the said *Thomas Lewis*, his executors, and administrators, shall until *Mary Lewis* shall attain her age of eighteen years or be married which shall first happen, place the same £2000 out at interest, upon good securities, to be approved by my sister, *Jane Beacher*, her guardian, and shall from time to time put out at interest the interest of the same £2000 as the same shall arise to a fit sum, upon good securities, to be approved as aforesaid, and when the said *Mary Lewis* shall attain her age of eighteen or be married which shall first happen, then shall pay to the said *Mary Lewis*, to and for her own use and benefit the said principal sum of £2000 and the interest, proceeds, and produce thereof. And I will and appoint that all the gross sums which the premises given to *Godfrey Clarke* are hereby made subject to, shall be paid within one year and a half after my decease.

[700] "Provided that my said messuage in or near Lincoln's Inn Fields (which was a freehold), shall in the first place be charged with the said gross sums charged on the premises given to *Godfrey Clarke*, his heirs, executors, and administrators."

Lady Craven died on the 12th of March 1733.

Thomas Lewis, the trustee, died in the lifetime of the testatrix.

Mary Lewis died 5th of June 1734.

And this was a bill brought by the plaintiff as administrator of *Mary Lewis* against *Godfrey Clarke*, the representative of *Godfrey Clarke*, named in the will for the payment of this legacy of £2000.

Mr. Browne for the plaintiff.

Mr. Noel and *Mr. Murray*, for the defendant.

In mere personal legacies there is a difference allowed between a legacy given at a certain time and given absolutely to be paid at a certain time. But that difference is not allowed where the legacies are charged upon real estates. *Powlet v. Powlet*, 2 Vent. 366. *Yates v. Phettiplace*, 2 Vern. 416. *Carter v. Bletsoe*, 2 Vern. 616. Suppose this had been given merely out of personal estate, it would not have been vested; for here the day is annexed to the substance of the legacy.

There are no words of bequest to the trustee but by the direction to pay, and that is within a year and a half, and the *cestui que trust* died before that time.

Mr. Browne in reply.

If this were a legacy out of land merely, the rule of the Court would be too hard for us; but this legacy is given out of real and personal estate, and we have no occasion to resort to the real estate, but can take satisfaction out of the personal estate. In *Yates v. Phettiplace*, 2 Vern. 416, the real estate was directly sought to be charged. In the Duke of Chandos v. Talbot, 2 P. Wms. 604, *Jennings* and *Looks*, 2 P. Wms. 267, it was held, that if the personal estate is sufficient, the legacy should be paid.

In *Wilson v. Spencer*, 3 P. Wms. 172, there was a charge on the real estate, if the personal estate insufficient; the legatee died within the time prescribed for raising the legacy, and it was decreed to be raised.

In *Whaley v. Cox*, decided at the Rolls, 8th March 1736, *J. S.* makes his will as follows :

"I give and bequeath unto *Richard Plumer* £300, to be [701] paid within three years after my decease, in trust to put the same out at interest, and to pay the interest and profit thereof to my niece *Whaley* for her separate use during her life, and after her decease I give £200 thereof to her son *Thomas Whaley*, and the other £100 to her son *Charles*." *Mrs. Whaley* and *Thomas Whaley* both died within the three years, and yet the Master of the Rolls decreed that the whole money should be paid to the trustee who was living, and that the £200 should go to the representative of *Thomas*.

It was charged upon both funds, but it was admitted that the personal estate was sufficient.

July 21, 1739.—*Lord Chancellor.* The general rules are certain.

1st. Where a legacy is given out of the personal estate only to a person at a particular time, and interest not given in the mean time, the legacy does not vest if the legatee dies before the time of payment; and if such legacy is given to a person at a certain time, and interest to be paid in the mean time, it is transmissible to the representative. This is laid down in *Cloberry's* case, 2 Ventr., and is agreeable to the civil law.

2dly, The rule of this Court of legacies given out of a real estate is contrary; for there it shall sink for the benefit of the estate. (See *Prowse v. Abingdon*, ante, page 312, and the cases cited in note (2) to that case.)

I am of opinion in this case, that if the infant had survived a year and a half, her representative would have been entitled; for after the year and a half, the £2000 must be considered as separated from the estate, and considered as making interest for her benefit, and how could this sink into the estate for the benefit of the owner after it is separated from it. Suppose after the money raised, the estate had been sold, and then she had died under eighteen. If this is to be considered as a lapsed legacy who would be entitled to it? Surely not the purchaser out of whose estate it was not raised. Shall then the devisee have it, he has no estate for it to sink into. But I will now consider what is the consequence of *Mary Lewis* dying within the year and a half. By the death of the trustee (and so far his death is material), there could be no remedy in the ecclesiastical court. Supposing it a legacy out of the personal estate, and as here [702] there are no express words of gift, but the first clause relates to the last, the time is annexed to the substance of the legacy, and therefore even if it were a legacy out of the personal estate only, I think it would not be vested; But here it is charged first upon the real estate, for she directs her house in *Lincoln's Inn Fields* to stand charged with the several gross sums devised as aforesaid before the rest of the premises given to *Godfrey Clarke*, his heirs, executors, and administrators, which comprehends the personal as well as the real estate.

The case of *Whaley* and *Cox* goes further than any case I know.

However this case is plainly distinguishable from it, because here the real estate is first charged. It was intended to be given as a portion, and in such case, this Court has always leaned against giving it to the representative, therefore the bill must be dismissed without costs. (Reg. Lib. B. 1738, fo. 344.)

(1) The statement of this case and the arguments of counsel are taken from Lord *Hardwicke's* Note-book; the judgment from a manuscript report.

[703] ATTORNEY-GENERAL *ex relatione*, EDMUND ETHERY, BENJAMIN MOYER, SIR HENRY MAYNARD, MATTHEW WEYMONDSOLD, PETER HARTOP, CHRISTOPHER CURE, on behalf of themselves and the other Inhabitants of the West Division of the Hundred of Becontree, *Plaintiffs*; (1) and SAMUEL HUNTON, Chief Constable of the Division, and THOMAS BRAMSTON, Treasurer of the County, *Defendants*.

July 26th, 1739.

A chief constable of a division having received from the inhabitants of that division more county rates than he ought to have received; upon an information filed against him and the treasurer of the county, by some of the inhabitants, on behalf of themselves and the other inhabitants; the chief constable was decreed to account.

Samuel Hunton, as chief constable of the west division of *Becontree*, having received during a period of nine years and eight months, from the several parishes included in that division, larger sums of money than they ought to have paid;

The relators brought this information against the defendant *Hunton*, as chief constable, that he might account for so much as he had received over and above what he ought to have received, and against the defendant *Bramston*, as treasurer of the county, that he might account for what he had received from the defendant *Hunton*, for and in respect of the parishes contained in that division.

Hunton, by his answer, insisted that he ought not to be brought to an account in a court of equity, but that if the relators had any remedy, it was at law.

Mr. *Noel* and Mr. Serjeant *Comyns*, for the plaintiffs.

Hunton admits that he has received £254, 7s. 10d. more than he ought to have received, but insists that he may retain it according to the precedents of his predecessors. There is no ground for his retaining the money. There is no remedy at law but by the particular inhabitants for money [704] had and received to their use. This is like the case of the *Attorney-General* and *Grantham*, coram *Macclesfield*, Chancellor.

Mr. *Browne* and Mr. *Hopkins*, for the defendants. The constant custom for the chief constable to receive something more from the inhabitants than was taxed, in order to satisfy him for his pains. There is no ground for an account in this court. The proper remedy would be an information in the Court of King's Bench. This case differs from the *Attorney-General* and *Grantham*, that was a proper case for an account.

July 26, 1739.—Lord Chancellor decreed that the defendant *Hunton* should account for all the monies received by him as chief constable of the west division of the half hundred of *Becontree*, from the inhabitants of the said division, or any of them. But the accounts which have been passed between him and the treasurer of the western division of the county, for monies received by virtue of any rates or assessments were not to be ravelled into; and what should be found due upon his account, was to be paid to the said defendant *Bramston*, to be by him disbursed and paid over to the respective inhabitants of the said division, from whom the same was received, or the representatives of such of them as were dead: and the said defendant *Hunton* was to be indemnified by the relators against any action or suit that might be brought against him by any of the inhabitants, or representatives of such of them as were dead of the said division, for any money that should be paid by him to the said defendant *Bramston*. And it was ordered, that the defendant *Hunton*, pay unto the relators their costs of this suit, to be taxed by the Master. (Reg. Lib. A. 1738, fo. 663.)

(1) This case is taken from Lord *Hardwicke's* Note-book.

[705] HARRISON and Others, Representatives of THOMAS HAUGHTON, Plaintiffs; (1) and ROBERT GRAHAM, and ELIZABETH NICHOLAS, Defendants.

July 27th, 1739.

Barbara Graham, by her will, gives to her brother *John Graham*, £300, to be paid to him six months after the decease of her mother and sister; *John Graham* by indenture, in consideration of £100, assigns to *Thomas Haughton*, his legacy of £300, and the receipt for the £100 is indorsed upon the indenture, and gives a warrant of attorney to confess judgment, which was entered up for £600, to be void on payment of the legacy; upon a bill brought by *Thomas Haughton* against the representatives of *Barbara Graham* for the payment of the legacy; the defendants insisting by their answer, that the consideration of £100 was not paid, and *Thomas Haughton* having proved in the cause the loss of the indenture, a copy of the indenture, and that a receipt for the £100 had been indorsed thereon; the Master of the Rolls referred it to the Master to inquire into the consideration of the assignment; but the Lord Chancellor upon appeal, reversed the decree, and directed the legacy to be paid to the plaintiffs by the defendants, out of the personal estate of *Barbara Graham* the daughter.

Barbara Graham, by her will, devised all her estate, after all debts paid, to her mother *Barbara Graham*, her sister *Margaret*, her brother *Robert Graham*, and the defendant *Nicholas*, in trust for the uses therein mentioned, during the lives of her mother and sister, and the longest liver of them, and after their decease, she gave to her brother *John Graham*, since deceased, £300, to be paid to him within six months after the decease of the survivor of them, and appointed her said mother and sister, and the defendants, *Robert*, her brother, and *Elizabeth Nicholas*, executors.

The testatrix died possessed of personal property more than sufficient for the payment of her debts and legacies. *Margaret* alone proved the will. *John Graham* having applied to *Thomas Haughton* to purchase his legacy, the same was purchased by *Thomas*

Haughton, and by an indenture dated the 1st of October 1731, *John Graham* in consideration of £100 sold to *Thomas Haughton* the said legacy, and covenanted that the testatrix left sufficient assets for the payment thereof, and appointed *Haughton* his attorney to receive the same. The receipt for the £100 was indorsed upon the indenture.

[706] *John Graham*, on the 1st of October 1731, executed a warrant of attorney to confess judgment for £600, on the back of which was indorsed a defeasance to make void the judgment upon the performance of the covenants.

The judgment was entered up.

Margaret Graham died on the 15th of July 1735, and *Barbara*, the mother, died in December 1735, whereupon *Thomas Haughton* brought his bill against the defendants, who are the surviving executors of *Barbara*, the daughter, and executors or administrators of the said *Margaret* and *Barbara*, the mother, to pay the said £300 legacy to him.

The defendants insisted by their answer, that the sum of £100 the consideration for the assignment was not paid, and the defendant *Graham*, by his answer, insisted that his brother *John Graham* was indebted to him upon bond dated the 23rd of May 1730, for £250, and that as administrator to his brother, he was entitled to retain out of the legacy, being his only assets, the said sum of £250 with interest.

The plaintiff having lost the indenture of assignment of the 21st of October 1731, proved in the cause the loss, and a copy of the indenture of assignment, and that a receipt for £100 was indorsed thereon; and upon the cause coming on to be heard before the *Master of the Rolls*, his Honor decreed that it should be referred to the *Master* to inquire into the consideration of the assignment from *John Graham* to the plaintiff; and for the better discovery thereof, the plaintiff was to be examined upon interrogatories. From this decree the plaintiff appealed, and the plaintiff *Haughton* having died, the cause was revived by the plaintiffs, his representatives.

Attorney-General for the plaintiffs.

At the *Rolls*, the Court only directed an inquiry into the consideration of the assignment of the then plaintiff *Haughton*; but that is not material in respect of the defendants; and besides, it sufficiently appears, the receipt is sufficient evidence of the payment.

As to the defendant *Graham* insisting to be a creditor of *John Graham*, this legacy is not to be considered as any part of his assets at the time of his death.

Mr. Browne and *Mr. Hollings*, for the defendants.

It is proper that there should be an inquiry into the consideration. Defendant *Robert Graham*, is a creditor of *John Graham*, and therefore if the legacy is not well assigned, it will be assets towards satisfaction of his debt, and [707] which as administrator to his brother, he may retain. If there is no consideration paid, the Court would not support this assignment.

Lord Chancellor ordered the said decree to be reversed, and referred it to the *Master* to take an account of what was due in respect of the said legacy of £300 assigned by the said deed of the 1st of October 1731, with interest at 4 *per cent.* from the death of the said *Barbara Graham*, the mother, and an account was directed of the personal estate of *Barbara Graham*, the daughter, and what should be found due for principal and interest of the said legacy of £300 be paid to plaintiff out of such personal estate. (Reg. Lib. A. 1738, fo. 453.)

(1) This case is taken from Lord *Hardwicke's* Note-book.

MILES v. LEIGH.(1)

Appeal.

July 27th, 1739. 1 Atk. 573.

Where a testator gives an estate to his wife for life, with remainder to his son in fee. and directs that he shall, when he comes into possession, as well of the estate devised as of another estate of which he was tenant in tail, pay to the testator's daughter a legacy; held, that though the son never comes into possession of the estates, that the legacy is a charge upon the estate devised, into whatever hands the estate comes.

Henry Leigh being possessed of considerable personal estate, and seised in fee of a tenement called *Hills*, and being tenant in tail male in remainder, expectant upon

the death of *Mary Leigh*, of a messuage and tenement called *Bowery Hay*; on the 23rd of March 1701, made his will in manner following :—

“As to my worldly goods which God of his goodness hath endued me with, I give and dispose thereof in manner and form following :—I give and bequeath unto my dear wife *Joan Leigh*, all that my messuage and tenement, with its rights, members, and appurtenances called *Hill's* tenement, situate in the parish of *Carhampton*, in the county of *Somerset*, during her natural life, and after her decease, unto *Robert Leigh*, my son, and his right heirs for ever : *Item*, I give and bequeath unto *Henry Leigh*, my son, the sum of £150 of lawful *English* money, to be paid in twelve [708] months time, when *Robert Leigh*, my said son shall come to and enjoy the said tenement called *Hill's* tenement, and also that my messuage and tenement called *Bowery*, otherwise *Bowery Hay*, situate in the parish of *Carhampton* aforesaid. *Item*, I give and bequeath unto my daughter *Mary Leigh*, the sum of £150 of lawful *English* money, to be paid in twelve months time, at and upon the time that my said son *Robert Leigh*, shall come and enjoy the said premises above-mentioned; and in case that my said son *Robert Leigh* shall happen to die before *Joan*, my said wife, that then my true intent and meaning, and will is, that the said *Henry Leigh*, my son, he coming to the possession of the said premises, and surviving his said mother shall pay to the said *Mary Leigh*, my said daughter, the sum of £200 of lawful money of *England*. *Item*, All the rest and residue of my goods and chattels of what nature or kind soever, I do give, devise, and bequeath, unto my dear and loving wife *Joan Leigh*, whom I do appoint sole executrix of this my will.”

Joan proved the will, possessed herself of the testator's personal estate, and entered upon and enjoyed the *Hill's* tenement, till the time of her death, which happened in the year 1729.

Upon her death (*Robert* and *Henry* both dying in the lifetime of *Joan*), the defendant *Henry Leigh*, as son and heir of *Robert*, who was son and heir of *Henry* the testator, entered upon the premises called *Hill's* tenement; and he likewise became entitled as tenant in tail upon the death of his father, to the premises called *Bowery Hay*.

In Easter Term 1736 the plaintiff brought her bill against the defendant, for the payment of the legacy of £150 and interest, insisting that the said *Hill's* tenement and *Bowery Hay*, were by the will of her father charged with the said legacy.

The cause coming on to be heard before the *Master of the Rolls*, his Honor decreed that it be referred to the Master to see what was due to the plaintiff for her legacy of £150, and to compute interest at 4 *per cent.* from a year after the death of the said *Joan Leigh*, and that the defendant pay what was found due, or in default thereof, the defendant was to account for the rents and profits of the *Hill's* tenement, and directed the said *Hill's* tenement to be sold to pay the same legacy. And he further decreed, that the plaintiff's bill, so far as it related to the estate called *Bowery Hay*, be dismissed, and the consideration of costs was reserved.

[709] On the 27th of July 1739, this cause came on before his Lordship upon an appeal on the part of the defendant, from the decree of the *Master of the Rolls*.

The *Attorney-General* for the plaintiff insisted, that the words of the will giving the legacy at the time the estate comes to *Robert Leigh*, shewed that it was intended that it should be paid out of that estate.

Mr. *Pauncefort*, Mr. *Chute*, Mr. *Browne*, and Mr. *Joddrel* for the defendant.

This never could be intended as a charge upon this estate, it must be paid out of the personal estate. There are no express words or necessary implication in the will of the testator to charge this estate. There is no direction that this legacy should be paid out of the land, it only points out the time when it shall be paid, it is directed to be paid when *Robert* comes to the estate, and when *Henry* comes into possession, it is directed that he shall pay it, but it is no where said, that it shall be paid when it comes to their heirs. The testator has no where disposed of the estate called *Bowery Hay*, and he might intend that the legacy should be paid at the death of the mother out of the personal estate when she no longer would want it. But even if this were a charge upon the real estate, it was a charge contingent upon *Robert's* coming into possession of the estate, and the contingency never happened, both sons dying in the lifetime of their mother.

July 27th, 1739.—*Lord Chancellor*. This will is very obscurely penned, and I think the construction of it must arise upon taking the whole will together, and I think the decree at the rolls was right.

G. v.—37*

The will must be considered as if the legacy followed the devise of the land, and I think it is to be considered as a condition annexed to *Robert's* estate, and the same as if the testator had said, *he paying*.

And there are many cases where *adverbs* of time have been considered as creating conditions, and the clause of payment by *Henry Leigh* must be taken into consideration which is not a distinct legacy, but an increase of the same, when he came to the estate. As to *Hill's* tenement being but of small value, it is plain, the testator intended this payment should come out of both estates, though he had no power over the other. For it is not a rule in wills, that a man would distribute what he has to give equally, but he [710] regards rather equality of provision that is at all events to come amongst his family.

It is not said, he shall pay these legacies within a year after the mother's death, but when he comes to possession of both estates, which might be long after; for *Bowery Hay* was then enjoyed by a tenant for life, who might survive *Joan*, and therefore if *these were legacies*, payable out of the personal estate, no reason can be assigned why he should fix that particular time to them: but the time respecting the possession of the estates only, gives on the other side a strong ground for the implication of their being a charge on them. As to the contingency, it is said it depends on *Robert's* enjoyment, but I think the proper construction is, when the devise to *Robert* takes effect only, and if it is considered as a condition annexed to *Robert's* estate, it will then bind his heirs as well as him. *Marks v. Marks* is a strong authority to that purpose. As to the argument drawn from the word residue, he begins his will with disposing of all his worldly goods, which include both his real and personal estate, and then after giving the estate, what the wife takes is properly a residue, but that is too slight to ground the construction upon. I think on the whole will, it was clearly the intent of the testator, to charge the lands into whosoever hands they came, with this sum of money, and if *Henry* came into possession then to increase it.

Appeal dismissed, no costs on either side. (Reg. Lib. B. 1738, fol. 351.)

(1) The statement of this case, and the arguments of counsel are taken from Lord *Hardwicke's* Note-book; the judgment from a manuscript report.

[711] *PIERSON v. SHORE*:—CHARLES PIERSON and MARY his Wife, *Plaintiffs*; (1) and ELIZABETH SHORE Widow, JAMES PYM, WILLIAM HAYE, and WILLIAM DOBLE, *Defendants*.

November 13th, 1738; July 28th, 1739. 1 Atk. 480.

Mary Briggs being entitled to a lease to her and her heirs for three lives devises the same to her daughter, and directs that the trustees shall manage her estate for the benefit of her daughter either by placing her monies out at interest or by making purchases; The trustees upon the decease of one of the lives in the lease agree with the dean and chapter of *C.* the lessors, that the existing lease should be avoided by forfeiture for non-payment of rent, and that a new lease should be granted for the benefit of the daughter; the old lease having been avoided by forfeiture, a new lease is granted to the trustees in trust for the daughter and her heirs, which new lease is afterwards surrendered in consideration of a similar lease; the daughter dies an infant, the lease shall go to the heirs of the infant *ex parte materna*.

Doctor *Eades* being entitled to a lease for three lives under the Dean and Chapter of *Chichester* settled it upon various uses, with an ultimate remainder to the right heirs of his son *Henry*.

Doctor *Eades* and his son *Henry* being dead, *Mary Briggs* became entitled to the lease as heir at law to the latter, and having duly surrendered it, a new lease was on the 2nd of May 1726 granted to her and her heirs for three lives, in which there was a proviso for re-entry in case of non-payment of rent for 21 days.

Mary Briggs by her will dated the 14th of March 1725, devised this lease to her only daughter, and appointed the defendant *James Pym* and others guardians and trustees of her daughter, and directed them to order and manage her estates both

real and personal for the payment of her debts, and to and for the use and benefit of her daughter, to grant [712] and make leases to undertenants of the best improved rents, and in such manner as they in their discretion should think fit and most for the benefit of her said daughter, and to receive the rents and profits of her said estate both real and personal, and to make the best improvement of her estate they could, by placing monies out at interest, or making purchases, for her as they should think fit to and for the use and benefit of her said daughter.

Mary Briggs being dead, and one of the lives upon which the lease was held having dropped, the trustees under the will, agreed with the Dean and Chapter that the lease should be avoided by forfeiture for non-payment of rent, and that the Dean and Chapter should grant a new lease for three lives for the benefit of the infant daughter of *Mary Briggs*.

The old lease having been accordingly avoided by forfeiture, the Dean and Chapter of *Chichester* granted a new lease dated 24th of October 1727 for three lives to the trustees and their heirs under the will in trust for the use and benefit of the said *Mary Briggs*, the daughter, her heirs, and assigns.

This new lease was afterwards surrendered, and a similar lease dated the 18th of May 1731 was granted to the defendants *Pym*, *Haye*, and *Doble* for three other lives.

One of the lives upon which the lease of 1726 was granted was still in being.

The daughter of *Mary Briggs* died an infant at the age of twelve years, leaving the plaintiff *Mary Pierson* her heir, *ex parte materna*, and the defendant *Elizabeth Shore*, her heir *ex parte paterna*.

The bill prayed an assignment of the lease, and an account of rents and profits from the death of the infant.

The cause first came on to be heard on the 13th, 14th and 16th of November 1738, when it was contended on behalf of the plaintiff,

1st, That the old lease being inheritable by heirs, *ex parte materna*, the new lease was subject to the same uses, and therefore descended to those heirs.

2dly, That the old lease was not well avoided by the forfeiture, and was therefore still a subsisting and valid lease.

The defendant *Elizabeth Shore* contended that the old lease was effectually avoided, and claimed the new lease as heir *ex parte paterna*.

[713] Upon this hearing, the Lord Chancellor directed a trial at law in an ejectment, in order to try whether the lease of 1726 was avoided in point of law by a sufficient demand and re-entry.

Upon that trial it was found that the lease of 1726 was well avoided.

The cause came on again on the 28th of July 1739, when the only question was, whether the new lease descended to the heirs of the infant, *ex parte materna*, or to those *ex parte paterna*.

Mr. Browne, Mr. Noel, Mr. Fazakerley, and Mr. Talbot for the plaintiff.

The descendible quality of these freehold leases is governed by the same rules as estates of inheritance at common law. Vaugh. 201. *Finch v. Tucker*, 2 Vern. 184. *Wastney's v. Chappell*, 1 Bro. P. C. 457 [2nd ed. 3 Bro. P. C. 50]. *Baxter v. Dowdeswell*, 2 Lev. 138, in which it was held a lease for three lives of Borough English lands descended to the youngest son of the lessee.

It is established by the verdict that there has been a forfeiture of the old lease, but equity will look to the intention of the whole transaction. The forfeiture was incurred by agreement for the purpose of having a new lease granted. The forfeiture must therefore be considered as a surrender, and the lease granted upon that forfeiture as a renewed lease. But the right of renewal is an inheritable right, and a renewed lease is considered as an engraftment upon the original right, as a continuance of it, and as subject to the same uses.

If an original lease is subject to trusts, a renewed lease will be subject to the same.

A lease renewed by an executor or administrator is considered as assets. If an original lease is entailed, a renewed lease is subject to the same limitations. *Palmer v. Young*, 1 Vern. 276.

If a real forfeiture had been incurred, and the infant had died before the renewal, relief against the forfeiture would have been granted to the heir, *ex parte materna*. The heir, *ex parte paterna*, shall enter for a condition broken; but if the lands descended from the side of the mother, the heir, *ex parte materna*, shall enter upon him. Co. Litt. 12, 13.

At law, the admission of an heir to a copyhold estate is a new grant ; but if the estate come *ex parte materna*, it will descend in the same way.

[714] If an infant is entitled to the equity of redemption upon a mortgage in fee, and the trustees buy in the mortgage, or redeem and take a conveyance to themselves in trust for the infant and his heirs, the heir of the infant, *ex parte materna*, will inherit the estate, if the equity of redemption came from that side.

If an estate descended *ex parte materna*, be settled to various uses with an ultimate remainder to the right heirs of the settlor, the heir, *ex parte materna*, is entitled. *Abbot v. Burton*, 2 Salk. 590.

This Court will not suffer trustees for infants to change the nature of the property from real to personal, or from personal to real, or from one kind of real property to another. If that were permitted, trustees would, in effect, have the power of making wills for the infants.

In *Witter v. Witter*, Hil. 4 Geo. 2 [1731], *coram King, C.*, it was decreed that a freehold lease which had been granted to executors in trust upon a surrender by them of a chattel lease, to which an infant was entitled, should, upon the infant's death, be distributed as personal property.

In *Mason v. Goodrick*, the Court directed that the money produced by timber, which had been cut down by the guardian of an infant, should be re-invested in land ; and in *Drake v. Drake*, the late Lord Chancellor, in directing the profits of an infant's estate to be applied in the discharge of incumbrances, provided that they should be assigned as securities that the infant might have the power of disposing of the money during his infancy.

If the heir *ex parte materna* is not entitled to the whole of the new lease, he is at least entitled so long as any of the lives in the old lease shall continue, or to have the new lease upon paying the expenses of the renewal.

The case of the Earl of Winchelsea *v. Norcliffe*, 1 Vern. 435, was decided upon the same principle.

Mr. Attorney-General, for the defendant.

The heir does not succeed to these freehold leases as heir but as special occupant, and every special occupant is a purchaser and takes as an assignee at law, Vaugh. 204, 205.

If this lease had been surrendered by a person of full age, it is clear that a renewed lease granted upon such surrender would have been a new estate, and that the descent would have been broken. If a man make a feoffment in fee, and take back an estate to him and his heirs, it is a new estate, [715] Co. Litt. 12 b, but it is said that the trustees had no right so to deal with the estate as to create any alteration in it.

We insist that the trustees were justified in what they did by the will of *Mary Briggs*. She directed her trustees to make purchases from time to time for the benefit of her daughter.

In the execution of that trust they acquired this new lease for the infant by which her estate has been greatly benefited.

In *Mason v Goodrick* and the other cases cited, the trustees had no power to do the acts by which the nature of the property was changed, in this case they had.

In *Mason v. Day*, Prec. in Ch. 319, and Gilb. Eq. Rep. 77, this very question was decided.

July 28th, 1739.—Lord Chancellor. The lease is a descendible freehold, and if no alteration had been made it would have gone to the heir *ex parte materna*, but the new lease is to be considered as a new purchase, and vested in the infant as a purchaser ; and the question is how this new lease will go, considered as a new purchase.

If the infant had lived till full age, and had then surrendered the old lease and taken a new one, it certainly would have gone to the heirs *ex parte paterna*. So if all the lives had died and the lease had been renewed, it would likewise have gone to the heirs on the part of the father.

The true reason why the guardians of an infant cannot convert his personal estate into real, is because the infant would thereby be deprived of the power of disposing of it so soon, and not out of any regard to the real or personal representative. (*Witter v. Witter*, 3 P. Wms. 100, note. *Rook v. Warth*, 1 Ves. 461.)

In the case of a lease in trust, or entailed, a renewed lease would indeed be subject to the old uses ; (2) but in those cases the *cestui que trust* and remainder-man had an actual interest in the original lease which the claimants in this case had not.

[716] The renewal was a reasonable and proper act for the trustees to do. The interest of the infant required that it should be done; and how could the trustees have done it, so as to secure the inheritance of the property to the heirs, *ex parte materna*, only by giving an estate for life to the infant, with a remainder to those heirs, as purchasers; but that would have diminished the infant's estate, which the trustees would not have been justified in doing.

If indeed the lease had been wantonly renewed, without any sufficient reason or real benefit to the infant, there might have been ground for coming into this court for relief; but in the present case, there was sufficient reason for what was done; it was necessary to preserve the infant's interest entire.

Besides, in the present case, the executors of the mother were by her will directed to manage the infant's estate and to make purchases as they should think fit; now this was as proper a purchase as could have been made, and must be considered as having been done in pursuance of that power.

This circumstance makes the present case plainer, but I should have been of the same opinion, if it had not existed.

The case of *Mason v. Day*, is precisely in point with the present.

It has been argued that the plaintiff is at least entitled to the new lease, upon paying the charges of the renewal; but to whom is that money to be paid? not to the personal representatives, for there is no debt; and not to the heirs *ex parte paterna*, because the money was not raised out of the estate; but it would be taking from them an estate to which they are entitled.

The following note is taken from the *Lord Chancellor's Note-book* :—

"Bill dismissed without costs, on the reasons and authority of the case of *Mason and Day*." (2 Eq. Ca. Ab. 494, pl. 7, S. C.; Gilb. Reps. S. C.)

His Lordship declared, that the defendant, *Elizabeth Shore*, as heir at law to the said *Mary Briggs*, the infant, on the part of the father, is entitled to the trust and benefit of the leasehold estate in the pleadings mentioned. (Reg. Lib. B. 1738, fo. 374.)

(1) The statement of this case and the arguments of counsel are taken from *Lord Hardwicke's Note-book*; and the judgment from his Lordship's *Note-book*, a manuscript report, and Mr. *Atkyns's* report.

(2) So *Holt v. Holt*, 1 Ch. Cases, 190. *Edwards v. Lewis*, 3 Atk. 538. *Pickering v. Vowles*, 1 Bro. Ch. Ca. 197. *Rawe v. Chichester*, Amb. 715; 1 Bro. Ch. Ca. 198, S. C., note. *Owen v. Williams*, Amb. 734; 1 Bro. C. C. 199, S. C. in note. *Taster v. Marriott*, Amb. 668. *James v. Dean*, 11 Ves. 383, and 15 Ves. 236, S. C. *Featherstonhaugh v. Fenwick*, 17 Ves. 299. *Randall v. Russell*, 3 Mer. Rep. 190. *Hardman v. Johnson*, ib. 347.

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